

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 19359/11

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the matter between:

FEDORIK, RADOVAN

Plaintiff

and

DE KLERK, VERMAAK & PARTNERS INCORPORATED

Defendant

Coram: WEPENER J

Heard: 5 August 2014

Delivered: 8 August 2014

Summary: Road Accident Fund – Claim by uninjured third party for damages – such claim based on common law – absence of duty of support disentitles a party to claim expenses gratuitously incurred.

JUDGMENT

WEPENER J:

[1] This matter came before me as a special case in terms of Rule 33 which provides for the parties to agree on a written statement of facts for adjudication.

[2] The plaintiff sues the defendant, a firm of attorneys, for damages due to the defendant's negligence in that it failed to recover damages which the plaintiff suffered as a result of medical costs incurred by him after his ex-wife was involved in a motor vehicle collision.

[3] It is common cause that the claim against the defendant is only sustainable in the event of the plaintiff proving that he would have been successful with this claim against the Road Accident Fund (RAF), which claim was handled by the defendants. The case is set out as follows:

'2. That on or about 2005, and at Vanderbijlpark, the plaintiff and the defendant entered into an oral agreement in terms of which the defendant would do all things necessary to lodge and recover from the Road Accident Fund (hereinafter the "RAF") all expenses incurred and /or loss of earnings allegedly sustained by the plaintiff and / or plaintiff's ex-wife, Alena Fedorik (hereinafter "Alena") as a result of a motor vehicle collision in which Alena was injured.

3. On 13 November 2002 and in Vanderbijlpark, a collision occurred between a motor vehicle and Alena who was a pedestrian at the time. The abovementioned collision was caused entirely by the negligence of the driver of the motor vehicle. The question of liability was resolved on the basis that the RAF would be liable for 70% of the damages.

4. During 2007 and in the North Gauteng High Court Pretoria under case number 25558/2007, the defendant representing Alena caused a summons to be served on the RAF claiming the damages allegedly suffered by Alena.

5. The amended particulars of claim filed by the defendant on behalf of Alena included, *inter alia*, a claim for past hospital, medical and related expenditure in the amount of R1 543 357.00.

6. The abovementioned expenses, which were annexed to Alena's particulars of claim as annexures "A1" to "A7" were expenses actually incurred by the plaintiff.

7. On 31 August 2009, Advocate JJ Botha was appointed as *curator ad litem* for Alena to assist in the conduct of the trial of her claim against the RAF.

8. Prior to the commencement of the trial the legal advisors representing Alena, including the defendant and the *curator ad litem*, Advocate JJ Botha, agreed to abandon the claim set out in annexures "A1" to "A7" as they were of the view that the abovementioned claim was unlikely to succeed.

9. On 3 June 2010, the action instituted by Alena against the RAF was settled and the abovementioned settlement did not include provision for or payment of the amount of R1 543 347.00, contemplated in paragraph 10.1 of the particulars of claim.

10. On 4 July 2002, the plaintiff and Alena were divorced, in terms of which divorce order included, *inter alia*, that Alena would forfeit her right to claim any benefits from the marriage which was in community of property.

11. Neither at the time of the accident, nor at any stage subsequent thereto, did the plaintiff owe a legal duty of support to his ex-wife, Alena. Furthermore the plaintiff did not incur the expenses referred to in paragraphs 5 and 6 above pursuant to any legal duty to Alena.

12. Subsequent to the accident, and notwithstanding the fact that the plaintiff and Alena were divorced, the plaintiff accommodated Alena in his house and paid the expenditure referred to in paragraph 5 and 6 above.'

[4] The plaintiff's argument was short and crisp. It was submitted that by virtue of the provisions of s 17(1) of the Road Accident Fund Act (RAF Act)¹, the RAF was liable to compensate the plaintiff for medical costs incurred by him for and on behalf of his ex-wife. Section 17 provides:

'17 Liability of Fund

1. The Fund or an agent shall –
 - a. ...
 - b. be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place in the Republic'

[5] Counsel for the defendant submitted that the RAF Act only envisages a claim by a non-injured party such as a parent or a spouse where there is a legal duty by such a claimant to maintain the injured person.

[6] In this regard it is also significant to have regard to ss 19 and 21 of the RAF Act. Section 21 abolishes certain common law claims. I need not digress on this as the exceptions referred to in that section are not applicable to this matter.

