

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

REPORTABLE

CASE NO: 343/2000

In the matter between

XOLISA PRIMROSE RAYI N.O.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ON 22 FEBRUARY 2010

ZONDI, J

Introduction

[1] In terms of the stated case submitted by the parties, the issue to be determined is whether the defendant is liable to the plaintiff for the payment of the past medical expenses in an amount of R58 736-94. The relevance of this question arises because Bonitas has already paid the expenses on behalf of the plaintiff. The contentions of the parties are set out in paragraphs 9 and 10 of the stated case as follows:

"9. *The plaintiff avers that the defendant is liable to pay her the amount of R58 736.94 in terms of the doctrine of subrogation.*

10. *The defendant avers that it is not liable to pay the plaintiff the amount of R58 736.94 as it will amount to enrichment; and that Bonitas must claim the amount from the defendant which claim has prescribed."*

Factual Background

[2] The facts in the present matter are largely common cause.

[3] Mr Zalisile Norman Rayi ("Rayi") instituted a claim for damages in terms of the Road Accident Fund Act against the defendant for injuries he sustained in a motor vehicle accident on 25 January 1997.

[4] On 20 January 2000, Rayi caused summons to be issued against the defendant. In his summons, Rayi claimed *inter alia* payment of the past hospital, medical and related expenses, general damages and costs. The defendant served its plea on 27 July 2000.

[5] Rayi passed away on 3 August 2004. In consequence, his widow, as an executrix was substituted as a plaintiff.

[6] During his lifetime, Rayi was a member of Bonitas Medical Aid Scheme ("Bonitas"). Bonitas paid on behalf of the Rayi past medical expenses in an amount of R58 736-94 which Rayi had incurred and for which the defendant was primarily responsible.

[7] In return Rayi signed an undertaking in terms of which he undertook in the event of there being a successful recovery from the defendant to reimburse Bonitas for all costs incurred on his behalf in connection with a claim against the defendant.

[8] It is common cause that the parties have settled the plaintiff's claim on the basis that the defendant would pay 70% of the plaintiff's proven damages as well as legal costs. The parties have agreed that the total amount for the past medical expenses before apportionment is R58 736-94.

Legal Principles

[9] The question is whether the defendant is liable to compensate plaintiff for the past hospital and medical expenses in light of the fact that they have already been paid by Bonitas.

[10] Section 17(5) of the Road Accident Fund Act, 56 of 1996 ("the Act") makes provision for the person who provided certain goods or services to or on behalf of the third party to claim direct from the defendant.

[11] It provides as follows:

“(5) Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19 (c) or (d) , claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.”

[12] It is clear to me that a procedural remedy which is available to the supplier of goods or services in terms of section 17(5) of the Act is not available to Bonitas. It paid past medical expenses on behalf of the plaintiff. It did not supply goods or provide services on behalf of the plaintiff. Bonitas can therefore not claim direct from the defendant the expenses it incurred on behalf of the plaintiff in terms of section 17(5) of the Act.

[13] Bonitas can recover from the defendant the payment it made on behalf of the plaintiff and for which the defendant is primarily responsible by way of an

action based on the principle of subrogation. It may sue the defendant in its own name or in the name of the plaintiff. (**Rand Mutual Assurance Co Ltd v Road Accident Fund** 2008 (6) SA 511 (SCA) at para 24). Subrogation embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance (Lawsa (reissue) vol 12 para 373).

[14] *Ms Carter*, who appeared for the defendant, submitted that the plaintiff cannot claim for the past medical expenses after payment of such expenses by Bonitas. She argued that in the absence of a cession of its right of action by Bonitas in favour of the plaintiff, Bonitas is the only party that is entitled to claim for past medical expenses. I disagree with *Ms Carter's* contention.

[15] In my view, settlement by Bonitas of the plaintiff's past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for the past medical expenses he incurred. Payment by Bonitas was made in terms of the undertaking made by the plaintiff to Bonitas in terms of which Bonitas agreed to settle the plaintiff's past medical expenses on the understanding that upon a successful recovery from the defendant, the plaintiff would reimburse Bonitas for all the costs it incurred on plaintiff's behalf in connection with the claim against the defendant.

[16] The obligation which the undertaking imposes on the plaintiff towards Bonitas does not arise until such time that there is a successful recovery of the

past medical expenses by the plaintiff from the defendant. The defendant primarily remains liable to the plaintiff for the payment of the past medical expenses and the liability of Bonitas to the plaintiff for the past medical expenses is secondary to that of the defendant. The defendant should pay the past medical expenses to the plaintiff who should upon receipt of payment account to Bonitas in terms of the undertaking.

[17] The undertaking given by the plaintiff to Bonitas creates a contingent liability which is enforceable on the happening of some future event. Bonitas' right of recourse against the plaintiff for reimbursement does not arise until the plaintiff has received payment from the defendant. The defendant's liability to the plaintiff for the payment of the past medical expenses is not affected by Bonitas payment on behalf of the plaintiff.

[18] The plaintiff's obligation to reimburse Bonitas in terms of the undertaking is triggered immediately plaintiff receives payment from the defendant for the past medical expenses and Bonitas may sue plaintiff for reimbursement should the plaintiff fail to reimburse it. The principle was succinctly stated by Ward J in **Ackerman v Loubser** 1918 OPD 31 at 36 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.”

[19] It therefore follows that Bonitas has an election. It may elect to proceed against either the plaintiff in terms of the undertaking agreement should the plaintiff have received compensation from the defendant or the defendant on the doctrine of subrogation. On the basis of this approach, there is no danger of the plaintiff being compensated twice for the same loss as suggested by *Ms Carter* on behalf of the defendant.

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

[21] I therefore conclude, on the facts of the stated case before me, that the defendant is liable to pay the plaintiff the sum of R58 736-94 for the past medical expenses.

[22] I now turn to consider the question of costs. In accordance with the general principle that cost follows the event, I will award costs in favour of the plaintiff. The

amount in dispute does not, however, merit the award of costs on a high court scale. In the exercise of my discretion, I will order that the costs should be payable on the magistrates court scale.

Order

[23] In the result, I make the following order:

1. the defendant is ordered to pay the plaintiff's claim for the past medical expenses in the sum of R58 736-94 less an agreed apportionment.
2. the defendant to pay the plaintiff's costs of the stated case on the magistrates court scale.

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