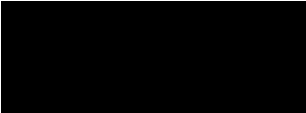


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/1093

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
7 March 2024	
DATE	SIGNATURE

In the matter between:

MAPHOSA, FRANKO

Plaintiff

and

ROAD ACCIDENT FUND
(Link Number: 5223080)

Defendant

JUDGMENT

Pienaar AJ:

Introduction

[1] This is an action for damages brought by the Plaintiff against the Road Accident Fund in terms of the provisions of the Road Accident Fund Act 56 of 1996 ("the RAF Act"), as amended.

- [2] The Plaintiff, a foreign national, sues for personal injury sustained in a motor vehicle accident on 11 December 2020 at Central African Republican Road, Cosmo City, Randburg. He was a pedestrian at the time of the accident.
- [3] The issues to be determined are the liability of the Fund and, if the Fund is liable, the amount of compensation for future medical expenses and loss of earnings and earning capacity.
- [4] The Fund did not admit the RAF 4 serious injury assessment of the Plaintiff, nor did the Fund make any offer on general damages.
- [5] During the trial, two specific legal questions arose. These questions are: (a) whether a Plaintiff's failure to respond to an objection letter under section 24, read with section 17(1) of the RAF Act, leads to the prescription of a claim, and (b) whether the Plaintiff's status as an "illegal" foreign national disqualifies him from seeking compensation under the RAF Act.

Special Plea – Does Plaintiff's Failure to Respond to An Objection Letter Under Section 24, Read with Section 17(1) Of the RAF Act, Lead to The Prescription of His Claim?

- [6] On the morning of the trial, the Fund filed a notice in terms of Rule 28 to amend its plea to include a special plea of prescription.
- [7] The special plea reads as follows:

"(1) The Defendant pleads that the Plaintiff's claim is in terms of the Road Accident Fund Act No. 56 of 1996 ("the Act") as amended by Act 19 of 2005. The Plaintiff has failed to comply with Section 24 of the Act, and more specifically Section 17(1)(a).

- In terms of Section 17(1)(a) of the Act the defendant is unable to establish the liability of the Fund as there is insufficient proof to link the injuries of the injured with the accident. **(Inconsistency in the DOA and dates on the hospital records)**

- Proof of injury, RAF4 form for serious injury report duly completed in line with AMA guide (par 19)
 - (i) Serious injury on RAF 4 form
 - (ii) Narrative test where applicable
 - Medical reports or documentation establishing, or substantiating claimants temporary/permanent disability and the loss of earning claimed (Medico legal reports)
 - An itemized tax invoice from a registered medical provider/or hospital for past medical expenses not submitted
 - Proof of payment of medical expenses
 - The claimant has not been positively identified (**Copy of claimant's asylum seeker temporary permit is expired**)
- (2) The Defendant on the 28 October [2021] duly objected to the validity of the claim and accordingly no valid claim was lodged.
 - (3) In the premises the Plaintiff has failed and/or neglected to comply with the provisions under the said Act and section timeously, and therefore, the Plaintiff's claim is accordingly unenforceable in the present proceedings.
 - (4) The claim having not been lodged timeously, has duly prescribed on the 11 December 2023.
 - (5) The objection not having been attended to timeously, has duly prescribed on the 11 December 2023.

WHEREFORE, the Defendant prays that the Plaintiff's claim be dismissed with costs."

[8] The Plaintiff did not oppose the amendment, nor did the Plaintiff file any replication.

[9] The Fund elected not to call any witnesses on the special plea. The Plaintiff did not call any witnesses either.

[10] Following arguments, I reserved judgment on the special plea and directed the parties to continue with the main case. What follows are the reasons for my decision to proceed.

[11] In the matter of *Jugwanth v Mobile Telephone Networks (Pty) Ltd*,¹ the Supreme Court of Appeal confirmed the party that invokes prescription bears the full onus to prove it and, the question of the prescription itself is fact-driven. The relevant portions read as follows:

"[6] It is settled law that a person invoking prescription bears a full onus to prove it. In *Gericke v Sack*, Diemont JA explained:

'[It] was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was prescribed this he did by way of a special plea five months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defense.'

...

[8] [The question of the] ... prescription is fact driven."

[12] Section 24(5) of the Act deals with the Fund's objections to claim documents and the consequences of a failure to object. The section reads as follows:

"If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in all respects." [Emphasis added.]

