



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4617/2010

In the matter between:

**MEC FOR PUBLIC WORKS, ROADS &
TRANSPORT, FREE STATE PROVINCE**

Applicant

and

JJ VAN DER MERWE

1st Respondent

COMPENSATION COMMISSIONER

2nd Respondent

MINISTER OF LABOUR

3rd Respondent

**DIRECTOR-GENERAL OF THE DEPARTMENT
OF LABOUR**

4th Respondent

IN RE:

JJ VAN DER MERWE

Plaintiff

and

**MEC FOR PUBLIC WORKS, ROADS &
TRANSPORT, FREE STATE PROVINCE**

1st Defendant

COMPENSATION COMMISSIONER

2nd Defendant

MINISTER OF LABOUR

3rd Defendant

**DIRECTOR-GENERAL OF THE DEPARTMENT
OF LABOUR**

4th Defendant

CORAM: VAN ZYL, J

HEARD ON: 21 JULY 2022

DELIVERED ON: 31 OCTOBER 2022

- [1] This is an application by the applicant/first defendant in terms of Rule 33(4) that the second special plea raised in its amended plea be separated and that it be adjudicated before any other issues in the trial on the quantum of the action.

Background to the action and the present application:

- [2] The first respondent/plaintiff instituted action against the applicant/first defendant for damages she suffered as the result of an accident which occurred on 27 July 2009 on the provincial road between Dealesville and Bloemfontein, Free State Province, when the first respondent/plaintiff lost control over the Ford Bantam bakkie which she was driving at the time, whereafter it left the surface of the road and overturned ("the accident").
- [3] At the time when the accident occurred, the first respondent/plaintiff was driving the bakkie in the course and scope of her employment as a sales executive for Fidelity Supercare Services Group (Pty) Ltd.
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[4] In terms of the particulars of claim, the first respondent/plaintiff sustained the following injuries as a result of the accident:

- 4.1 A fracture-dislocation of the cervical spine resulting in partial quadriplegia such that the first respondent/plaintiff has total paralysis of her lower body and partial paralysis of her upper body;
- 4.2 A head injury;
- 4.3 A neck injury;
- 4.4 An injury of the right shoulder; and
- 4.5 Various lacerations, abrasions and bruises.

[5] It is further pleaded in the particulars of claim that as a result of the aforesaid injuries, the first respondent/plaintiff:

- 5.1 Experienced pain, suffering and discomfort and will do so in the future;
 - 5.2 Experienced emotional shock and trauma, and will experience further such trauma in the future;
 - 5.3 Required hospital and medical treatment and will, in the future, incur further such expenditure with regard thereto;
 - 5.4 Has been permanently disfigured;
 - 5.5 Has been disabled, and has consequently suffered a loss of income and earning ability;
 - 5.6 Has suffered a loss of the enjoyment and of the amenities of life; and
 - 5.7 Has been permanently disfigured.
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[6] In terms of the particulars of claim the first respondent/plaintiff suffered damages in the amount of R27 500 000.00, which amount is comprised as follows:

- | | | |
|-----|---|----------------|
| “1. | Fair compensation to the plaintiff's family for their caregiving of her between the date of the accident and the date of the final award herein ... | R500 000.00 |
| 2. | Past hospital, medical and related expenditure incurred by the plaintiff and on behalf of the plaintiff ... | R500 000.00 |
| 3. | Estimated future hospital, medical and related expenditure ... | R18 000 000.00 |
| 4. | Estimated loss of income and of earning capacity ... | R6 000 000.00 |
| 5. | General damages. | R2 500 000.00” |

[7] The action was contested by the applicant/first defendant and after the parties agreed that the adjudication of the merits and *quantum* be separated in terms of Rule 33(4), the matter went on trial in relation to the merits thereof. On 28 February 2019, Naidoo, J delivered judgment in which she found, *inter alia*, as follows in paragraph 47.1 of the said judgment.

