SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 158/2016

In the matter between:

THE PREMIER OF THE WESTERN CAPE
PROVINCIAL GOVERNMENT N.O. **APPELLANT**

and

ROCHELLE MADALYN KIEWITZ
obo JAYDIN KIEWITZ **RESPONDENT**

Neutral citation: *The Premier of the Western Cape Provincial Government N.O. v Rochelle Madalyn Kiewitz obo Jaydin Kiewitz* (158/2016) [2017] ZASCA 41 (30 March 2017)

Coram: Leach, Tshiqi, Majiedt and Swain JJA and Nicholls AJA

Heard: 22 February 2017

Delivered: 30 March 2017

Summary: Delict: damages: compensation for future medical expenses: impermissible to tender services in lieu of payment of a monetary award.

ORDER

On appeal from: Western Cape Division, Cape Town (Nuku AJ sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Nicholls AJA (Leach, Tshiqi, Majiedt and Swain JJA concurring):

[1] The question in this appeal is whether plaintiffs in delictual claims against a provincial government are obliged to mitigate their damages by accepting a tender for future medical treatment at a provincial health facility rather than receiving a monetary payment in respect of assessed future medical expenses.

[2] The respondent, Ms Rochelle Kiewitz, sued the Western Cape Provincial government for damages suffered by her minor child, Jaydin, who became blind as a result of retinopathy of prematurity, negligently undetected at birth. The appellant, the Premier of the Western Cape, in her capacity as overall head of Health Services in the Western Cape, including Tygerberg Hospital where Jaydin was born, has conceded the merits. Save for a claim in respect of future medical expenses, all other damages have been settled in the sum of R7 million. The only issue for

determination by the High Court was whether the appellant's so-called 'plea in mitigation' should be upheld. The High Court (Nuku AJ) dismissed the plea with costs but granted leave to appeal to this court.

[3] In its plea in mitigation, the appellant undertook to provide all future healthcare, reasonably required by Jaydin as a result of his sight impairment, at provincial healthcare institutions in the Western Cape, at no cost. The appellant undertook to provide a designated representative from the provincial health department to deal with Jaydin's health needs and proposed a dispute resolution mechanism in the event of disagreement as to the nature of the treatment required. The appellant contends that failure to accept this undertaking and mitigate the damages as set out, must result in a concomitant reduction of the damages. In essence, the effect of the plea in mitigation is to deny the plaintiff any monetary award in respect of future medical treatment.

[4] Delictual damages have been defined as the 'monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage.'[1] It is trite that the primary purpose of awarding delictual damages is to place the injured party in the same position as they would have been in, absent the wrongful conduct. As a general rule, restitution in kind is prohibited where patrimonial loss such as past and future medical expenses, past and future loss of income and loss of support has been suffered as a result of personal injury.[2] Claimants have a duty to mitigate their damages but this goes no further than

[1] J M Potgieter, P J Visser, L Steyn and T B Floyd *Visser & Potgieter: Law of Damages* 3 ed Juta Law at 185

[2] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 782 D-E; *Van der Merwe v Road Accident Fund & another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at p252- 253

obliging a plaintiff to take reasonable steps to minimise the loss, either by reducing the original loss or by averting further loss.[3]

[5] In support of the plea, the appellant eschews any reliance on the development of the common law. The somewhat disingenuous contention of the appellant is that the plea is not an attempt to circumvent the common law: instead, so it is argued, the respondent should mitigate the loss by accepting health services based not on the exorbitant cost of private health care, but free of charge in the public health system. As the damages in respect of future medical costs would be reduced to zero, Jaydin and his mother are consequently under a duty to accept the tender. The result is that the plea absolves the appellant from paying a monetary award.

[6] Despite the appellant's assertion that it does not seek to develop the common law, this cannot be construed as anything other than an attempt to abolish the long-established common law rule that compensation for patrimonial loss should sound in money. The appellant seeks to provide restitution in kind instead of making a monetary award, which is impermissible in delictual claims for patrimonial loss as a result of bodily injuries. The purpose of an Aquilian claim is to compensate a victim in money terms for any loss suffered.[4]

[7] In any event the acceptance of the appellant's undertaking would not finally dispose of the issues between the parties. The nature of the treatment Jaydin will require and whether his needs will be adequately

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[3] *Swart v Provincial Insurance Co Ltd* 1963 (2) SA 630 (A) at 633*; Da Silva & another v Coutinho* 1971 (3) SA 123 (A) at 145

[4] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* fn at 782 D-E; J Neethling JM Potgieter PJ Visser: *Law of Delict* 5 ed LexisNexis at 217

met by the services that the provincial health authorities will be able to provide in future, are issues that remain undetermined. Indeed this will provide fertile ground for future litigation, a situation that the 'once and for all' rule was designed to avoid.

