THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1036/2016

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

and

KHOMOTSO POLLY MPHIRIME **RESPONDENT**

Neutral citation: *Road Accident Fund v Mphirime* (1036/2016) [2017] ZASCA 140 (2 October 2017)

Coram: Leach, Tshiqi, Majiedt and Mathopo JJA and Ploos van Amstel AJA

Heard: 1 September 2017

Delivered: 2 October 2017

Summary: Road Accident Fund Act 56 of 1996 : undertaking to pay future services under s 17(4)*(a)* of that Act : undertaking may be given in respect of the cost of providing a domestic assistant.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Opperman AJ sitting as court of first instance):

1 The appeal succeeds. There will be no order as to costs.

2 The order of the court a quo dated 25 February 2016 is set aside and is substituted with the following:

'(a) It is declared that the cost of employment of a domestic assistant to the plaintiff is an expense that the defendant is entitled to pay in terms of an undertaking under s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996;

(b) The defendant is ordered to furnish the plaintiff with such an undertaking.'

JUDGMENT

Leach JA (Tshiqi, Majiedt and Mathopo JJA and Ploos van Amstel AJA concurring)

[1] The issue that arises for decision in this appeal is whether the state of the law at present allows the appellant, the Road Accident Fund (the Fund) to discharge its liability to pay for the costs of employing a domestic servant required by an injured claimant by issuing an undertaking under s 17(4)*(a)* of

the Road Accident Fund Act 56 of 1996 (the Act). The court a quo held that pursuant to the amendment of the Act by the Road Accident Fund Amendment Act 19 of 2005, it was no longer competent for the Fund to do so. Its judgment in this regard has been followed in certain cases but disapproved in others. This appeal is with the leave of the court a quo.

[2] On 12 June 2012 the respondent, a middle-aged mother of three children, was a passenger in a motor vehicle which collided with another motor vehicle. The collision occurred in circumstances which rendered the appellant liable to the respondent for damages due to the bodily injuries she sustained as a result. Consequently, when the matter came to trial in November 2015, the Fund consented to an order that it is liable 'for payment of 100% of the (respondent's) proven or agreed damages'. Agreement was also reached on almost all of the outstanding issues relating to the respondent's claim, including a sum in respect of her general damages as well as her past hospital expenses, and an order in respect of these agreed damages was granted by consent on 17 November 2015. However, as no agreement was reached in respect of a claim relating to the cost of providing a domestic assistant, that issue was argued the following day.

[3] When the matter was heard on 18 November 2015, the Fund conceded that the respondent needed a domestic assistant. The parties were also agreed on an amount that would constitute a fair and reasonable monetary sum to be awarded in that regard. The Fund insisted, however, that as a matter of law it could discharge its liability by giving an undertaking under s 17(4)*(a)* of the Act. The respondent, on the other hand, contended otherwise and insisted on being paid the agreed amount in a lump sum. The court quo was called upon to decide which contention was correct in law. In its judgment delivered on 25 February 2016, it held in favour of the respondent and made the following award:

'1 The [Fund] is ordered to pay an amount of R 231 474.00 to the [respondent] for the costs of employing a domestic assistant.

2 The [Fund] must pay the costs for the day that includes the costs for experts on the matter of domestic assistance.'

[4] The appeal to this Court is brought solely against paragraph 1 of this order. It is clear from the relatively insubstantial amount of the award, that the appeal is directed at obtaining clarity on the issue of what claims may be dealt with by way of an undertaking under the section. As appears from what follows, and as things presently stand, this is somewhat of an academic exercise.

[5] In consequence of the so-called 'once and for all principle' of the common law, a court is generally obliged to determine all items of a plaintiff's loss, both past and future, in the same proceeding. In respect of future losses, the assessment of loss is often speculative involving, as it does, 'a prediction as to the future without the benefit of crystal balls, soothsayers, or oracles'.[1] As this Court stated in *Anthony & another v Cape Town Municipality*[2] '(w)hen it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess . . .' As a result, the process of calculating future loss may obviously result in an award potentially to the substantial prejudice of one side or the other.

[6] In so-called 'third party' cases involving plaintiffs injured in motor vehicle accidents, the situation was ameliorated somewhat by s 21(1C) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.[3] Introduced with effect from 1 September 1978, it entitled a defendant sued for damages under that Act

[1] Per Nicholas JA in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113G.
[2] *Anthony & another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B-C.
[3] The section was introduced by s 8 of Act 69 of 1978.

to furnish an undertaking to compensate the third party with, inter-alia, 'the costs of future accommodation in a hospital or nursing home or treatment of or *rendering of a service* or supplying of goods to him' once such costs were incurred. Similar provisions were included in the legislation that succeeded Act 56 of 1972: see art 43*(a)* of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1980, s 8(5) of the Motor Vehicle Accidents Act 84 of 1986, and s 17(4) of the Road Accident Fund Act 56 of 1996. This Court pointed out in, *Arendse*[4] that the purpose of these provisions was to help solve the quantification problem of future loss.