“The defendant is liable to the plaintiff for hundred percent of her agreed or proven damages arising out of the injuries she suffered in a motor vehicle accident which occurred on 27 July 2009 on the road between Dealesville and Bloemfontein.”

[8] The *quantum* of the first respondent's/plaintiff's claim is still in dispute.

[9] On or about 17 December 2021 the applicant/first defendant filed an interlocutory application ("the first application") in terms whereof the following relief was sought in the Notice of Motion:

- "1. That the Compensation Commissioner appointed under section 2(1)(a) of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993 ('COIDA') be joined as a party to this action.
 2. That once the Compensation Commissioner has been joined, any further pleadings in the main action shall reflect the applicant as the first defendant and the Compensation Commissioner as the second defendant.
 3. That the applicant's second special plea pertaining to COIDA and the benefits payable to the respondent in terms of COIDA be separated in terms of Uniform Rule 33(4) of the Rules of Court, and that it be adjudicated before any other issues in the action.
 4. That the court grants a declarator that:
 - 4.1 The respondent is obliged to submit her medical expenses to the Compensation Commissioner as a result of the injuries which she sustained in an accident that occurred during the course and scope of her employment on 27 July 2009 ('the incident').
 - 4.2 The applicant will not be liable to compensate the respondent for any items paid by or payable by the Compensation Commissioner as a result of the incident; and
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4.3 The applicant will only be liable to compensate the respondent for such expenses for which the Compensation Commissioner is not liable.

5. That the respondent be ordered to pay the costs of this application in the event that she opposes it, such costs to include the costs attendant upon the employment of two counsel."

[10] On or about 19 January 2022 the applicant/first defendant filed a further interlocutory application ("the second application") in terms whereof the following relief was sought in the Notice of Motion:

"1. That the Minister of Labour and the Director-General of the Department of Labour who administers the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993 ('COIDA') be joined as the third and fourth defendants, respectively, to this action.

2. That once the Minister of Labour and the Director-General of the Department of Labour have been joined, any further pleadings in the main action shall reflect the applicant as the first defendant, the Compensation Commissioner as the second defendant, the Minister of Labour as the third defendant and the Director-General of the Department of Labour as the fourth defendant.

3. That the respondent be ordered to pay the costs of this application in the event that she opposes it, such costs to include the costs attendant upon the employment of two counsel."

[11] It seems that both interlocutory applications served before court on 17 February 2022, whereupon, by agreement

between the parties, the applications were postponed to 10 March 2022, costs to stand over.

[12] On 10 March 2022 and by agreement between the applicant/first defendant and the first respondent/plaintiff the following order was issued, seemingly as a combined order pertaining to both applications:

- "1. The Compensation Commissioner appointed under section (2)(a) of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ('COIDA') is joined as the second defendant to this action.
 2. The Minister of Labour is joined as the third defendant to this action.
 3. The Director-General of the Department of Labour is joined as the fourth defendant to this action.
 4. Any further pleadings in the main action shall reflect the applicant as the first defendant, the Compensation Commissioner as the second defendant, the Minister of Labour as the third defendant and the Director-General of the Department of Labour as the fourth defendant.
 5. The applicant's application to have the second special plea, pertaining to COIDA and the benefits payable to the respondent in terms of COIDA, adjudicated separately and before any other issues in the action in terms of Uniform Rule 33(4) of the Rules of Court, is postponed to 21 July 2022.
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6. The applicant's request for a declarator in the terms as set out in paragraphs 4.1, 4.2 and 4.3 of the Notice of Motion dated 17 December 2021, is also postponed to 21 July 2022.
7. ...
8. All issues of costs are reserved for later determination."

[13] Paragraphs 5 and 6 of the last-mentioned order resulted in the present matter serving before me on 21 July 2022. In terms of the said paragraphs of the order, it is the adjudication of prayers 3 (the Rule 33(4) application) and 4 (the declaratory order) of the Notice of Motion issued in the first application which was to serve before me. Instead of continuing to specify it to be the first application, I will henceforth merely refer to it as "the application". Similarly, when I refer to the Notice of Motion, affidavits and annexures, it is *mutatis mutandis* to be understood as those filed in the first application, unless specified to the contrary.