[13] Accordingly, for the Fund to succeed with its special plea, it was the Fund's responsibility to demonstrate that it validly objected to the Plaintiff's claim. Broadly speaking, this entailed proving that the objection was made in writing; the content of the objection; that it was made within 60 days from the date on which the claim was sent by registered post or delivered by hand; that the objection was brought to the Plaintiff's attention; whether the Plaintiff responded to the objection or not; and if so, that the objection was not withdrawn and remained valid.

¹ [2021] ZASCA 114; [2021] 4 All SA 346 (SCA) at paras 6 and 8.

- [14] The Fund did not call any witnesses on this aspect. Instead, in argument, the Fund referred to a document dated 25 October 2021 titled "Re: Notice of objection to Lodgement documents..." uploaded to the digital case record (known as CaseLines).
- [15] However, merely uploading this document to CaseLines does not fulfil the Fund's burden of proof. The Plaintiff did not admit the document as evidence, nor was there any agreement that the document would be considered as evidence without further proof. Therefore, the Fund was required to provide evidence regarding the document and its delivery, which it failed to do.
- [16] Consequently, I find that since the Fund did not present any evidence of a valid objection to the claim, the allegations in the special plea remain unproven.
- [17] The Plaintiff's claim is deemed valid in all respects according to section 24(5) of the RAF Act.
- [18] It is, therefore, not necessary for me to determine the consequence of a third party's failure to respond to a valid objection in terms of the RAF Act.

Plaintiff's Evidence

- [19] On the initial day of the trial, the Plaintiff presented oral testimony regarding his asylum permits and the lodgement documentation submitted to the Fund. On the following day of the proceedings, the Plaintiff applied to introduce additional evidence via affidavit, in terms of rule 38. The Fund did not object to Plaintiff's application. Consequently, I granted the application.
- [20] The Plaintiff, a male Zimbabwean citizen born on 10 February 1988, sustained bodily injuries in a motor vehicle collision on 11 December 2020 at Cosmo City, Randburg.
- [21] At the time of the accident, the Plaintiff had crossed the road and was entirely on the sidewalk when a white Isuzu bakkie, registration number SN90JJ GP,

driven by Mr Amos Mengo (nationality unknown), collided with him. Mr Mengo, traveling on Central African Republic Road, lost control of the motor vehicle, leading to the collision with the Plaintiff on the sidewalk.

[22] The Plaintiff did not present any evidence of a valid permit for his tenure in the Republic on the accident date. Before the accident, he was the holder of an Asylum Seeker Temporary Permit dated 21 September 2018, which had expired on 21 March 2019. He currently holds an Asylum Seeker Temporary Permit dated 12 February 2024, expiring on 12 July 2024.

[23] Following the accident, the Plaintiff was taken by private vehicle to Helen Joseph Hospital, where he remained until 8 January 2021. As a result of the accident, he sustained a Weber C pilon-type open fracture injury to his left ankle, which was treated with an external fixator and wires. These were subsequently removed on 5 March 2021.

[24] According to the evidence of Dr Read, the Orthopaedic Surgeon, the Plaintiff has scarring on the medial aspect of his left ankle from the open fractures, as well as scarring on his left leg/ankle from the external fixator and K wires.

[25] The Plaintiff relied on crutches for five months during his recovery.

[26] Dr Read gave evidence that:

"Weber C fractures carry the worst prognosis of ankle fractures...Considering the left ankle injury sustained in the accident, the current X-ray findings, and the patient's young age (33 years old at the time), he is likely to develop progressive post-traumatic osteoarthritis of his left ankle as a result of this accident. The exact time frame for this development is difficult to estimate but may occur within the next ten years."

[27] Long-term conservative treatment for the Plaintiff's symptoms will be necessary, which may include analgesics; anti-inflammatories; muscle relaxants; and physiotherapy. Provision should also be made for left ankle

fusion or replacement surgery. The prognosis is poor, and he will require at least four months for future orthopaedic treatment. He will also need several occupational therapy sessions to assist him in managing his injuries.