[7] Section 19 of the RAF Act provides:

'Liability excluded in certain cases

The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

- (a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21;'

[8] From these provisions it becomes clear that s 19 limits a claim against the RAF to a claim that would have been competent under the common law². In that sense, the RAF steps into the shoes of the wrongdoer. A claim against it should be proved as if it

¹ 56 of 1996

² See *Santam v Henery* 1999 (3) SA 421 (SCA) at 429E

was the wrongdoer and all the necessary allegations and proof in order to assert a claim against a wrongdoer would be required. If the wrongdoer is not liable at common law, the RAF will also not be liable.³

[9] Having regard to the aforesaid, the elements of the plaintiff's claim as stated above need consideration. What is immediately apparent is that the plaintiff had no duty to maintain his ex-wife and that the expenses incurred by him can best be described as having been incurred on a charitable basis. Such a charitable payment, in the absence of any obligation to maintain his ex-wife can, in my view, not be classified as damage. Damages is described by Boberg⁴ as follows:

'The terms "damage" and "damages" are sometimes used incorrectly. "Damage" is the loss suffered by the plaintiff (*skade*, *damnum*); "Damages" is the monetary compensation that the court gives him for it (*skadevergoeding*).'

The concept includes a loss.

[10] The charitable assistance by or generosity of the plaintiff was no more than a gift by him to his ex-wife. As such, it cannot be converted into a loss or *damnum* and he consequently has no claim against the RAF.

[11] A claim by a non-injured party has been recognised in our law. Such claim is based on the claimant's common law duty to maintain the injured person.

[12] Du Bois in *Wille's Principles of South African Law (9th Edition)* says at p 1154:

'In addition to the claim of the injured person, a spouse or parent (or any other person who is obliged by law to support the injured person) who has paid the medical expenses of the injured person, or incurred additional household expenses due to his or her injury, may claim the amount expended; for, in such an instance, the wrongdoer commits a delict against both the injured person and those obliged to support him or her.' (own emphasis)

³ Klopper: *The Law of Third-Party Compensation* (3rd Ed) p 123

⁴ The Law of Delict Vol 1 page 475

[13] It has been said that the 'liability of a father to pay for such expenses is one which arises by operation of law (cf. *Vermaak vs Vermaak* 1945 CPD 89)⁵. It is this relationship and obligation which allows a father to recover any medical expenses incurred by him on behalf of a minor⁶. The Supreme Court of Appeal held in *Santam vs Henery*⁷ that there is no duty of support by a husband of his ex-wife with the result that a claim by him cannot, without more, succeed – the duty of support by the ex-husband having terminated. The basis of such a claim, ie the duty of support, was extensively discussed in *Du Plessis v Road Accident Fund*⁸. Had there been a contractual duty to support⁹ my conclusion may have been different.

[14] By disavowing reliance on the very basis upon which a claim can be instituted by an uninjured third party at common law, the plaintiff has non-suited himself. The relationship, ie the legally enforceable duty to support or maintain, is explicitly absent in the present matter and in the absence thereof, I am of the view, that the plaintiff is unable to recover his gratuitous payments from the RAF both as a result of the absence of a loss and as a result of an absence of a right due to an absence of a duty to support his ex-wife. Having come to this conclusion, this plaintiff's inability to have succeeded against the RAF was not as result of any wrongful or negligent act by the defendants but due to the operation of law.

[15] Counsel for the plaintiff submitted that the defendant, having had a mandate to recover any damages also suffered by the plaintiff, should have advised him to cede the claim to his ex-wife. The difficulty with this argument is that the plaintiff could only have ceded a valid and enforceable claim. Without a duty to support, there can be no valid claim capable of cession to his ex-wife.

[16] As a final argument it was submitted that the defendant should have submitted a 'suppliers claim' pursuant to s 17(3) of the RAF Act. Again, s 17(5) is premised on the

⁵ *Saitowitz v Provincial Insurance Co Ltd* 1962 (3) SA 443 at 445H

⁶ See *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W)

⁷ At 427I

⁸ 2004 (1) SA 359 (SCA) at paras 10 – 16. See also Gauntlett: Corbett The Quantum of damages, Vol 1 (4th Ed) p 27

⁹ *Du Plessis* ibid para 16

basis that the plaintiff would be entitled to compensation in terms of s 17. I have already shown that there is no such entitlement without a duty of support.

[17] In the circumstances the plaintiff's claim falls to be dismissed with costs.

Wepener J

Counsel for plaintiff: Adv. B. Joseph

Attorneys for plaintiff: De Meyer & De Vries Attorneys

Counsel for defendant: Adv. J.E. Joyner

Attorneys for defendant: Webber Wentzel