[14] From a reading of the founding and replying affidavits it is evident that the applicant/first defendant wanted both the Rule 33(4) application and the declarator to be adjudicated during the present hearing of the matter; hence, should the Rule 33(4) relief be granted in terms of prayer 3 of the Notice of Motion, the special plea is also to be determined and upheld in the form of the declarator in terms of prayer 4 of the Notice of Motion. The heads of argument filed on behalf of the applicant/first defendant was also drafted on this basis. In fact, Ms Williams, who appeared on behalf of the applicant/first

defendant, assisted by Ms Mahomed, also presented their oral arguments on this supposition.

[15] During the hearing of the oral arguments of Ms Williams, I raised my concern about the correctness of this supposition and my *prima facie* view that the applicant/first defendant cannot request that the special plea and hence the declarator be adjudicated at this stage already, even should the Rule 33(4) application be successful. Ms Williams immediately and very readily conceded that the applicant/first defendant could and should not have requested same and that the determination of the declarator in terms of prayer 4 of the Notice of Motion should stand over to be determined during the adjudication of the merits of the special plea.

[16] In my view this concession was correctly made. The outcome of the present Rule 33(4) application will determine at what stage of the trial on the quantum of the action the merits of the second special plea will be adjudicated. Even should the Rule 33(4) application be granted, the merits of the second special plea will only be determined at a later stage and not as part of this application, whether on the basis of arguments alone, or after the presentation of possible oral evidence by one or both parties in support of or in opposition to the special plea. The adjudication and outcome of the declarator will be directly connected to and dependent upon the determination and outcome of the merits of the second special plea. The adjudication of the declaratory order is consequently to stand over to be adjudicated simultaneously with the adjudication of the second special plea.

- [17] I am consequently only called upon to decide the application in terms of Rule 33(4) pertaining to the second special plea of the applicant/first defendant.

Background to and contents of the second special plea:

- [18] I will henceforth refer to the parties as cited in the action with due consideration of the joinder of parties as already referred to above.
- [19] From the respective affidavits filed in the application, it is evident that it is common cause between the parties that at the time of the accident which gave rise to the plaintiff's claim, she was an employee as defined in COIDA and she was injured in the course and scope of her employment and as such entitled to compensation in terms of COIDA. As a result of the accident the plaintiff sustained permanent disablement of 100%. The plaintiff submitted claims to the second defendant ("the Commissioner") in terms of COIDA. The Commissioner accepted liability to compensate the plaintiff for her reasonable medical expenses and her loss of earnings (although according to the case of the plaintiff the Commissioner has not been paying for all her reasonable medical expenses).
- [20] It is also common cause between the parties that the plaintiff has been receiving and is currently still receiving compensation from the Commissioner for her reasonable medical expenses and for her loss of earnings (in the form of monthly pension payments) since 2009 and that the

Commissioner has undertaken, as he is compelled to do in terms of COIDA, to continue paying the plaintiff accordingly until her death.

[21] Against the aforesaid background, I will now deal with the contents of the second special plea and that of the subsequent replication and rejoinder.

[22] The second special plea raised by the first defendant in his amended plea reads as follows:

- "(i) At the time of the incident giving rise to the plaintiff's claim she was an employee as defined in the Compensation for Occupational Injuries and Diseases Act, No. 61 of 1997 ('COIDA'), was injured on duty and is entitled to compensation in terms of COIDA.
 - (ii) All of the damages claimed by the plaintiff are liable to be recompensed in terms of COIDA.
 - (iii) The plaintiff has submitted claims in terms of COIDA and has received payments from the Compensation Commissioner.
 - (iv) In terms of section 36(2) of COIDA when awarding damages in an action referred to in section 36(1)(a) thereof, the court shall have regard to the compensation paid in terms of this Act.
 - (v) Consequently, all payments made and to be made in the future to the plaintiff in terms of COIDA shall be taken into account by this court, thereby reducing the damages commensurately."
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[23] The plaintiff filed a replication in which she replicated to the first defendant's second special plea.