- [28] Before the accident, the Plaintiff was in good health and had no complaints related to his left ankle.
- [29] Since the accident, he has experienced pain in the left ankle region related to activity and cold weather, necessitating rest and occasional pain relievers. He now faces difficulties standing for extended periods; running; walking long distances; using a ladder; and lifting heavy items due to his left ankle symptoms. Previously enjoying running and gym activities during leisure time, he can no longer engage in these activities to the same extent due to his injuries. Additionally, he experiences anxiety when traveling in a car.
- [30] The Plaintiff completed his O levels in Zimbabwe in 2007 before leaving school. He is uncertain about any academic setbacks but likely repeated at least one year.
- [31] The Plaintiff worked as a painter on a project-by-project basis (commonly called "piece job" employment) from 2009 until the accident date. In this arrangement, his employment was structured around individual projects, with his working hours varying depending on the size and scope of each project. He has not pursued formal vocational courses or possess a driver's license.
- [32] At the time of the accident, the Plaintiff earned R7,100.00 per month, including travel and housing allowances, which placed him around the median for semi-skilled workers in the non-corporate sector.
- [33] As a painter, the Plaintiff's duties included traveling to the site with employer-provided transportation; loading tools onto the vehicle; carrying heavy paint cans (20 litres) from storage; climbing ladders to paint ceilings and high areas; painting walls or ceilings as needed; applying Polyfilla on ceilings; and scraping and smoothing before painting. His skill level at the time of the collision

can be classified as "unskilled", and his occupation entails medium physical demands.

- [34] The Plaintiff could not work due to his injuries from December 2021 to June 2022, during which time he earned no income.
- [35] Following the accident, he returned to his pre-accident employment with his previous employer until July 2023, when the employer relocated to Cape Town, leaving the Plaintiff unemployed. He was employed in a sympathetic environment where he received assistance from his colleagues and took rest breaks.
- [36] The Plaintiff has endured significant pain and suffering due to the ankle injury. Additionally, he faces the prospect of future painful surgery. He experienced considerable disability for six months post-accident and remains moderately disabled. He walks with an antalgic gait, with mild wasting of the left thigh muscles.
- [37] While adhering to recommended treatment may initially improve his disability, the potential development of progressive osteoarthritis in his left ankle could lead to considerable morbidity and increasing disability before definitive ankle surgery is necessary.
- [38] Currently, the Plaintiff experiences limitations in standing; walking; stooping; stair climbing; and assuming low work postures. Although he can handle medium workloads of up to 15 kg, he experiences pain and discomfort in the left ankle, resulting in reduced weight-bearing on the left leg during physical tasks. Due to these limitations, frequent lifting or carrying loads is not advisable.
- [39] The Plaintiff is currently better suited for sedentary work and occasionally engaging in light work tasks. His pre-accident and current occupation as a painter are no longer suitable.

- [40] The injuries sustained in the accident have significantly impacted the Plaintiff's ability to meet the demands of his pre-accident and current work, rendering him highly vulnerable in the open labour market. The progression of osteoarthritis in his left ankle will likely result in physical deterioration, limiting him to secondary types of occupations and hindering his employment prospects in the open market, given his experience and skills. Without new skills training, he faces prolonged unemployment. Considering the impact of the accident on his pre-accident and current life roles and circumstances, the accident's effects are considered moderate.
- [41] Had it not been for the accident, the Plaintiff would have continued working as a painter and seen an increase in earnings over the years, potentially working for himself or securing alternative employment. His monthly earnings would have progressed steadily, peaking between the median and upper quartile for semi-skilled workers in the non-corporate sector by age 50. Afterward, his income would have remained similar with inflationary adjustments until his intended retirement age. The monthly salary range for semi-skilled workers in the non-corporate sector is between R2,850.00 to R15,917.00.
- [42] Before the accident, the Plaintiff led a relatively healthy and active lifestyle, with no indications that he would not have continued working until the normal retirement age of 65.
- [43] It is unlikely that the Plaintiff will secure suitable sedentary employment in the open labour market, and employment opportunities will likely be limited to informal sector employment, either as an employee or self-employed. His most probable options include working in informal trading as a Spaza Shop Assistant or becoming an Informal Trader himself. His earnings would start at the lower quartile of the Informal Trader salary scale, with the potential to increase to just above the median by age 50, with inflationary adjustments until retirement at age 65.

[44] The Industrial Psychologist, Mr Vlamingh, recommended a higher than normal post-accident contingency deduction for unemployment, considering the uncertain nature of the Plaintiff's projected post-accident career. According to him, given Dr Read indicating that the age of retirement will depend on the nature of his work duties and the condition of his left ankle in the future, considering the degenerative nature of his ankle injury, early retirement, even as an Informal Trader, cannot be ruled out. This should be included as a risk for a much higher than normal post-accident contingency.

[45] Based on the Industrial Psychologist's report, the Actuary postulated a total loss of earnings of R1 470 800.00 without applying any contingencies.

Defendant's Evidence

[46] The Defendant did not call any witness.

Disputes

[47] On the pleadings, the *locus standi* of the Plaintiff is in dispute. The Fund pleaded:

“Save to admit the names of the Plaintiff, the Defendant has no knowledge of the allegations set forth in this paragraph, denies same and puts the Plaintiff to the proof thereof.”

