THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 030/2002

In the matter between

ROAD ACCIDENT FUND **Appellant**

And
PATRICK NORMAN ARENDSE NO **Respondent**

CORAM: HARMS, SCHUTZ, CAMERON, NAVSA and CONRADIE JJA

HEARD: 15 NOVEMBER 2002

DELIVERED: 29 NOVEMBER 2002

Undertaking by Road Accident Fund – cost of administering undertaking not claimed by way of compensation and consequently not included in settlement – cannot be claimed subsequently

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JUDGMENT

CONRADIE JA

[1] Before the establishment of the Road Accident Fund ('the RAF') by section 2(1) of the Road Accident Fund Act 56 of 1996 ('the RAFA'), compensation for road accident victims was paid by a fund ('the MMF') established by the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ('the MMF Act'). Section 2(2)(a) of the RAFA abolished the MMF. All its assets and liabilities, rights and obligations were taken over by the RAF.

[2] The MMF Act incorporated a schedule containing the text of the agreement setting up the MMF. Article 40 of the schedule provided :

> 'The MMF or its appointed agent, as the case may be, shall subject to the provisions of this Agreement be obliged to compensate any person whomsoever (in this Agreement called the third party) for any loss or damage which the third party has suffered as a result of-
>
> (a) any bodily injury to himself;

(b) the death of or any bodily injury to any person, in either case caused by or arising out of the driving of a motor vehicle by any person…' [1]

[3] Article 43(a) of the schedule to the MMF Act provided that-

'Where a claim for compensation under article 40 -

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying goods to him, the MMF or its appointed agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the MMF or its appointed agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof.' [2]

[4] The respondent is the father and natural guardian of his minor daughter

[1] This provision has been reenacted in much the same form by section 17(1) of the RAFA.

[2] The successor to this provision is to be found in practically the same terms in section 17(4)(a) of the RAFA

Cindy who was severely injured in a road accident in September 1991. In an action brought by the respondent on his own and Cindy's behalf he claimed damages in respect of the cost of future hospital accommodation and medical treatment. In terms of a settlement agreement, the MMF's appointed agent, the South African Eagle Insurance Company Limited ('SA Eagle'), gave to the respondent, and to Cindy herself once she came to be a major, an undertaking under article 43(a) which was guaranteed by the MMF. It also agreed to pay the costs of a *curator bonis* to administer the damages award. After the settlement the respondent's legal advisers decided not to proceed with the application for the appointment of a *curator bonis* but instead to form a trust to administer the damages award. A sum of R22 810 00 which had been agreed as the capitalized cost of remunerating the *curator bonis* was then paid to the trust to cover the costs of its administration. One of the trustees is Mr Halliday, the respondent's attorney of record.

[5] In terms of the undertaking S A Eagle –

> 'having settled the claim for compensation under Article 40 of the Schedule to the Multilateral Motor Vehicle Accidents Fund

> Act…hereby undertakes under Article 43(a) of the Schedule to the said Act to compensate the parties, acting on behalf of Cindy Patricia Arendse, as recorded in the document styled as "Agreement of Settlement" dated 16 and 17 April 1996, appended hereto, for the costs of the future accommodation of Cindy Patricia Arendse in a hospital or nursing home or treatment of or rendering of a service or the supplying of goods to the said Cindy Patricia Arendse after the costs have been incurred and on proof thereof.'

[6] At a later stage the MMF took over S A Eagle's liability in terms of the undertaking and later still the RAF took over the liability when it stepped into the shoes of the MMF.

[7] The respondent is a labourer with a grade five education. He says that he is not equal to the task of administering the undertaking, something which it is his duty as Cindy's guardian to do. I am prepared to accept that there are some aspects of the administration of the undertaking that would be beyond him. For the reasons that follow I am nevertheless not persuaded that he is entitled to the declaratory order made by Msimang AJ in the Court *a quo.* This reads:

> '1 The costs incurred by Mr Halliday, *qua* attorney, for the

services rendered by him on behalf of the Applicant in administering the Article 43(a) undertaking furnished in terms of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 fall within the meaning of the said undertaking;

2 The Respondent is liable to compensate the Applicant in respect of the said costs after the costs have been incurred and on proof thereof.'