[24] In paragraph 1 of the replication the plaintiff pointed out that the first defendant's reference to Act 61 of 1997 is probably a mistake and that the plaintiff proceeds on the assumption that the first defendant intended to refer to Act 130 of 1993 (COIDA) and in particular section 36 thereof.

[25] The plaintiff replicated further as follows:

"2. The plaintiff takes no issue with the defendant's contentions:

2.1 That the plaintiff was entitled to compensation from the Compensation Commissioner in accordance with COIDA and did claim and has received such compensation;

2.2 That the plaintiff having claimed compensation from the Compensation Commissioner in terms of the COIDA Act does not preclude the plaintiff from seeking compensation from the defendant in respect of the common law damages suffered by the plaintiff, in accordance with Section 36(1) of the COIDA Act; and

2.3 That the above Honourable Court shall, in awarding damages against the defendant, have regard to the compensation paid to the plaintiff in terms of the COIDA Act, in accordance with Section 36(2) thereof.

3. The plaintiff records the following with regard to future hospital, medical and related expenditure and the costs of another person for constant help incurred from date of the award herein onwards:

- 3.1 The plaintiff's claim for compensation from the Compensation Commissioner in respect of medical aid in terms of section 73(2) of COIDA [hereafter 'further medical aid'] and the cost of another person for constant help to perform the essential actions of life, in terms of section 28 of COIDA [hereafter 'essential help'], will terminate with effect from date of the award herein;
 - 3.2 The plaintiff will seek no further compensation from the Compensation Commissioner in respect of such further medical aid and essential help from date of such award onwards; and
 - 3.3 Consequently, the plaintiff will seek compensation in respect of future hospital, medical and related expenditure and essential help incurred from date of the award herein onwards from the defendant, and not from the Compensation Commissioner, and the defendant will likewise not be required to meet any claim from the Compensation Commissioner in terms of section 36(1)(b) in respect of such future hospital, medical and related expenditure and essential help to be incurred from date of the award herein onwards.
4. The plaintiff consequently also does not take issue with the defendant's contention that all payments made to the plaintiff in terms of COIDA shall be taken into account by the Court, thereby reducing the damages payable by the defendant to the plaintiff accordingly.

WHEREFORE the plaintiff persists in the plaintiff's claim against the defendant."

[26] The first defendant filed a rejoinder to the plaintiff's replication.

[27] In terms thereof the first defendant admitted that the reference to Act 61 of 1997 in paragraph (i) of the second special plea is incorrect and should be a reference to Act 130 of the 1993 ("COIDA").

[28] The first defendant furthermore pleaded as follows in his rejoinder:

"2. **Ad paragraphs 3 – 3.1 thereof:**

- 2.1 Section 28 of COIDA relates to an employee requiring constant help and authorises the Director-General to grant an allowance towards the cost of such help if the said section is complied with.
- 2.2 Section 28 relates only to the cost of help of another person and does not relate to future hospital, medical and related expenditure.
- 2.3 The benefits payable in terms of section 28 are not terminable at the will of the plaintiff, nor do they terminate with effect from the date that an award is made in this action.

WHEREFORE the defendants persist with their defence of this matter and join issue with any allegations in the plaintiff's pleadings which are inconsistent therewith."

