IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA

Case no: 126/2020

In the matter between:

NOXOLO LYNETTE MALGAS **Appellant**

AND

THE ROAD ACCIDENT FUND **Respondent**

Coram: D van Zyl DJP
Heard: 25 November 2022
Delivered: 1 December2022

JUDGMENT

D VAN ZYL DJP:

[1] The plaintiff was injured in a motor vehicle collision. The defendant (the Fund) was found to be liable for such damages as the plaintiff may have suffered in consequence of the collision. The only outstanding claim in dispute between the parties is the plaintiff's claim for past hospital and medical expenses, the quantum of which has been admitted in the amount of R245 166.32 (two hundred and forty five thousand, one hundred and sixty six rand and thirty two cents).

[2] The Fund has denied liability for the plaintiff's past hospital and medical expenses. The basis of its denial has been formulated as follows is its plea:

> **"Defendant pleads that it has assessed the claim for past medical expenses. The Defendant takes note of the fact that the past medical expenses claimed were paid by the Discovery Health medical scheme. As a consequence, the Plaintiff has not sustained any loss or incurred any expenses in respect of the past medical expenses claimed and there is therefore no duty on the Defendant to reimburse the claimant and Defendant hereby denies the claim for the past medical expenses."**

[3] The facts relevant to the determination of the outstanding issue are common cause. Those are that the plaintiff was a member of the Discovery Health Medical Scheme (the medical aid). In terms of the policy provisions

regulating the plaintiff's membership, of the scheme (i) the medical aid was obliged to pay the hospital and medical treatment received by the plaintiff in consequence of her injuries; and (ii) the plaintiff was obliged, in the event of there being a successful recovery from the Fund of such amounts as were paid on her behalf by the medical aid, to reimburse the medical aid for all such recovered amounts.

[4] Following the collision, the plaintiff received medical treatment and incurred expenses in the amount claimed. In compliance with its contractual obligations, the medical aid paid the expenses to the hospital and the other medical service providers. The expenses were admitted by the Fund to have been reasonable and necessary in the treatment of the plaintiff's injuries.

[5] The Fund's obligation to compensate the plaintiff for her patrimonial loss arises from the provisions of the Road Accident Fund Act 56 of 1996 (the RAF Act). The Fund's liability is delictual and is founded in the common law. At common law the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict[1].

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[1] *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917 B; Santamversekerings Maatskappy v Byleveldt 1973 (2) SA 146 (A) at 150 B – C; (Beyleveldt); and *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) at 277 H – 278 B (Zysset).

[6] An Aquilian claim for patrimonial loss for bodily injury is compensatory in nature. It does not embody a punitive element[2]. This principle is embodied in the RAF Act. In section 17 it obliges the Fund to **"compensate"** any person for any loss or damage suffered as a result of bodily injury caused by or arising from the driving of a motor vehicle. A plaintiff is accordingly only entitled to compensation to the extent of the reduction of his patrimony caused by the wrongful and negligent act of the wrongdoer.

[7] As a damage causing event may also result in a plaintiff receiving some advantage or benefit (also referred to as collateral benefits) that may increase his patrimony, such benefit or advantage must be taken into account in determining the amount of compensation that must be awarded. A benefit or advantage that reduces a plaintiff's loss should therefore result in a corresponding reduction in the amount of compensation awarded. **"It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double**

[2] *Union Government v Warneke* 1911 AD 567 at 662 and 665 – 667

compensation which, of course, is inconsistent with the fundamental nature of the action[3]."

[8] A plaintiff' is accordingly in principle not entitled to receive, what may conveniently be referred to as, double compensation. The question when a benefit would amount to double compensation is informed by **"considerations of public policy reasonableness and justice[4]."** What is considered fair and just in the circumstances of a case is determined on the basis of two opposing considerations. The one is that the plaintiff should not receive double compensation. The other is that the wrongdoer ought not to be relieved of liability on account of some gratuitous event. Benefits which has in our law been accepted over time should be excluded in determining the damages to which a plaintiff is entitled, are "**(a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff[5]**."

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[3] *Zysset* supra at 277 J – 278 B.

[4] *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 SA (SCA) at 42 B. See also *Beyleveldt* supra at 150 E – F and 153 B – C; *Zysset* supra at 279 A – B; and Minister van Veiligheid en Sekuriteit v Japmoco BK. 2002 (5) SA 649 (SCA) at 666 F and 668 D.

[5] *Zysset supra* at 278 C, quoted with approval in *Makhuvela v Road Accident Fund* 2010 (1) SA 29 (GSJ) at para [4].

[9] There are other instances where legislation expressly provides that a benefit received by a plaintiff must be disregarded in the determination of compensation for patrimonial loss. Section 1 of the Assessment of Damages Act 9 of 1969 provides by way of example that "**When in any action, the cause of which arose after the commencement of this Act, damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.**" The RAF Act on the other hand expressly provides in section 18 that any amount to which a plaintiff is entitled to by way of compensation in terms of that Act, must be reduced to the extent of any compensation received by the plaintiff under the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Defence Act of 1957, or any other Act of Parliament governing the South African National Defence Force.