[7] And to that purpose, such provisions were put. Undertakings were given not only in respect of future hospital or medical expenses[5] but also, for example, in respect of the services rendered by a *curatrix bonis*,[6] and the appointment of an assistant to assist an injured farmer in his farming enterprise.[7] This was done under the aegis that such an undertaking related to 'the rendering of a service' as envisaged in the relevant legislation. It is accepted by both sides that until 1 August 2008, the costs occasioned by an injured party employing a domestic assistant were capable of being dealt with in this way.

[8] Until then s 17(4)*(a)* of the Act had been in terms similar to those already mentioned, authorising the Fund to give an undertaking to the injured claimant in respect of 'the costs of the future accommodation . . . in a hospital or nursing home or treatment of or *rendering of a service* or supplying of goods . . .' However, on that date, s 6 of the Road Accident Fund Amendment Act 19 of 2005 came into effect. It amended s 17 to provide, inter alia, the following:

'17(4) Where a claim for compensation under subsection (1) —

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[4] *Road Accident Fund v Arendse NO* [2002] ZASCA 150; 2003 (2) SA 490 (SCA) para 9.
[5] Eg *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A).
[6] *Reyneke NO v Mutual & Federal Insurance Co Ltd* 1992 (2) SA 417 (T).
[7] *Brink v Guardian Nasionale Versekering Bpk* 1998 (1) SA 178 (O).

(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 of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or an agent to furnish such undertaking, to compensate —

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii) the provider of such service or treatment directly . . .

in accordance with the tariff contemplated in subsection (4B);

. . .

(4B)*(a)* The liability of the Fund or an agent regarding any tariff contemplated in sub-section (4)*(a)* . . . shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act 61 of 2003), and shall be prescribed after consultation with the Minister of Health.'

[9] The court a quo regarded the Fund's obligation under s 17(4)(i)*(a)* '. . . to compensate . . . in accordance with the tariff contemplated in subsection (4B)', coupled as it is with the tariff referred to in the latter subsection being based on a health services tariff, to thereby exclude the services of a domestic assistant from the aegis of an undertaking. In *Manqola v Road Accident Fund*[8] the judgment of the court a quo was approved and followed. The contrary argument is that to limit an undertaking solely to what might be regarded as pure health services, ie medical and hospital expenses, would ignore the history of the statute, the purpose of undertakings of this nature and their introduction in the first case. Thus in *Barnard NO v The Road Accident Fund,*[9] in which the approach of the court a quo in the present case was considered but not followed, Goosen J said the following:[10]

'The effect of such a restrictive interpretation would be to confine the purpose of the provision only to the future provision of medical services and treatment and leave all other

[8] *Manqola v Road Accident Fund* (GP) unreported case no 3210/15 of 29 April 2016.
[9] *Barnard obo Cakwebe v The Road Accident Fund* [2016] ZAECPEHC 71; 2017 (1) SA 245 (ECP).
[10] Paras 29-30.

recognised and accepted categories of future loss to be determined as lump-sum payments of patrimonial loss, subject to the vagaries and uncertainties that the legislature has sought to address by the introduction of the provision. This would require trial proceedings involving expert evidence to determine, amongst other things, the present value of a future liability. The provision of an undertaking serves not only to avoid the difficulties of quantification of such claims, it serves also to provide a claimant who will require future treatment or the rendering of services with a measure of security of access to such services that payment of a lump-sum award cannot provide. This, in my view, serves to protect the dignity of claimants. That the statutory scheme of compensation for victims of road accidents serves as a form of social security is well recognised. An interpretation of s 17(4)*(a)* which is consonant with the values of human dignity and equality must be favoured if there is any ambiguity in the proper construction to be placed on the section.

In my view, had the legislature intended as significant and far-reaching an amendment of s 17(4)*(a)* as is suggested by the *Mphirime* judgment, then it would have effected it in clear and unambiguous terms. This it has not done.'

[10] In *Katz* this Court commented that it was an understatement to say that the original s 21(1C) of Act 56 of 1972 is 'not a model of legal clarity or of the art of legal draftsmanship'.[11] That is true of the drafting of s 17 of the present Act as well, and the failure of the legislature to clearly identify what may be covered by an undertaking under s 17(4)*(a)* has, both inevitably and understandably, given rise to different interpretations. Indeed, it was to resolve this conundrum and these conflicting judgments that the Fund appealed to this court.