Rule 33(4): Applicable legal principles:

[29] Rule 33(4) determines as follows:

"If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may

make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

[30] In **Berman & Fialkov v Lumb** 2003 (2) SA 674 (C) at para [17] the approach to an application in terms of Rule 33(4) was summarised as follows:

“[17] In terms of the provisions of Rule 33(4) in its present form, an application for the separation of issues by any party must be granted unless it appears that such issues cannot conveniently be decided separately (see *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) at 132D) and it is incumbent on the party who opposes such an application to satisfy the Court that such an order should not be granted (see *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G). The convenience to be considered is primarily that of the Court and the litigants (*Braaf v Fedgen Insurance Ltd* (*supra* at 939H)). **Convenience** in the context does not only connote facility or ease or expedience but also appropriateness in the sense that in all the circumstances it is **fitting and fair to the parties concerned** (*Braaf v Fedgen Insurance Ltd* (*supra* at 940C - D)). The Court's function is to assess to the best of its ability **the nature and extent of the advantages and the disadvantages** that would result should the order that is being sought be granted (see *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364D - E). Such an application will normally be granted if the advantages that will flow therefrom outweigh the disadvantages (see *Grindrod Cotts Stevedoring (Pty) Ltd and Another v Brock's Stevedoring Services* 1979 (1) SA 239 (D) at 241A).” (Own emphasis)

[31] In **Copperzone 108 (Pty) Ltd & Another v Gold Port Estates (Pty) Ltd & Another** [2019] JOL 41599 (WCC) at para [25]

the court dealt with the principles which are to be considered when considering an application in terms of Rule 33(4):

“[25] The guiding principles are as follows:

- 25.1 Whether the hearing on the separated issues will materially shorten the proceedings: if not, this militates against a separation. In *Braaf (supra)* it was said that despite the wording of the subrule, it remains axiomatic that the interests of expedition and finality are better served by disposal of the whole matter in one hearing;
- 25.2 Whether the separation may result in a significant delay in the ultimate finalisation of the matter: such a delay is a strong indication that separation ought to be refused. The granting of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in reaching a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper;
- 25.3 Whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation;
- 25.4 Whether the issues in respect of which a separation is sought are discrete, or inextricably linked to the remaining issues: if after careful consideration of the pleadings, the relevant issues are found to be linked, even though at first sight they might appear to be discrete, it would be undesirable to order a separation; and

25.5 Whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about. Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination.” (Own emphasis)

[32] The potential merits of the particular issue to which a Rule 33(4) application pertains is a further relevant factor which is to be considered, without deciding the merits. In **Minister of Agriculture v Tongaat Group Ltd** 1976 (2) SA 357 (D) at 364 B – D the court held as follows in this regard:

“...the Court hearing an application under the Rule must necessarily give consideration to the merits of the particular questions which it is desired to have answered before trial, despite the fact that it is not required to give any decision on the merits. The Court is not likely to grant an application which is brought by a litigant who has raised a point which, if sound, would eliminate a certain claim and thus save much evidence at the trial, if it appears to the Court that there is no or very little substance in such point. Obviously, if there is no substance in the point, it would be a sheer waste of time and costs to have a separate hearing.” (Own emphasis)

The aforesaid principle was followed and applied in **S v Malinde & Others** 1990 (1) SA 57 (A) at 68D – E:

“When deciding an application under the subrule, the Court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs.” (Own emphasis)

- [33] In addition to the aforesaid factors and principles, it was pointed out in the Copperzone-judgment, *supra*, that the Supreme Court of Appeal has in recent times adopted a strong view that piecemeal litigation is not to be encouraged, that the convenient and expeditious disposal of litigation is not always achieved by separating the issues but often best served by ventilating all the issues at one hearing. In Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd 2005 (5) SA 276 (SCA) at paras [26] – [27] the Supreme Court of Appeal held as follows:

- [26] ... It is correct that the objective of Rule 33(4) ... is to facilitate the convenient and expeditious disposal of litigation. ... A court approached to sanction this course has a duty to satisfy itself that the separation will serve the desired purpose. ...
- [27] ... I refer to this scenario simply to voice our disquiet at yet another manifestation of a failure to ensure that a separation of issues in terms of Rule 33(4) has the potential to curtail litigation expeditiously. Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation.”