[48] The fact of the collision is also in dispute.

[49] The Fund admitted the injury but denied the nexus between the injury and the collision.

[50] At the hearing of the matter, the Fund further disputed the Plaintiff's eligibility to claim compensation from the Fund, based on the premise that the Plaintiff was an “illegal” foreign national.

Findings:

- [51] I pause to mention that the Fund sought a postponement on the second day of the trial. The parties informed me that they had agreed to postpone the hearing indefinitely. Their decision was based on the Fund's belief that an "illegal" foreigner does not have the right to claim against the Fund. The resolution of this aspect, so the parties indicated, is pending before a specially convened full bench later this year in the *Mudawo* matter.
- [52] I denied the request for postponement for several reasons, the most pertinent of which was that this matter was part-heard and it would not prejudice the parties to conclude the evidence. I indicated to the parties that they should present all the evidence necessary to prove their respective cases.
- [53] At the time, I considered, and so informed the parties that I may deal with the eligibility of the Plaintiff to claim from the Fund, if it proved relevant, by reserving my judgment indefinitely pending the outcome of the full bench's decision. After the parties closed their respective cases and concluded their arguments, I suggested that I may consider separating that issue in terms of rule 33(4). Upon reflection, I have determined that neither of the above-mentioned proposed solutions is in the interest of justice.
- [54] It is essential to acknowledge that the potential for higher courts to overturn lower court judgments on appeal is inherent in the judicial process. However, this possibility should not dissuade a lower court from fulfilling its duty to adjudicate the case without fear.
- [55] A core function of the judiciary is to interpret and apply the law impartially, regardless of the prospect of review by higher courts. While appellate review is integral to the legal system, it should not compromise the lower court's obligation to deliver timely and well-founded judgments based on the evidence and relevant legal principles.

[56] It is not in the public interest that I delay my judgment solely because a higher court might reach a different ruling on the same issues.

[57] Accordingly, I find no justifiable reason to delay this aspect indefinitely. If my judgment is deemed incorrect based on the findings of the full bench in a different matter, the Fund may appeal this judgment, or the Plaintiff may choose to waive its benefits.

Possible Separation of Issues

[58] The court should determine the Fund's liability to compensate the Plaintiff before determining any compensation amount the Fund owes the Plaintiff. Doing it afterward forces a court to suspend its ruling contingent upon a second court's resolution of a specific issue, which I believe would introduce ambiguity regarding the enforceability of the first court's decision.

[59] Court judgments should be conclusive, providing clear guidance and closure to the parties involved. Any uncertainty on the enforceability of court orders undermines the integrity of the judicial process.

[60] It is not in the public interest that I make ambiguous and unenforceable orders. Accordingly, I cannot conveniently separate the issue of the Plaintiff's eligibility to claim in terms of rule 33(4).

Does the Plaintiff's Status as an "Illegal" Foreign National Disqualify Him from Seeking Compensation Under the RAF Act?

[61] It is common cause that the Plaintiff is not a South African citizen.

[62] His asylum seeker permits authorised/s him to "temporarily reside in the Republic of South Africa for the purpose of applying for asylum in terms of the Refugees Act No 130 of 1998" during the following periods:

21 September 2018 to 21 March 2019 (the first asylum permit); and
12 February 2024 to 12 July 2024 (the current asylum permit).

[63] The Plaintiff did not provide any evidence that he had applied for asylum as stipulated in the condition of his permit; that he is the holder of another permit authorising his stay in the Republic; or that he qualified for any exemption under the Immigration Act 13 of 2002 after the expiry of the first asylum period and before the commencement of the current asylum period.

[64] Accordingly, based on the evidence before me, the Plaintiff did not prove that he was lawfully within the Republic at the time of the accident. His first temporary asylum permit had by then expired.

[65] Thus, at the time of the accident, the Plaintiff was an illegal foreigner, i.e., a *foreigner who is in the Republic in contravention of the provisions of the Immigration Act 13 of 2002*.

[66] The Fund contends illegal foreigners are ineligible to claim under the provisions of the RAF Act.

[67] The Fund relies on the extemporaneous judgment of the honourable Justice Baqwa in *Chola Stanley v Road Accident Fund*,² where the court expressed the view that it is incumbent upon a foreigner plaintiff to prove that he had legally entered the country, and that to be able to claim in terms of the RAF Act, he was not an “illegal foreigner”. Baqwa J believed that on his interpretation of section 17(1), unless a foreign plaintiff proved aforesaid, he was excluded from the definition of “any person”.