[8] The rule is that a delictual claim is based on a single, indivisible cause of action and a plaintiff must claim once, and be compensated, for all damage suffered, not only for loss already suffered but prospective loss as well.[5] This has been settled law for over a century. In 1917 Solomon JA in *Cape Town Council v Jacobs* [6] stated:

'That in an action at common law for damages for injuries sustained by an accident the plaintiff is only entitled to sue once and for all cannot, I think, be questioned.'

[9] This court recently had occasion to deal with the proposed abolition of the 'once and for all' rule under the guise of developing the common law in *The MEC for Health and Social Development of the Gauteng Provincial Government v Zulu.* [7] In that matter an order was sought that future medical costs be paid as and when they arose, rather than as a lump sum award. It was argued that large lump sum payments have the effect of depriving others of much needed medical care thereby placing in jeopardy the constitutional right to access to health care services.

[10] The court rejected the notion that the abolition of the rule would promote the constitutional right of all individuals to health care as provided for in s 27 of the Constitution. [8] The court went on to state that

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[5] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472

[6] *Cape Town City Council v Jacobs* 1917 A.D. 615 at 620

[7] *The MEC for Health and Social Development of the Gauteng Provincial Government v Zulu* (1020/2015) [2016] ZASCA 185 (30 November 2016)

[8] 27 Health care, food, water and social security

(1) Everyone has the right to have access to-

this was an issue more appropriately dealt with by legislative intervention:

'. . . in exercising their power to develop the common law, judges have to be 'mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary'.[9] The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with dynamic and evolving fabric of our society.'[10] The development of the common law sought by the appellant is not an incremental change, but one of substance and more appropriately dealt with by the legislature, being an issue of policy. Any legislated change in the common law rule could only be effected after the necessary process of public participation and debate.'[11]

[11] Furthermore, in the event of a dispute over the treatment required for Jaydin, the tender provides for the determination thereof by 'a registered health professional agreed to by the parties, and failing such agreement, by a person nominated by the Dean of the University of Stellenbosch Faculty of Health Sciences.' This appears to be an attempt to exclude judicial oversight in regard to future medical treatment. Without an agreement with a plaintiff, a defendant cannot unilaterally divest a court of its jurisdiction to deal with one of the triable issues properly placed before it, by tendering an alternative procedure to determine that which a court has been called upon to decide - in the present instance the respondent's damages in respect of future medical expenses.

(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

[9] *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 40

[10] *R v Salituro* [1991] SCR 654 (Canada) as cited by Kentridge AJ in *Du Plessis* & others *v De Klerk & another* 1996 (3) SA 850 (CC) para 61.

[11] *The MEC for Health and Social Development of the Gauteng Provincial Government v Zulu* at para 12

[12] When the Road Accident Fund was faced with unaffordable claims for future medical costs, the legislature intervened and effected changes in legislation. As a result the future medical expenses of accident victims may now be catered for by the introduction of a undertaking in terms of s 17(4) (*b*) of the Road Accident Fund Act 56 of 1996 in terms of which the Fund undertakes to pay the medical expenses of a claimant at a public healthcare institution, as and when the need arises. Whether a similar arrangement needs to be made in respect of cases such as this, is a policy decision for the legislature and not one for judicial reform.

[13] Despite the disavowal of any reliance on the development of the common law, the plea in mitigation, therefore, offends against both the 'once and for all' rule and the rule that compensation in bodily injury matters must comprise a monetary award. On both these grounds the plea in mitigation is ill-conceived and unsustainable. In view of this finding, it is unnecessary to deal with the evidence regarding the adequacy of medical care offered at provincial hospitals. Suffice it to say that the court a quo did not err in dismissing the appellant's plea in mitigation.

[14] In the result the following order is made:

The appeal is dismissed with costs.

C NICHOLLS

ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: A C Oosthuizen SC (with B Joseph)

Instructed by: The State Attorney Cape Town

The State Attorney Bloemfontein

For Respondent: J S Saner SC

Instructed by: Heyns & Partners Inc

C/o Rosendorff Reitz Barry Attorneys