



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO. 845/2021

In the matter between:

MORNÉ VAN HEERDEN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

RUGUNANAN J

[1] The plaintiff's claim arises from bodily injuries sustained in a motor cycle collision on 3 May 2019. The defendant conceded liability on the merits on 10 February 2022. The matter served before me on 5 September 2022 on the civil trial roll. Essentially, all heads of damages claimed by the plaintiff barring the claim for past medical expenses were settled. In terms of an order of 5 September 2022 that claim was, by agreement, postponed for trial to 8 September 2022. On that day the

defendant moved for an amendment to its plea. The amendment was allowed without objection. It was introduced without any prior indication being given to the plaintiff during the case flow management and roll call processes, nor through the mechanism of a rule 37 conference, much less by way of a formal notice of intention to amend delivered in accordance the uniform rules of court.

[2] The amendment reads as follows:

‘7.1 Defendant denies being liable for Plaintiff’s claim for past hospital and medical expenses, and puts the Plaintiff to the proof thereof.

7.2 In amplification, Defendant pleads that it has assessed the claim for past medical expenses. Defendant takes note of the fact that the past medical expenses were paid by the Discovery Health medical scheme. As a consequence, the Plaintiff has not sustained any loss or incurred any expenses in respect of the past medical expenses claimed and there is therefore no duty on the Defendant to reimburse the claimant and Defendant hereby repudiates the claim for past medical expenses.’

[3] Arising from the amendment, the issue for determination is whether the defendant is liable for payment of past medical expenses in light of the fact that the plaintiff’s medical aid scheme had already paid expenses on behalf of the plaintiff. In accordance with uniform rule 33(4), I directed that the issue be determined precedent to the quantification of the claim which presently is for the amount of R1 036 513.01 pending further amendment for a higher amount.

[4] It is common cause that the plaintiff’s expenses (to date) have been paid by his medical scheme.

- [5] Save for the above, no evidence was tendered by either of the parties at the hearing of the matter.
- [6] The plaintiff did not replicate to the amended plea, nor was a copy of his contract with his medical scheme placed before me.
- [7] It will, however, and for present purposes, be assumed that:
- (a) The payments by the plaintiff's medical scheme constituted the discharge by the scheme of a contractual obligation flowing from a contract concluded between it and the plaintiff;¹
 - (b) In return the plaintiff undertook, in the event of there being a successful recovery from the defendant, to reimburse the scheme for all medical expenses incurred by the scheme on his behalf;²
 - (c) The scheme provides for the principle of subrogation which means that it may sue the defendant in its own name or in the name of the plaintiff.³
- [8] Referring to the authorities cited below, plaintiff's counsel addressed me in argument.
- [9] The defendant's legal representative made no submissions.
- [10] I am thus constrained to decide the matter on the basis of the arguments advanced on behalf of the plaintiff.

¹ Compare *Bane and Others v D'Ambrosi* 2010 (2) SA 539 (SCA) at paragraph [19]

² Compare *Rayi N.O. v Road Accident Fund* [2010] JOL 25238 (WC) at paragraph [7]

³ Compare *ibid* at paragraph [13]

[11] The effect of payments by a medical scheme for medical expenses incurred by a member was made plain by the Supreme Court of Appeal in *Bane and Others v D'Ambrosi*⁴ where the following was said:

‘[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.’

[12] An undertaking creates a contingent right of recourse by a scheme against its member for reimbursement. In this case the plaintiff’s obligation to reimburse his medical scheme in terms of his undertaking is prompted once he receives payment from the defendant for past medical expenses and the medical scheme may sue the plaintiff for reimbursement should he fail to reimburse it.

[13] This was explained in *Rayi N.O. v Road Accident Fund*⁵ in which the Western Cape High Court quoted *Ackerman v Loubser*⁶ where the principle was laid down as follows:

‘A plaintiff, however, who has received full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrongdoer, is not entitled to a double satisfaction; but, as soon as he has received from the underwriter or insurer the amount for which he is insured, he becomes a trustee for the latter in respect of any compensation paid or payable by the wrongdoer, and is bound to hand over to the insurer whatever money he receives from the wrongdoer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance.’

⁴ 2010 (2) SA 539 (SCA) at paragraph [19]

⁵ [2010] JOL 25238 (WC) at paragraph [18]

⁶ 1918 OPD 31 at 36

[14] Adverting to the present matter, it follows that the plaintiff's medical scheme has an election. It may elect to proceed against either the plaintiff in terms of the undertaking should the plaintiff have received compensation from the defendant, or the defendant on the basis of the doctrine of subrogation. In *Rand Mutual Assurance Company Ltd v Road Accident Fund*⁷ the Supreme Court of Appeal recognised it to be the prevailing practice that insurers litigate in the name of the insured.⁸ The court acknowledged that the practice creates confusion over the identity of the real plaintiff, and while the practice may be less than desirable it would be wrong to abolish it by judicial fiat.

[15] Subrogation is nothing more than a procedural device⁹ and where, as in the present case, the defendant did not specifically claim to be prejudiced¹⁰ I am of the view that the plaintiff cannot be non-suited by litigating in his own name.¹¹

[16] In the circumstances, I hold that payment by the plaintiff's medical scheme of his past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for such expenses.

[17] Accordingly, the following order issues:

- (i) The defendant is liable to pay the plaintiff for past medical expenses either as proven or agreed.
- (ii) The defendant shall pay the plaintiff's costs of suit.

⁷ 2008 (6) SA 511 (SCA)

⁸ At 521E

⁹ *Rand mutual Assurance Company Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA) at 521B

¹⁰ Compare *ibid* at 522A

¹¹ *Ibid* at 522A

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

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Date heard: 08 September 2022

Date delivered: 04 October 2022