[68] The relevant portions of his judgment read as follows:

“It is true, and it is trite, that the Road Accident Fund will be liable to compensate any person who is a victim of a motor vehicle accident within the Republic of

² Case number 4182/2019 (Gauteng Local Division, Johannesburg) dated 9 May 2023.

South Africa in terms of the Road Accident Fund Act but I must state at the very beginning of this brief judgment that I accept, as submitted by Ms Aamir Singh for the defendant, that "any person does not include an illegal foreigner".

In the submissions made by both counsel, reference has been made to the case of *Mudau [Mudawo] v the Road Accident Fund* which has become central to the order I am about to make in this judgment. Adam Mudau [Mudawo] ... in that case RAF argued that he could not lodge a claim, having come into this country as an asylum seeker in January 2020 and his asylum permit having expired by the time he lodged a claim. Mr Mudau [Mudawo] has since launched a constitutional challenge against the RAF's new directive regarding proof of lawful entry into the country as a requirement for a valid claim against the Road Accident Fund... .

...

The requirement to prove legality of entry into the Republic of South Africa is provided for in terms of regulation 7(1) of the Road Accident Fund Regulations 2008, and in that sense, it is a requirement which has been factored into the so-called RAF1 in terms of the Act and it came into effect on 1 June 2022. Its provisions can therefore not be ignored by this Court. Counsel for the Plaintiff, Mr Grobbelaar, has argued strenuously that it having come into operation on 1 June 2022, it is not applicable to the Plaintiff's claim because, as he submitted that it cannot, since it would result in a negative consequence for the Plaintiff, it ought not to be allowed to operate retrospectively against him.

...

Counsel for the defendant submits, as a matter of law, and as I have indicated, refers in this regard to the Immigration Act 2002. The plaintiff is duty bound to prove that he entered the country legally and that "any person" in the Road Accident Fund Act does not include (exclude) an illegal foreigner. I am inclined, as already alluded to, to accept the correctness of that submission. It is not in dispute that the plaintiff did not enter the country on humanitarian grounds and that the only possibility therefore is a legal entry which can be verified easily by the Home Affairs Department, as I have said again, this has not been done.

I have given serious consideration to the possibility of making a separation of issues and making an order in terms of section 17(4), issuing a certificate by the Defendant and an order for general damages separate from the loss of earnings but as Defendant's counsel submits, the Mudau [Mudawo] case is about "capacity to claim by the plaintiff". The fact of the matter therefore, it is either he has that capacity or alternatively he does not have. This, to use a colloquial phrase, is the million dollar question which has to be answered by the apex court."

[69] The *Mudawo* matter³ referred to by Baqwa J stands to be determined by a specially convened full bench of the Gauteng Division, Pretoria later this year. It is a review application to set aside the substituted RAF1 form and the RAF Management Directive dated 1 June 2022. Given the importance of this aspect, I anticipate the full bench's decision may not be the final word on the matter, and it may take years for this aspect to be finally determined.

[70] For completeness, I fully record the relief sought in the *Mudawo* matter:

"(1) In terms of section 172(1)(a) of the Constitution of the Republic of South Africa, it is declared that the provisions of substituted RAF1 claim form (prescribed by virtue of R2235 promulgated in Government Gazette 46661 dated 4 July 2022 issued by the Minister of Transport (1st Respondent) in terms of section 26 of the Road Accident Fund, 56 of 1966 as amended), is inconsistent with the Constitution and invalid to the extent that both part 6.1 (substantial compliance injury claims) and part 12.1 (substantial compliance death claims) require that, if the claimant is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident.

(2) In terms of section 17(1)(a) of the Constitution of the Republic of South Africa, it is declared that the provisions of the RAF Management Directive dated 21 June 2022, title CRITICAL VALIDATIONS TO CONFIRM THE IDENTITY OF SOUTH AFRICAN CITIZENS AND CLAIMS LODGED BY

³ Adam Mudawo v Minister of Transport and Road Accident Fund, case number 11795/2022, Gauteng Division, Pretoria.

FOREIGNERS, is unconstitutional and inconsistent with the Constitution, to the extent that:

(2.1) In respect of foreign claimants, it makes provision that proof of indentity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident.

(2.2) In respect of foreigner claimants, they are required to show a passport with an entry stamp and/or exit stamp to be submitted – Where the foreigner claimant left the RSA, the passport must have an exit stamp and if the foreigner claimant is still in the country, proof that the claimant is still in the RSA with an approved Visa.

