Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MAKHANDA)

Case No: 3200/2019

(Consolidated Claims Case Nos. 3200/2019 & 3201/2019)

In the matter between:

JOHAN BESTER obo C[…] & E[…] N[…] Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

METU AJ:

INTRODUCTION

1. These are two consolidated cases in which the plaintiff acts as curator *ad litem* for both minor children. This is the fifth time this matter has come before the Court, and the other heads of damages have been settled save for loss of support and past hospital and medical expenses. Past hospital and medical expenses are before me for determination, and by agreement, the loss of support claim is separated and postponed for later determination *sine die.*

2. Ms. Watt for the Plaintiff seeks to adduce evidence pertaining to past hospital and medical expenses by way of affidavit, which is permissible in terms of Rule 38 (2) of the Uniform Rules of Court. Ms. Futshane, for the Defendant, acquiesced to evidence being brought by way of an affidavit as she had no intention of cross-examining the witness.

3. According to Rule 38 (2) a Court has the discretion to depart from the default position that oral evidence be led as a norm, where the following factors are taken into consideration:

   3.1. the nature of the proceedings;

   3.2. the nature of the evidence;

   3.3. whether the application for evidence to be adduced by way of affidavit is by agreement and

   3.4. whether it is fair to allow evidence on affidavit.

4. An answer to the above-enumerated factors, what is before this Court for determination is a limited issue of past hospital and medical expenses.

   Ms. Watt seeks to adduce through affidavit(s) evidence of Ms. Ziphora Mahlare, a Financial Consultant of Profmed Medical Scheme. The medical scheme paid for the treatment at the hospital(s), for the two minor children as a result of injuries they sustained in the motor vehicle accident that occurred on 14 October 2015.

5. The defendant neither denies that Profmed Medical Scheme paid for the past hospital and medical expenses nor that these were reasonable costs for the treatment provided.

6. The defendant's issue is whether it is permissible at law for the Fund to refund the Plaintiff for the past hospital and medical expenses which were paid by the medical aid, as the Defendant views this as double compensation.

ISSUES FOR DETERMINATION

7. Whether to allow evidence to be adduced through affidavits.

8. Whether the Plaintiff is entitled to compensation for past hospital and medical expenses.

9. Whether or not this Court is best poised to grant costs for these proceedings. Put otherwise, whether costs should be reserved for later determination.

CONSIDERATION OF WHETHER TO ALLOW EVIDENCE TO BE ADDUCED BY AFFIDAVIT

10. The point of departure is that the Defendant is not opposed in evidence being produced by way of affidavit in so far as the issue of past hospital and medical expenses is concerned.

11. The Defendant does not challenge the reasonableness of the amounts charged by the hospital nor does she challenge the need for the treatment.

12. The witness would have to come down from Johannesburg to confirm that the medical aid paid the undisputed amounts to the mentioned hospital(s).

13. Clearly, producing evidence through affidavits in circumstances where the deponent is not required to be cross-examined is less expensive and expedient than fastidiously following the norm of having *viva voce* evidence.

14. Plasket, AJA in ***Madibeng Local Municipality v Public Investment Corporation Ltd*** aptly stated[1]:

> *"The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit."*

15. In ***Uramin t/a Areva Resources Southern Africa v Perie*** Satchwell, J propounded[2]:

> *[24] We rightly expect and prefer that viva voce evidence in both civil and criminal proceedings be given in a courtroom at the seat of the court in the presence of the parties and their representatives and the judicial officer and the public. The reasoning is obvious. The court buildings and personnel and the procedures therein are dedicated to the process of litigation. Anyone may attend. The legitimacy of the process derives, in part, from this dedication.*

[1] 2018 (6) SA 55 (SCA) @ para 26
[2] (unreported KZD A105/2004) (20 August 2018)