[8] Before the introduction of the predecessor to article 43(a),[3] a court hearing an action for damages in a running down case would have had to apply the 'once and for all principle'.[4] This obliged it to award then and there (and consequently to assess and quantify) in one and the same proceeding any claim for damages proved to have been suffered by a plaintiff. No matter how anxiously a court peered into the future when assessing future hospital or medical expenses, or the costs of goods and

[3] Section 21(1C) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.
[4] See *Marine and Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) where earlier decisions on this point are approved (at 970C – G)

services, it risked awarding either too much or too little. Yet, nothing could be left over in order to see how things turned out. Then came s 21(1C) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.[5] Its purpose was to take the guesswork out of the assessment of damages of this kind. Since the introduction of the amendment such damages could be paid as damage eventuated.

[9] It is against this background that article 43 (a) must be interpreted. Its purpose, like that of its predecessor and of its successor, was to help solve the quantification problem, nothing more. It could be invoked by the MMF (or its appointed agent) in every case in which there was a claim for compensation under article 40 which included a claim for the cost of future accommodation of the plaintiff in a nursing home or for (medical) treatment or for the supply of goods or services. Article 43(b) served the same purpose in relation to an award for loss of future earnings or support. If there was a claim or claims of this kind the MM (if it accepted liability or was adjudged liable) might in its sole discretion decide to tender an undertaking instead of paying damages to the plaintiff in a lump sum.[6]

[10] The cost of the attorney's services which were rendered in this case (leaving aside that it is not at all clear on the papers that they were rendered to the respondent and not to the trust) had not been claimed in the plaintiff's particulars of claim as part of the respondent's or of Cindy's damages. When S A Eagle offered to compensate the respondent for the future costs

[5] It was introduced into the principal Act by s 8 of Act 69 of 1978 with effect from 1 September 1978.
[6] The corresponding section in force at present is 17(4)(a) and (b) of the RAFA

of 'rendering of a service', it was not agreeing to pay the costs of the future administration of the undertaking. It was offering an undertaking only in respect of costs of the kind set out in article 43(a) which were included in the respondent's claim for compensation and for which it was prepared to assume liability. [7]

[**11**] The RAF's liability to a third party is to compensate him or her for 'loss or damage.' Whether the costs of services of the kind rendered by Mr Halliday could in an appropriate case justifiably be claimed in a summons as future 'loss or damage,' and so qualify for inclusion in an undertaking offered by the RAF or ordered by the Court, is a matter that does not arise for decision. I refrain from saying anything about it one way or the other.

[12] Another difficulty stands in the respondent's way. If he had gone ahead with the original idea of having a *curator bonis* appointed to Cindy's estate, the curator would, as part and parcel of administering the estate, have been obliged to pay and claim reimbursement for accounts for the payment of which the RAF was responsible. The quantum of the curator's remuneration for attending to the estate had been settled. Now that trustees

[7] Like the costs of the *curator bonis.* See *Reyneke NO v Mutual and Federal Insurance Co Ltd* 1992 (2) SA 417 (T) at 419 D – J.

have been appointed instead, it seems extraordinary for them to say that the administration of the undertaking is really the respondent's responsibility and that if they themselves now administer it on the respondent's behalf they are to be remunerated beyond what a curator would have received for doing the same thing.

[13] In the light of the questions of general importance for the RAF raised in the appeal, Mr Dickerson who appeared on its behalf fairly did not press for costs, either in this Court or in the Court below.

The appeal succeeds. The order of the Court *a quo* is altered to read: 'The application is dismissed.'

J H CONRADIE

JUDGE OF APPEAL

HARMS JA)

SCHUTZ JA) CONCUR

CAMERON JA)

NAVSA JA)