(2.3) If foreign claimants did not have any stamp on a passport, the Second Respondent wil not be lodging such a claim.

(2.4) The requirement that the passport of a foreigner claimant can only be certified by the South African Police Service.

(3) In terms of Section 172(1)(b) of the Constitution, the provisions of the substituted RAF 1 form of 4 July 2022, to the extent as set out in paragraph 1 above; AND the RAF Management Directive of 21 June 2022, to the extent as set out in paragraph 2 above, are set aside.”

[71] The substituted RAF 1 claim form and the Management Directive, which is the subject of the dispute in the *Mudawo* matter, did not apply when the Plaintiff submitted his claim.

[72] The Honourable Justice Baqwa does not provide any rationale for his finding that "any person (the third party)," as outlined in section 17 of the Act, excludes illegal foreigners. He merely briefly referenced Ms. Aamir Singh's submissions.

[73] Judge Baqwa's remark is evidently *obiter dictum*. He had not heard any evidence and was not called to make a finding on the issue. He was called to determine an application for postponement premised on the possibility that the

review application may be successful. He granted the application for postponement, postponing the matter *sine die* pending the decision of the *Mudawo* case on this aspect. As such, I am not bound by Judge Baqwa's decision.

[74] I respectfully disagree with this *obiter dictum* expressed by Honourable Justice Baqwa.

[75] The court must interpret legislation against the principles determined by the apex court in *Cool Ideas 1186 CC v Hubbard and Another*⁴ that are as follows:

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provisions must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

[76] Thus, the starting point is the ordinary grammatical meaning of the words "any person" as contained in section 17 of the RAF Act, which reads as follows:

17. Liability of Fund and agents. — (1) The Fund or an agent shall—

...

be obligated to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself of 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 within the Republic"

⁴ [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[77] In determining the ordinary meaning of the words “any person” in legislation that contained similar wording and had preceded the RAF Act, the court in *Stegen and Others v Shield Insurance Co Ltd*⁵ held that:

“The section in terms obliges the registered company to compensate ‘any person whatsoever’ who is injured in the circumstances stipulated. The phrase is one of obviously wide meaning and its use is in conformity with the general purpose of the Act, which is to substitute a statutory insurer for the actual wrongdoer as regards compensation legally claimable by any person under the common law. See *Lockhat's Estate v North British & Mercantile Insurance Co. Ltd.*, 1959 (1) SA 24 (D) at p. 26”

[78] If regard is then had to the purpose of the RAF Act, sections 3 and 21 are relevant. These sections read as follows:

“3. Object of Fund. — The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.”

and

“21. Abolition of certain common law claims. —(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—

- (a) against the owner or driver of a motor vehicle; or
- (b) against the employer of the driver.

(2) Subsection (1) does not apply—

- (a) if the Fund or an agent is unable to pay any compensation; or
- (b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the

⁵ 1976 (2) SA 175 (N) at 177B-C.

death of another person as a result of the driving of a motor vehicle.”

- [79] The meaning of “any person (the third party),” as referenced in section 17 of the RAF Act, must be read together with sections 3 and 21 purposively and contextually with regard to the RAF Act as a whole.
- [80] It is not permissible to read exclusions into the RAF Act where it clearly contradicts not only the plain, unambiguous text of sections 17 and 21 of the RAF Act, but also the clear purpose of section 3 and the RAF Act as a whole.
- [81] Section 17(1) cannot be interpreted from the perspective of the Fund only but must be interpreted from the perspective of the insured driver and the third party (the “victim”) as well.
- [82] In its purposive context, the Supreme Court of Appeal, in the matter of the *Road Accident Fund v Busuku*,⁶ per Eksteen AJA, concluded:

“... In considering the context in which the provisions appear and the purpose to which they are directed it must be recognised that the Act constitutes social legislation and its primary concern is to give the greatest possible protection to persons who have suffered loss through negligence or through unlawful acts on the part of the driver or owner of a motor vehicle. For this reason the provisions of the Act must be interpreted as extensively as possible in favour of third parties in order to afford them the widest possible protection. On the other hand, courts should be alive to the fact that the Fund relies entirely on the fiscus for its funding and they should be astute to protect it against illegitimate or fraudulent claims. In the current matter there has, however, been no suggestion of any illegitimate or fraudulent claim.”

- [83] Where the legislature intended to exclude certain victims from claiming against the Fund, it explicitly did so in section 21(2)(b) with victims who suffered an emotional shock as a result of the driving of a motor vehicle. The RAF Act does not contain an explicit exclusion where the victim is an illegal foreigner, as it

⁶ [2020] ZASCA 158; 2023 (4) SA 507 (SCA) at para 6.

does with these victims.