[11] However, by reason of the effect of the judgment of the Constitutional Court in *Law Society of South Africa & others v The Minister for Transport & another*,[12] it is in my view not appropriate to attempt to do so. In that case the

[11] *Katz* fn 5 at 969A-B.
[12] *Law Society of South Africa & others v Minister for Transport & another* [2010] ZACC 25; 2011 (1) SA 400 (CC).

validity of various aspects of the amendment to the Act brought about by the provisions of Act 19 of 2005 were attacked on the basis of their alleged lack of constitutional validity. Most of the provisions that were subjected to constitutional scrutiny survived. However, whist accepting that the Minister had the power under s 17(4B) to prescribe a tariff, the court found that reg 5(1) which contained the tariff was inconsistent with the Constitution. Part of its order therefore reads as follows:

'*(c)* The appeal against the order of the High Court, dismissing the applicants' constitutional challenge to reg 5(1) issued by the Minister for Transport on 21 July 2008 in terms of s 17(4B)*(a)* of the Road Accident Fund Act 56 of 1996, is upheld.

(d) It is declared that reg 5(1) is inconsistent with the Constitution and invalid.

(e) Until the Minister for Transport prescribes a new tariff for health services in terms of s 17(4B)*(a)* of the Road Accident Fund Act, a third party, who has sustained bodily injury and whom the Road Accident Fund is obliged to compensate as contemplated in ss 17(4)*(a)*, 17(5) and (6) of the Road Accident Fund Act, *is entitled to compensation or health services as if he or she had been injured before the Road Accident Fund Amendment Act 19 of 2005 came into operation.*'(My emphasis.)

[12] Surprisingly, given the lapse of seven years since that judgment was delivered, the Minister has failed to prescribe a fresh tariff. Thus the position today, and as it was in 2016 when the judgment was given in the court a quo, is that the position as it was immediately prior to 1 August 2008 applies in respect of undertakings under s 17(4)*(a)*. As I have said, the position at that time was that the Fund was entitled to give a certificate relating to the future costs of a domestic assistant. The decision of the Constitutional Court was not mentioned by the court a quo, presumably because it was not drawn to its attention. But the position really is simple in respect of the respondent's claim and the court a quo ought to have determined the dispute in that regard in favour of the Fund, and not the respondent.

[13] It was argued by Mr Berry who appeared on behalf of the respondent, that if we were to find that the Fund was entitled to give a certificate in respect of a domestic assistant under s 17(4)*(a)*, the respondent was not obliged to accept it and could insist upon being paid with a lump sum. There is no merit in this. Section 17(4)*(a)* states that the Fund 'shall be entitled . . . to compensate' by way of furnishing an undertaking. No provision is made for a claimant to refuse such an undertaking should the Fund exercise its right to do so. The appeal must therefore succeed.

[14] It was argued on behalf of the Fund that this Court should declare that the cost of employing a domestic assistant is an expense that can be paid by way of an undertaking under s 17(4)*(a)* of the Act, irrespective of whether a new tariff for health services is prescribed by the Minister under s 17(4B). In my view, however, it would be both unnecessary and unwise to do so. Not only is such a declarator surplus to requirements in respect of this judgment, but this court should not speak for the Minister if and when a fresh tariff is prepared. All one can hope for is that either the tariff will determine what may be paid in respect of the costs of an attendant, or that the Act be amended to spell out with great clarity what expenses can be dealt with by way of an undertaking . In either event, one lives in the hope that the lawgiver will attend to the ambiguity that has bedevilled this issue.

[15] Turning to the question of costs, the appeal was brought as a test case for the public good. The Fund, quite correctly, did not seek to recover costs from the respondent in the event of it succeeding. It is therefore appropriate to make no order as to costs.

[16] It is therefore ordered:

1 The appeal succeeds. There will be no order as to costs.

2 The order of the court a quo dated 25 February 2016 is set aside and is substituted with the following:

‘(a) It is declared that the cost of employment of a domestic assistant to the plaintiff is an expense that the defendant is entitled to pay in terms of an undertaking under s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996;

(b) The defendant is ordered to furnish the plaintiff with such an undertaking.’

LE Leach

Judge of Appeal

Appearances:

For the Appellant:	A J Louw SC (with him L Botha)
Instructed by:	Maduba Attorneys, Bloemfontein
For Respondent:	A P Berry
Instructed by:	B L Kretzman Attorneys, Bloemfontein