- [34] In Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd & Another 2010 (3) SA 382 (SCA) the court confirmed and applied the *dictum* in

Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) and held as follows at paras [89] - [90] of its judgment:

"[89] ... Piecemeal litigation is not to be encouraged. ...

[90] This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately."

See also **Firststrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd** 2018 (5) SA 300 (SCA) at para [9].

[35] With regard to the "onus" in a Rule 33(4) application, the court in the **Copperzone**-matter considered the conflicting decisions within the Western Cape Division on whether it is incumbent on the applicant for a separation of issues to satisfy the court that it should be granted. After it also considered the explanation by the Supreme Court of Appeal with regard to the purpose of the rule and how it should be applied, the court concluded as follows at para [24] of the **Copperzone**-judgment:

"It does seem clear that, irrespective of which party bears the 'burden of persuasion' the court is nonetheless enjoined to apply its mind properly and judiciously to whether a separation should be granted. Self-evidently therefore, it is incumbent on both parties to place all relevant information before the court to enable it to exercise its discretion. If an applicant fails to do so ... it will have to accept that the court may not be

in a position to properly weigh the advantages and/or disadvantages of granting a separation.”

Rule 33(4): Consideration of the applicable principles and factors:

A: Consideration of the potential merits of the second special plea:

[36] As determined earlier, the potential merits of the separate issue which forms the subject-matter of the Rule 33(4) application, in this instance the second special plea, is to be considered as one of the factors when adjudicating the application, without deciding and pronouncing the merits of the special plea. Counsel consequently also addressed me fully on this issue.

[37] In terms of section 1 of COIDA “**compensation**” is defined to mean “compensation in terms of this Act and, where applicable, medical aid or payment of the cost of such medical aid.” (Own emphasis)

[38] Section 1 of COIDA defines “**pension**” to mean “a pension referred to in section 49 or 54”. Section 54 is not applicable to the present matter. The said section 49 deals with “**compensation for permanent disablement**”. In terms of section 49(1)(a) compensation for permanent disablement shall be calculated on the basis set out in items 2, 3, 4 and 5 of Schedule 4 subject to the minimum and maximum amounts. Section 49(4) further determines as follows:

“For the purpose of this section ‘**monthly pension**’ means, where it appears in the relevant items in Schedule 4, a pension payable monthly

during the lifetime of the employee and which expires at the end of the month in which the employee dies.”

[39] As previously indicated, it is common cause between the parties that the plaintiff sustained permanent disablement of 100% as a result of the incident. From a reading of the abovementioned Schedule 4 to the Act, it is consequently evident that item 3 of Schedule 4 is applicable to the plaintiff, with the result that she is entitled to a monthly pension as compensation calculated at 75% of her monthly earnings at the time of the accident, subject to a maximum and minimum compensation as determined by the Compensation Commissioner.

[40] It is also common cause between the parties that the plaintiff has been receiving and is currently still receiving compensation for her loss of earnings in the form of monthly pension payments calculated as aforesaid and that the Commissioner accepted liability and undertook to continue paying same for the lifetime of the plaintiff as prescribed in section 49(4) of COIDA

[41] With regard to the issue of medical aid or payment of the costs of such medical aid as included in the definition of “compensation”, “medical aid” is defined in section 1 of COIDA to mean “medical, surgical or hospital treatment, skilled nursing services, any remedial treatment approved by the Director-General, the supply and repair of any prosthesis or any device necessitated by disablement, and ambulance services where, in the opinion of the Director-General, they were essential.”

[42] **"Medical expenses"** are regulated by section 73 of COIDA:

"73. Medical expenses

(1) The Director-General or the employer individually liable or mutual association concerned, as the case may be, shall for a period of not more than two years from the date of an accident or the commencement of a disease referred to in section 65 (1) pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by such accident or disease.

(2) If, in the opinion of the Director-General, further medical aid in addition to that referred to in subsection (1) will reduce the disablement from which the employee is suffering, he may pay the cost incurred in respect of such further aid or direct the employer individually liable or the mutual association concerned, as the case may be, to pay it."