[10] The question raised by the plea is whether the payment of the plaintiff's medical expenses by the medical aid relieved the Fund from paying compensation to the plaintiff in respect of her past medical expenses. There exists no reason to make any distinction between an ordinary insurance contract, and the contract which exists between a medical scheme and its members. A medical aid is in essence simply another form of insurance. In *D'Ambrosi v Bane and Others*[6]

[6] 2006 (5) SA 121 (C)

(D'Ambrosi) the court rejected the argument that payments received from a medical aid scheme should be treated as a benefit that must be deducted from the plaintiff's claim for compensation for future medical expenses. It found that a medical aid scheme, like the one the plaintiff in that case was a member of, was in substance a form of insurance. The court quoted with approval the following passage in *Thomson v Thomson*[7]: **"A medical aid scheme is, if not in law then in substance, a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums, or claims which far exceed the value of the premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme[8]."**

[11] I pause here to mention that a benefit, which is found must be excluded from the compensation to be awarded to a plaintiff, is in the case law referred to as *res inter alios acta*. The description of the result of the finding as *res inter alios acta* should preferably be avoided as it does not accurately reflect the reason for the finding. The maxim, fully expressed, is *res inter alios acta alteri nocere non debet*. It literally means **"things done between strangers ought not to prejudice those who are not parties thereto[9]."** This maxim, Trollip JA said in *Beyleveldt*, is **"a slippery one, difficult to grasp firmly and to apply with any certainty or confidence in**

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[7] (2002 (5) SA 541 (W)

[8] At 547 H – I

[9] Hiemstra and Conin **Trilingual Dictionary** 3rd ed at page 279.

assessing claims for bodily injuries (cf. too the remarks in British Transport Commission v Gourley, 1956 A.C. 185 at pp. 199, 206-7). The reason is that many of the *res actae* of a plaintiff relating to his injuries (e.g., contracts with others for medical treatment) do have a direct and manifest bearing on the assessment of his economic loss, and although they are *inter alios*, they must be admissible in evidence and taken into account *inter partes*, if justice is to be done between them[10]." The issue raised by a plaintiff having received a financial benefit payable as a consequence of the damage-causing event, is not determined solely with reference to the fact that the benefit is received from a source other than the wrongdoer, or the fact that it is arising from an obligation outside of the wrongdoer's delictual liability. It is, as stated by Rumpff JA in *Beyleveldt*, ultimately a question of legal policy, answered with reference to considerations aimed at doing justice between the parties[11]. **"In light of the aforegoing I agree with Neethling, Potgieter & Visser Law of delict[12] that '(q)uestions regarding collateral benefits are normative in nature; they have to be approached and solved in terms of policy principles and equity', and that in doing so 'there should always be a weighing-up of the interests of the plaintiff, the defendant, the source of the benefit as well as the community in establishing how benefits resulting from a damage-causing event should be treated[13].'"**

[12] In *Bane and Others v D'Ambrosi*[14] (Bane) the Supreme Court of Appeal upheld the decision of the court in *D'Ambrosi.* The findings in *Bane* and

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[10] *Supra* at 172 C – E

[11] *Supra* at 153 B – C.

[12] 5 ed (2006) at p 215 – 16

[13] Cachalia JA in Erasmus Ferreira and Ackermann v Francis 2010 (2) SA 228 (SCA) at para [17].

[14] [2009] JOL 24237 (SCA)

D'Ambrosi are in my view correct. Being in the nature of insurance, a member of a medical aid secures a benefit for himself at his own expense. As stated in *Zysset*, the wrongdoer or his insurer should in principle not be relieved of liability by reason of some fortuitous event such the prudence of a plaintiff to have insured himself[15]. Further, the plaintiff will not receive double compensation by reason of the insurer's right of subrogation that can generally be expected to form part of the rules of a Medical Scheme[16]. This may entitle the medical aid to recover from a plaintiff what it paid on his behalf when the plaintiff is compensated by the Fund.[17] Also, the effect of refusing to allow a plaintiff to recover in full his medical expenses from the Fund, may, as in this matter, have the effect of depriving the medical aid of its contractual right to be reimbursed directly by the plaintiff.

[13] A last consideration that militates against the defence raised by the Fund is, as it was pointed out by the Constitutional Court in *Coughlan v The Road Accident Fund*[18], the fact that the legislature chose to expressly provide that payments received by the categories of persons in section 18 of the RAF must be deducted from compensation paid by the Fund. There is no equivalent reference

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[15] *Zysset* supra at 278 C – D

[16] Bane supra at para [19]

[17] Rand Mutual Assurance Co Ltd v Road Accident Fund 2008 (6) SA 511 (SCA)

[18] 2015 (4) SA 1 (CC) at para [59]

to any other from benefit which may be considered to be double compensation. On a reading of section 18 of the RAF Act, it does therefore not expressly, or by implication, provide for the exclusion of benefits a plaintiff for compensation in terms of the RAF Act had received from a Medical Aid Scheme for past medical and hospital expenses.

[14] The finding in *Bane* (supra) and the considerations discussed above equally find application on the facts of this matter. A consideration that takes on particular importance is that upon payment of the costs of the hospital and medical treatment, the medical aid acquired the right to recover the costs of what it paid from the plaintiff's in terms of her obligation to reimburse the medical aid arising from the express terms of the contract regulating their relationship. This is therefore not an instance where the plaintiff stands to unduly benefit from the recovery of full compensation for her medical expenses from the Fund. It would accordingly in my view not be in the interests of justice to bring into account in the calculation of the amount of compensation to be awarded to the plaintiff the benefit she received in terms of her contractual relationship with the medical aid.

[15] For these reasons, I conclude that payment by the medical aid of the plaintiff's past hospital and medical expenses did not relieve the defendant of its obligation to compensate the plaintiff for such expenses. The defendant is

accordingly, on the facts placed before me, liable to pay the plaintiff the sum claimed, and there is no reason not to award the plaintiff her legal costs.

[16] In the result, an order is issued in the terms of the draft order presented by the plaintiff at the hearing of the matter, marked “VZ”.

SIGNED

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D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

For Appellants:	Adv N Patterson
Instructed by:	Jaco Hattingh Attorneys 28 – 7th Avenue Newton Park GQEBERHA
For the Respondents:	Ms C Jantjes
Instructed by:	State Attorney 29 Western Road Central GQEBERHA