IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

CASE NUMBER: 2021/4279

In the matter between:

SITHOLE: AARON SIPHO PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

REQUEST FOR REASONS IN TERMS OF RULE 49(1)(c)

THE FACTS:

1. This matter came before me on the 18th of July 2023 in one of the newly created dedicated RAF Default Judgment Courts and which courts commenced their operation on the 17th of July 2023. When the matter was

called Adv D Grobbelaar appeared for the Plaintiff and Mr D Coetzee from the State Attorney's Office on behalf of the Defendant.

2. I was advised by Mr Coetzee that the defendant entered and appearance to defend albeit at a very late stage but did so under the protection of Rule 19(5) which allows a defendant to enter an appearance to defend even after the expiry of the periods provided for in subrules (1) and (2) of Rule 19, provided it is before default judgment is granted. Rule 19(5) then continues and states that if the appearance to defend is entered after the application for default judgment has been launched then the Plaintiff shall be entitled to his costs.

3. Mr Coetzee advised that the defendant is ready to proceed in respect of all issues but for the aspect of past hospital and medical expenses and in respect of which the defendant wished to move an application for a postponement.

4. No formal application for a postponement had been prepared and Mr Coetzee presented the defendant's case from the Bar. If I understood the application correctly it was based on two premises:

   4.1 An internal unit of the defendant called "Bill Review" had not yet evaluated the claim for past hospital and medical expenses.

   4.2 There is a pending application before the Constitutional Court to appeal the matter of the Road Accident Fund and Discovery Health (Pty) Ltd and another CCT 106/2023 ("the Discovery matter").

5. Mr Coetzee was invited to address me on the retrospective application of the Discovery matter, if the Constitutional Court should find in the Road Accident

Fund's favour. He indicated that he is not able to do so and that he leaves it in the Court's hands.

6. The application was dismissed and the parties were called upon to proceed with the matter in its totality.

7. Both Mr Grobbelaar and Mr Coetzee had uploaded Heads of Argument and which formed the basis of their respective approaches to the matter. After their respective arguments were heard, the following contemporaneous Order was made:

7.1 By agreement: The Defendant is liable to compensate the Plaintiff for 100% of the proven delictual damages suffered as a result of the motor vehicle collision which occurred on 9 June 2019.

7.2 The Defendant shall pay the capital amount of R5 925 987.25 in full and final payment of the Plaintiffs' claim, which is calculated as follows:

7.2.1 Past hospital and medical expenses:	R678 542.25
7.2.2 Past loss of earnings:	R182 890.00
7.2.3 Future loss of earnings:	R3 264 555.00
7.2.4 General damages:	R1 800 000.00
Total:	R5 925 987.25

7.3 In respect of future hospital, medical and ancillary expenses the defendant shall furnish an Undertaking as is provided for in Section 17(4)(a) of the Road Accident Fund Act.

7.4 Plaintiff is entitled to party and party costs on the High Court scale.

7.5 The Order further made provision for a Trust to be created and all details contained in the Order in respect of the Trust were also by agreement between the parties.

8. On the 19th of July 2023 the defendant requested reasons in terms of Rule 49(1)(c) for the Order, referring specifically to the following:

8.1 The quantum awarded to the plaintiff in respect of his claim for non-pecuniary damages.

8.2 The reasons for refusing the defendant's application (made from the Bar) that the plaintiff's claim for past hospital and medical expenses be postponed:

8.2.1 pending the outcome of the appeal proceeding between the Defendant and Discovery Health (Pty) Ltd filed in the Constitutional Court under case number 106/2023.

8.2.2 in order to allow the Defendant an opportunity to defend against the Plaintiff's claim for past hospital and medical expenses on the basis provided for in terms of Rule 19(5) of the Uniform Rules of Court.

9. The Order made in respect of past loss of income, future loss of income, future hospital, medical and ancillary expenses as well as costs stands unchallenged, leaving the non-pecuniary damages and the aspect of the postponement of the aspect of past hospital, medical and ancillary expenses and which is dealt with herein below.

THE LAW ON POSTPONEMENTS:

10. A bare allegation of prejudice is not sufficient, the Defendant must satisfy the Court that there is prejudice or at least a reasonable probability thereof.

11. In Vollenhoven v Hanson and Mills 1970 (2) SA 368 C at 373 it was stated:

    "It is in the public interest that litigation should be disposed of as speedily as possible. There is such a thing as the tyranny of litigation and in many cases, it cannot be said that the mere offer of paying wasted costs would adequately compensate a respondent for any inconvenience suffered as a result of granting the postponement."