[43] Section 28 of COIDA makes provision for an employee requiring constant help and determines as follows:

"28. Employee requiring constant help

If the injury in respect of which compensation is payable causes disablement of such a nature that the employee is unable to perform the essential actions of life without the constant help of another person, the Director-General may in addition to any other benefits in terms of this Act, grant an allowance towards the costs of such help."

[44] I need to mention that in the answering affidavit it was stated that as far as the deponent could ascertain, the Commissioner has not paid the plaintiff any form of allowance in terms of section 28. However, in an affidavit filed by Mr SS Sibe, the

Assistant Director, Compensation Fund and Compensation Benefits at the Department of Labour, filed on behalf of the Commissioner, he stated that the plaintiff is receiving R2 294.10 per month for a caregiver. However, I presume that this aspect will be sorted out in due course and that the parties will probably eventually be *ad idem* with regard to the correct facts in this regard.

[45] Section 36 of COIDA is very relevant for purposes of the second special plea. It determines as follows:

"36. Recovery of damages and compensation paid from third parties

(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the 'third party') being liable for damages in respect of such injury or disease-

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection (1) (a) the court shall have regard to the compensation paid in terms of this Act.

(3) In an action referred to in subsection (1) (b) the amount recoverable shall not exceed the amount of damages, if any, which

in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54 (2) or 72 (2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.”
(Own emphasis)

[46] From a reading of paragraphs 2.3 and 4 of the plaintiff's replication it is evident that the plaintiff accepts, as contended by the first defendant, that whatever compensation the plaintiff has received and will receive from the Compensation Commissioner cannot also be claimed from the defendant and falls to be deducted from the plaintiff's damages to be awarded against the first defendant. This is in compliance with the provisions of section 36(2).

[47] The two opposing propositions between the parties are, however, the following:

1. It is the plaintiff's case that:

(a) The plaintiff has a choice to either continue claiming from the Commissioner or to claim the full extent of her damages from the defendant.

- (b) With regard to past medical expenses and related costs (from date of accident to date of award or settlement), the plaintiff will only be entitled to seek payment from the first defendant of any such expenditure as might not have been claimed from, or otherwise met or recompensed by, the Commissioner.
 - (c) With regard to future such expenditure (from date of award or settlement), the plaintiff undertakes not to claim same from the Commissioner in terms of section 28 and 73(2) of COIDA, but to claim payment thereof from the first defendant. This won't prejudice the first defendant, because the Commissioner would in any event have recovered any such payments from the defendant in terms of section 36(1)(b) of COIDA. The fact that the Commissioner has up to date not recovered any of the compensation he has paid to the plaintiff, is not due to any fault of the plaintiff and her rights cannot be restricted because of the Commissioner's failure to have done so.
 - (d) With regard to loss of income, Mr Mullins, who appeared on behalf of the plaintiff, assisted by Mr Zietsman, set it out as follows in paragraph 7.5.3 (c) of the plaintiff's heads of argument:
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"The plaintiff has received a measure of compensation from the Commissioner in terms of COIDA and will continue to receive this into the future.

The value of such compensation received from the Compensation Commissioner in terms of COIDA from date of the accident to date of settlement or award, and the capitalized value of future such compensation, will fall to be deducted from the totality of the plaintiff's loss of income and of earning capacity, with the defendant only being held liable for the balance."

This will neither benefit nor prejudice the first defendant since he will in any event be liable to the Commissioner for any claim in terms of section 36(1)(b) of COIDA.