[84] The legislator must have known that not all victims would be South African citizens or lawfully in the Republic and could have excluded them from claiming against the Fund.

[85] On this aspect, the apex court, in the interpretation of statutes held in *Van Zyl N.O v Road Accident Fund*:⁷

“Parliament made a policy choice to exclude certain categories of claimants for efficiency as well as for other considerations as advanced by the RAF above...

Furthermore, if two reasonable interpretations of legislation are possible, a court is constitutionally mandated to ‘prefer the interpretation that better promotes the spirit, purport and objects of the Bill of Rights’. Thus, if one interpretation denies the right of access to courts, while another interpretation has the opposite effect, a court is obliged to adopt the latter meaning that promotes access to courts.

This rule of interpretation is enshrined in section 39(2) of the Constitution, which provides:

‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

In *Independent Institute of Education*, this Court located the task of interpretation firmly under the rubric of the Constitution when it held:

‘And this is what this application is really about – giving an interpretation to a legislative provision primarily concerned about its consistency, not with another legislation but with the Bill of Rights. This should be done in recognition of the ever abiding guiding or instructive hand of our Constitution.’”

⁷ [2021] ZACC 44; 2022 (3) SA 45 (CC); 2022 (2) BCLR 215 (CC) at paras 40-2.

[86] In the current circumstance, there is no evidence that the Plaintiff's claim is fraudulent.

[87] Excluding the wrongdoer driver of a motor vehicle from the protection of the RAF Act because his "victim" is an illegal foreigner would discriminate against such drivers unfairly.

[88] In *Rose's Car Hire (Pty), Ltd v Grant*,⁸ the court, per Centlivres JA, in context to section 13 of the then Act (similar to section 21 of the RAF Act, 1996) held that:

"When a person is entitled under section eleven to claim from a registered company ..., [that person] shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the person who drove the vehicle as aforesaid, unless the registered company is unable to pay the compensation."

[89] It follows that if illegal foreigners are excluded from claiming against the Fund, such foreigners would be required to pursue their claims under the common law against the driver personally as the Fund is unable to pay the compensation in terms of section 21(2)(a) of the RAF Act.

[90] In this particular instance, the driver, Mr Mengo, who may be a South African citizen, would then be deprived of the insurance the RAF Act affords drivers against their negligent/wrongful driving of a motor vehicle and must compensate the Plaintiff from his own pocket.

[91] Such an interpretation would be untenable and defeat the Fund's purpose, which is "...the payment of compensation ... for loss or damage wrongfully caused by the driving of motor vehicles" (section 3 of the Act).

[92] There is no justifiable reason why the spirit, purpose, and objectives of the Bill of Rights, that everyone is equal before the law, should not be followed.

⁸ 1948 (2) SA 466 (AD) at 470.

[93] Giving an ordinary grammatical meaning to the words “any person (the third party)” to include the widest possible interpretation to afford all wrongdoers and victims equal protection under the law does not lead to any absurdity.

[94] To exclude certain victims from claiming compensation, would be contrary to the clear objective of the Act and the Constitutional principle that “Everyone is equal before the law and has the right to equal protection and benefit of the law”. It would also violate the meaning and clear language that encompasses the third party as any person in a wide sense, without any additions or subtractions to it.

[95] I find nothing in regulation 7.1 that alters this position. The regulation states:

“7. Forms

(1) A claim for compensation and accompanying medical report referred to in section 24(1)(a) of the Act, shall be in the form RAF1 attached as Annexure A to these Regulations, or such amendment or substitution as the Fund may from time to time give notice of in the Gazette.”

[96] The RAF1 form in effect when the Plaintiff lodged his claim, did not stipulate a requirement to prove the legality of the Plaintiff's residency in the Republic. If such a requirement existed, it would, for the reasons stated above, be contrary to the provisions of the Act, “*ultra vires*”, and unenforceable.

[97] I also find nothing in the Immigration Act or the Refugees Act 130 of 1998, that affects the Plaintiff's entitlement to claim or militates against the above interpretation of “any person”.

[98] In terms of section 27(b) of the Refugees Act, a refugee enjoys “full legal protection”, which included the rights set out in Chapter 2 of the Constitution ...”.

[99] Section 42 of the Immigration Act, deals with aiding and abetting of illegal foreigners. The section reads as follows:

“42. Aiding and abetting illegal foreigners. — (1) Subject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help –

(a) an illegal foreigner;

...

including but not limited to –

...