12. Any application for postponement must always be *bona fide* and not simply used as a tactical maneuver for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. See Trading CC v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA) at 4-5.

THE EVIDENCE IN RE THE APPLICATION FOR A POSTPONEMENT

13. In debating the matter of the postponement, Mr Coetzee was asked when the defendant received notice for the first time that there is a claim for past hospital, medical and ancillary expenses. Mr Coetzee did not have the information available. Mr Grobbelaar ventured that past hospital, medical and ancillary expenses would have been submitted with the original claim, but no evidence was available to substantiate this allegation. What is certain, and which was confirmed on behalf of all parties was that, at the latest, the defendant had knowledge of the complete claim for past hospital and medical expenses at the time when it was uploaded onto Caselines on 22 March 2022, (Caselines 007-1),15 months before the date of the application.

14. Mr Coetzee conceded that the “Bill Review” unit has never looked at the vouchers and schedules supporting the plaintiff’s claim for past hospital and medical expenses. Similarly, no indication could be given when, if ever, they would look at it, unless the defendant’s appeal to the Constitutional Court does not find favour with that court.

15. In contrast to the above Dr H J Schmidt, whose affidavit is found at Caselines 007-187 to 007-189, confirms under oath that he has considered the injuries and the invoices submitted to the defendant in respect of past hospital and medical expenses and is satisfied that all the invoices submitted relate to treatment received by the plaintiff as a result of the injuries sustained in the accident which forms the basis of the plaintiff’s claim against the defendant and that the treatment as rendered was fair and reasonable.

16. Dr Schmidt’s affidavit was never challenged and having been admitted under Rule 38(2), constitutes the confirmatory evidence of the treatment received and the cost of that treatment. This being the case, it becomes irrelevant what the opinion of an internal “Bill Reviewer” of the defendant might be. That horse had bolted and the defendant’s opportunity to contest the invoices has expired.

17. The alternative ground proffered by the Defendant for the postponement of the claim for past hospital and medical expenses, i.e., that the matter must stand over until such time as the Constitutional Court has ruled on the Discovery matter, will be dealt with next.

18. In this context there are three dates that are important:

A) The date of accident, when the cause of action arose, being 9 June 2019.

B) The date on which summons was issued, being 1 February 2021.

C) The date of the defendant's "Internal Directive", being 12 August 2022.

19. The question that was posed to Mr Coetzee was: "On what basis could the defendant aver that the Internal Directive of the defendant of 12 August 2022 would affect this matter, even if the Constitutional Court were to find in favour of the Defendant?"

20. The Defendant declined to engage the court and indicated the matter is left in the hands of the Court.

THE LAW ON RETROSPECTIVITY

21. In Kaknis v ABSA Bank Ltd and Another 2016 ZASCA 206 from paragraph 10 and further:

[10] I must mention from the outset that I am alive to the existence of a strong presumption that legislation is not intended to be retroactive, – nor retrospective (see S v Mhlungu & others 1995 (3) SA 867 (CC) paras 65 – 67), where Kentridge AJ observed that:

> *[65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation …. It is legislation which enacts that "as at a past date the law shall be taken to have been that which it was not". See Shewan Tomes & Co Ltd v Commissioner of Customs and Excise 1955 (4) SA 305 (A) at 311H, per*

> *Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights. See Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C) at 351, per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.*
>
> *[67] There is still another well-established rule of construction namely, that even if a new statute is intended to be retrospective insofar as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings. See Bell v Voorsitter van die Rasklassifikasieraad en Andere (supra); Bellairs v Hodnett and Another (supra at 1148). "*

[11] It is clear from the above exposition in Mhlungu that the legal position relating to the retrospective application of any statute is settled in our law and also in most foreign jurisdictions. In the case of Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 at 836 Lord Brightman said in this regard that: 'A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed. But these expressions „retrospective" and

„procedural", though useful in a particular context, are equivocal and therefore can be misleading. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

23. Even if an “internal directive” of the defendant and which is not aligned with the Road Accident Fund Act, was capable of being binding on third parties, which it is not, certainly the approach regarding retrospectivity would be similar to that which has been set out in the case law quoted above in the Kaknis and other matters. If an organ of State is bound by the settled law, as referred to above, how much more should it not be applicable to an internal directive, albeit for external application, in such an organisasion?

24. For the defendant’s request and argument *in casu* to succeed the following must happen:

a) The Constitutional Court must descend into the arena of contractual relationships to address the effect of the Medical Schemes Act, Act 131 of 1998 on Discovery in the context of personal injury claims arising from motor vehicle accidents.

b) It will have to set aside the principle of subrogation as it applies in our delictual law.

c) It will have to set aside the principle of *res inter alios acta* in respect of delictual claims.

d) It will have to rule that its judgment has retrospective effect in respect of all causes of action which arose before the internal directive of the RAF was issued on the 12th of August 2022.

e) It will have to rule that retrospectivity also applies to matters in respect of which litigation had already been joined.