[25] *Yet within these stone walls staffed by personnel dressed as though they were clerics in the reign of Henry the Eighth, we have no difficulty in recognising the need for accommodating witnesses to meet the interests of justice. We utilise many different ways of procuring evidence because both the Constitution and the High Court Rules permit development of appropriate procedures. We do so because we recognise that court procedures and the Rules which regulate such practices are devised to administer justice and not hamper it. Evidence is received on affidavit; closed-circuit television regularly allows for evidence to be given in one room and transmitted to a courtroom; inspections in loco take place and judges or nominated persons take evidence on commission. The test to be applied by the court in exercising its discretion is whether or not 'it is convenient or necessary for the purposes of justice'.*

[my underlining]

16. In exercising my discretion, I will allow Ziphora Mahlare's evidence to be adduced in the form of an affidavit regarding the past hospital and medical expenses incurred on behalf of C[…] and E[…] N[…], which I accept and admit as exhibits “A” and “B,” respectively.

IS THE PLAINTIFF SUITED TO BE COMPENSATED FOR PAST MEDICAL, HOSPITAL AND RELATED EXPENSES WHEN THE SAME WERE PAID BY THE MEDICAL AID SCHEME?

17. It is trite that a claimant cannot receive more than (s)he has incurred actual loss. Beshe J, in *Mullins v RAF (unreported)* (3650/2014) [2016] ZAECPEHC 32 (4 August 2016) had this to say,

> *"…In my view, it will be appropriate to deduct the amount received by way of a disability grant from the award for loss of earnings and earning capacity especially in view of the fact that it was received as a result of the disability arising from collision in question…"*

18. Ms Watt sought relief of defendant being ordered to pay the past hospital and medical expenses to the plaintiff, and from the bar indicated that these will be reimbursed to the medical scheme. Ms Futsane on the other hand argued that the payment to the plaintiff would be tantamount to double compensation.

19. Scott J in the case of ***Zysset and Other v Santam Limited*** tells us that[3]:

> *"…benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff. Nor, it would seem, are these the only benefits which are to be treated as res inter alios actae. In* ***Mutual and Federal Insurance Co Ltd v Swanepoel*** *1988 (2) SA 1 (A) it was held, for example, that a military pension which was in the nature of*

[3] 1996 (1) SA 273 (C) at paragraph 278 A – D.

a solatium for the plaintiff's non-patrimonial loss was not to be deducted.

20. Windell J quotes with approval the following cases:

*[13] Similarly, in **Mooideen v The Road Accident Fund**, the court confirmed that the medical aid's payment of medical expenses was an irrelevant collateral transaction, and the RAF was not entitled to raise the medical aid scheme indemnification as a defence and therefore benefit from the payment. The court held that:*

> *'Plaintiff thus, on behalf of the deceased's estate, in terms of the rules which I have said out of Discovery and the common law of insurance, can recover from the defendant as if there had been no indemnification at all. The recovery made by the deceased estate is a matter between the plaintiff and Discovery and has, therefore, raised res inter alios acta.'*

*[14] The court **in Rayi NO v Road Accident Fund**, was confronted with the same question as in the present matter, namely whether the RAF was obligated to reimburse the plaintiff for previous hospital and medical expenses, given that those costs had already been paid by the plaintiff's medical aid. Zondi J, held as follows:*

> *'[12] It is clear to me that a procedural remedy which is available to the supplier of goods or services in*

terms of section 175(5) of the [RAF] Act is not available to Bonitas. It paid past medical expenses on behalf of the plaintiff. It did not supply goods or provide services on behalf of the plaintiff. Bonitas can therefore not claim directly from the defendant the expenses it incurred on behalf of the plaintiff in terms of section 175(5) of the Act.

[13] *Bonitas can recover from the defendant the payment it made on behalf of the plaintiff and for which the defendant is primarily responsible by way of an action based on the principle of subrogation. It may sue the defendant in its own name or in the name of the plaintiff. (**Rand Mutual Assurance Co Ltd v Road Accident Fund** 2008 (6) SA 511 (SCA) at para 24). Subrogation embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance (Lawsa (reissue) vol 12 para 373).*

[14] *Ms Carter, who appeared for the defendant, submitted that the plaintiff cannot claim for the past medical expenses after payment of such expenses by Bonitas. She argued that in the absence of a cession of its rights of action by Bonitas in favour of the plaintiff, Bonitas is the only party that is entitled*

to claim for past medical expenses. I disagree with Ms Carter's contention.