(v) assisting, enabling or in any manner helping him or her to conduct any business or carry on any profession or occupation;

(vii) doing anything for him or her or on his or her behalf in connection with his or her business or profession of occupation.” [Emphasis added.]

[100] Section 42 cannot be interpreted to mean that if an illegal foreigner may claim against the Fund, it would constitute aiding, assisting, or enabling an illegal foreigner “in any manner” in contravention of the Immigration Act.

[101] A claim under the RAF Act is in the nature of compensation for a bodily injury sustained due to the wrongful driving of a motor vehicle. It is not “aid, abet, assist, enable, or help” afforded in securing temporary or permanent tenure in the Republic.

[102] Consequently, I conclude that the Plaintiff can submit a claim under the RAF Act.

Compensation to be Awarded

[103] The State Attorney, on behalf of the Fund, argued the Plaintiff’s post-accident prospects may not be as dire as portrayed by the experts. The Fund contended that the Plaintiff retained residual working capacity, enabling him to perform sedentary types of work.

[104] I agree with the State Attorney. While the Plaintiff’s Industrial Psychologist suggested sedentary roles in the informal sector, such as a Spaza Shop Assistant or an Informal Trader, alternative options in the formal sector, such

as that of a delivery person, were overlooked. In the post-Covid-19 era, it is, for example, typical for light parcels and groceries to be delivered using scooters. Although the Plaintiff currently lacks a driver's license for an automatic motorcycle, considering his age and level of education, it shouldn't be unrealistic for him to acquire one and secure employment as a delivery person. Operating a vehicle such as this would fit the scope of the Plaintiff's residual working capacity of doing a primarily sedentary job with limited use of this left leg and ankle. Therefore, I believe other employment opportunities are available to the Plaintiff, and a much higher than normal post-morbid contingency, as proposed, is inappropriate.

[105] It is also apparent that before the accident, the Plaintiff's employment was structured on a project-by-project basis, with his working hours contingent upon the size of the project. In my assessment, this posed a significant risk of unemployment for the Plaintiff, irrespective of the accident. Moreover, considering that his employer relocated to Cape Town in 2023, it is probable that the Plaintiff would have faced challenges in securing alternative employment regardless of the accident.

Accordingly, I make the following order:

1. The Defendant's special plea is dismissed.
2. The Defendant is liable for 100% of the Plaintiff's damages sustained due to the motor vehicle collision that occurred on 11 December 2020.
3. The Defendant shall pay the Plaintiff an amount of R960 000.00 as compensation for the Plaintiff's future loss of earnings and earning capacity.
4. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision

on 11 December 2020 after such costs have been incurred and upon proof thereof.

5. The issue of General Damages is postponed *sine die* to be referred to the HPCSA for adjudication.
6. The amount in paragraph 2 (two) above shall be paid directly to the Plaintiff's attorneys of record with the following particulars, which amount shall be paid within 180 (One hundred and eighty) days from the order being granted:

Accountholder	Wim Krynauw Attorneys Trust Account
Institution	Absa Bank Limited
Branch Code	632005
Branch	Krugersdorp
Account number	405 735 0513
Payment reference:	TM4718/NM

7. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale up to date, which costs shall include, but not be limited to:

7.1 The reasonable costs for the preparation of the medico-legal reports and actuarial calculations of the following experts:

- 7.1.1 Dr. G. Read (Orthopaedic Surgeon);
- 7.1.2 Ms. M. Georgiou (Occupational Therapist);
- 7.1.3 Mr. D. de Vlamingh (Industrial Psychologist);
- 7.1.4 Munro Actuaries (Actuary).

7.2 Costs of counsel to date hereof, including the preparation for trial and attendance on 20 February 2024 and 21 February 2024 and the drafting of Heads of Argument;

7.3 Costs of obtaining confirmatory affidavits for the experts mentioned above for purposes of trial;

7.4 The reasonable costs relating to travel and accommodation for the Plaintiff to attend the trial on 20 February 2024 and 21 February 2024;

7.5 Any costs attendant upon obtaining payment of the total capital amount referred to in paragraph 2 (two) above, as well as any costs attendant upon obtaining payment of the Plaintiff's agreed or taxed costs.



AJE PIENAAR
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCES

Counsel for the Plaintiff: Adv F Saint
Instructed by: Wim Krynauw Attorneys

Counsel for the Defendant: Mrs Y Ramjee
Instructed by: The Office of the State Attorney

Date of Hearing: 20 and 21 February 2024

Date of Judgment: 7 March 2024