25. The documents uploaded by the Defendant on CaseLines under 019:9 and 019:10 indicate that the Road Accident Fund's argument in its application to the Constitutional Court might cover a), b) and c) above but not d) and e).

26. Accordingly and considering the arguments and case law quoted in respect of retrospectivity it does not matter what the constitutional Court decides in respect of the application that is before it, it will not affect the claim and rights of the Plaintiff *in casu.*

27. The plaintiff's evidence on the value of the past hospital, medical expenses and ancillary expenses stands substantiated and uncontested and a postponement based on the pending Constitutional Court matter, "the Discovery matter", will hold no benefit for the defendant but would prejudice the plaintiff..

28.The content of paragraphs 10-27 above contain the reasoning why the application for a postponement was refused.

NON-PECUNIARY DAMAGES

29. I am indebted to both counsel for their assistance in this regard. Counsel for the plaintiff uploaded comprehensive Heads of Argument as well as a separate section

with the case law that the plaintiff believe would be relevant. This is to be found on Caselines in 019:4 from 019-80 to 019-87. The State attorney uploaded four matters and which may be found on Caselines at 019:5 to 019:8.

30. The medico-legal reports filed of record in this matter have been uploaded on Caselines at 003:1. I do not intend to refer to it in any detail. What is relevant is the RAF 4 Serious Injury Assessment Form completed by the neurosurgeon, Dr G Marus and which may be found on Caselines at 003-32 to 003-38. Dr Marus, having examined the plaintiff and having prepared a comprehensive medico-legal report, also applied his mind to the question of Whole Person Impairment and found the plaintiff to have a WPI of 47%. This finding was not contested and the Defendant, accordingly, accepted that the Plaintiff was entitled to non-pecuniary damages.

31. From the medico-legal reports filed of record the injuries and the more serious sequalae of the injuries, appear to be the following:

31.1 A severe diffuse brain injury that was complicated by a focal injury to the right frontoparietal area.

31.2 long term cognitive impairment was expected.

31.3 The Plaintiff had difficulty with communicating, with indistinct speech with an element of dysphasia (abnormal cell growth).

31.4 The Plaintiff has diminished insight into the extent of his current physical and mental problems.

31.5 The Plaintiff has spastic left sided weakness which impairs co-ordination and ability to walk adequately.

31.6 He will require physical assistance with day-to-day home management.

31.7 He is incapable of managing his own affairs.

31.8 He had been medically boarded.

31.9 The Plaintiff suffered blunt force trauma and a chest injury with right sided rib fractures from 1-3, combined with right pneumothorax and lung contusion.

31.10 A facture of the right scapula; (technical term for the shoulder blade);

31.11 Multiple lacerations of the scalp and face and multiple contusions.

32. In addition to the case law submitted by both the Plaintiff and the Defendant I also took cognizance of the following matters:

32.1 Khokho NO obo MG v Road Accident Fund 2019 (7A4) QOD 125 (FB)

32.2 Mnguni v Road Accident Fund 2010 (6E2) QOD 1 (GSJ)

32.3 Mohlaphuli NO v The South Africa National Road Agency Ltd 2013 (6A4) QOD 146 (WCC)

32.4 Maribeng v Road Accident Fund 2021 (8A4) QOD 39 (GNP)

33. Ultimately the assessment of non-pecuniary damages is reduced to the opinion of the presiding judge. None of the case law quoted by either party is on all fours with the injuries sustained by this plaintiff nor is the further case law that the court considered. All that the cases provide are guidelines of what previous courts in more or less similar matters have considered to be fair and reasonable to both parties.

34. Having considered all the available case law referred to and considering it in conjunction with the injuries as confirmed in the medical evidence filed of record, it was the opinion of the Court that an award of R1 800 000 in respect of non-

pecuniary damages would be fair and reasonable to both parties as well as being in line with the reported and available case law.

35. The above as is set out in paragraphs 29-34 above contains the reasons for the amount awarded in respect of non-pecuniary damages.

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Weideman AJ

JUDGE

GAUTENG HIGH COURT, JOHANNESBURG

Appearances:

Counsel for the Applicant: Adv D Grobbelaar

Counsel for the Respondent: Mr D Coetzee – State Attorney

Date of hearing: 18 July 2023

Date of judgment: 28 July 2023