[15] In my view, settlement by Bonitas of the plaintiff's past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for the past medical expenses he incurred. Payment by Bonitas was made in terms of the undertaking made by the plaintiff to Bonitas in terms of which Bonitas agreed to settle the plaintiff's past medical expenses on the understanding that upon a successful recovery from the defendant, the plaintiff would reimburse Bonitas for all the costs it incurred on plaintiff's behalf in connection with the claim against the defendant.

[16] The obligation which the undertaking imposes on the plaintiff towards Bonitas does not arise until such time that there is a successful recovery of the past medical expenses by the plaintiff from the defendant. The defendant primarily remains liable to the plaintiff for the payment of the past medical expenses and the liability of Bonitas to the plaintiff for the past medical expenses is secondary to that of the defendant. The defendant should pay the past medical expenses to the plaintiff who should

upon receipt of payment account to Bonitas in terms of the undertaking.' (Emphasis added)

21. Zondi J in ***Rayi N.O. v RAF*** at paragraph 28 enunciated the principle as follows:

> ***"****Payment by Bonitas of the plaintiff's past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for past medical expenses."*

22. Then Cloete J in *van Tonder v RAF (unreported)* (1736/2020; 9773/2021) [2023 ZAWCHC 305 (1 December 2023) asserted:

> *"The only way to prevent their loss of expenses incurred for the medical treatment of their client victims of motor vehicle accidents, would be for the medical schemes to institutes concurrent claims against the RAF and in due course seek the consolidation of the hearing of the two matters. The costs of the proceedings will be astronomical and unnecessarily incurred by the RAF which, in terms of the Public Finance Management Act, will constitute wasteful expenditure."*

23. In this division Ruganana J in the matter of ***van Heerden v RAF*** followed the SCA decision in ***Bane and Others v D'Abrossi*** 2010 (2) SA 539 (SCA) where he cites the following passage with approval[4]:

> *"[P]ayments which the medical aid was and is obliged to make to the respondent constitute the discharge by the respondent of contractual obligations flowing from the contract concluded between it and the respondent. As such they constitute res inter alios acta and the appellants cannot claim the benefit of them."*

[4] (845/2021) [2022] ZAECQBHEC 37 (4 October 2022) at paragraph 11.

24. I find that there is no justification at law why the Defendant should be exonerated to pay the Plaintiff the past hospital and medical expenses. Apart for submissions made from the bar, by Ms. Watt, there is no evidence led in this matter that there is an obligation to reimburse the medical scheme in terms of an undertaking that the Plaintiff and/or member of the medical scheme has signed. The medical scheme is not divested of relief in the event that it is not reimbursed upon payment being received by the Plaintiff.

25. With the foregoing, I make the following order:

A) The Defendant is liable to pay the plaintiff's past hospital and medical expenses for C[…] N[…] in the sum of R43 258.20 and R26 848.48 for E[…] N[…], which payment shall be remitted into the Trust Account of Plaintiff's Attorneys, AC DE SOUSA ATTORNEYS, whose details are as follows:

Account Holder : […]

Bank : […]

Branch : […]

Branch Code : […]

Account No. : […]

B) The Defendant is also liable for the costs of suit, including cost of Counsel on Scale B and for the cost of reservation and attendance upon consultations with the following experts:

a. Mr. Jean du Rand - Industrial Psychologist

b. Human & Morris - Actuaries

c. Karen Andrews - Clinical Psychologist

_____

B. METU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff	:	Adv. Watt
Instructed by	:	A C De Sousa Attorneys
		67 High Street
		Makhanda
		(Ref: D. Jepp/Cornelia/[…]4 & […]5)

Counsel for the Defendant	:	Ms. Futshane
Instructed by	:	Road Accident Fund
		20 Drury Lane
		East London

(Claim No.: 505/12768830/1012/2)

(Link No.: 4627214 (C N[…])
(Claim No.: 505/12768830/1012/1)
(Link No.: 4583244 (E N[…]))

Date Heard	:	27 May 2024
Date Delivered	:	30 May 2024