2. It is the first defendant's case that:
 - (a) The plaintiff's claim for future hospital, medical and related treatment, as well as loss of earnings was and remains payable by the second respondent in terms of sections 28 and 36(1) and (2) of COIDA, read with Schedules 2 and 4 thereof. The first defendant will only be liable to the plaintiff for those expenses for which the second defendant is not liable to compensate the plaintiff.
 - (b) The plaintiff made an election to claim compensation from the second defendant in terms of COIDA and has done so since 2009. No plausible reason exists as to why the plaintiff cannot continue to do so.
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There is no provision in COIDA which permits an employee such as the plaintiff to terminate compensation payable under COIDA at her own will in order to receive payment of damages to her from the first defendant from the date of the awarding of such damages against the first defendant.

- [48] In support of the plaintiff's case, Mr Mullins pointed out that sections 36(2) and (4) were amended by the Compensation for Occupational Injuries and Diseases Amendment Act, 61 of 1997, and that before its amendment section 36(2) read as follows:

"(2) In awarding damages in an action referred to in ss (1)(a) the court shall have regard to the amount to which the employee is entitled in terms of this Act." (Own emphasis)

Mr Mullins submitted that the aforesaid wording of the section, before the amendment, which directed a court to have regard to, therefore deduct, the amount to which the employee is entitled in terms of COIDA, included obligations already discharged and future obligations. However, after the amendment of the wording of section 36(2) which now directs a court to have regard to, therefore deduct, the compensation paid in terms of COIDA, it only relates to obligations already discharged.

- [49] Mr Mullins submitted that the aforesaid amendment was a deliberate change by the Legislature in order to give an employee the right as contended for by the plaintiff. Mr Mullins

furthermore submitted that the wording of section 36(4) which determines that compensation for the purposes of section 36 includes "the cost of medical aid already incurred", also confirms an interpretation that it does not relate to future obligations, especially not to the costs of future medical aid.

[50] Ms Williams, however, pointed out that section 36(4) determines that compensation for the purposes of section 36 also includes "any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalized value as determined by the Director-General of the pension...". She submitted that the words "paid or payable" contradict and/or negate the contention on behalf of the plaintiff in that the said words are indicative of an interpretation to include future obligations.

[51] In my view the aforesaid submissions advanced by both parties will constitute arguable contentions to the court in support of their respective interpretations of section 36 when the second special plea stands to be adjudicated.

[52] I will now deal with the case law which the parties dealt with during their arguments:

Peens v Road Accident Fund

[53] Both parties dealt in their respective arguments with the judgment in **Peens v Road Accident Fund** 2002 (2) SA 636 (D). In that matter the applicant/plaintiff was injured in a motor vehicle accident in circumstances which entitled her to compensation in terms of COIDA. She claimed compensation

from the Commissioner in terms of COIDA and, in terms of section 36(1)(a), also instituted action against the Road Accident Fund for damages. A week before the trial was due to commence, the respondent's/defendant's attorneys made an offer to settle it, tendering, *inter alia*, an undertaking in terms of article 43(a) of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act, 1989, which offer was accepted. The rights and obligations of the Multilateral Motor Vehicle Accidents Fund devolved upon the respondent/defendant in terms of the Road Accident Fund Act, 1996.

[54] Subsequent to the settlement the applicant/plaintiff submitted accounts in terms of the undertaking, whereupon the RAF responded that because the Commissioner "is involved in this abovementioned case", medical claims which arise should first be claimed from the Commissioner and if he repudiates liability, such claims may be submitted to the RAF with written proof from the Commissioner that he declined to pay the said claims and the reasons for disallowing same.

[55] The applicant/plaintiff then brought an application in which she sought an order against the respondent/defendant to comply with its undertaking. In its answering affidavit the RAF admitted not having reimbursed the applicant in terms of the article 43(a) undertaking, but alleged that it was not obliged to do so. The court dealt with the averments by the RAF at 639E – H of the judgment:

"According to the respondent, at the time the applicant was involved in the collision she was an 'employee' in terms of the provisions of ...

COIDA. In terms of s 36 of COIDA, the Director-General of the Department of Labour is given a right of recovery against the respondent for any compensation that he is obliged to make in terms thereof. Although on 7 July 1999 a 'final award' was made of disbursements which the Compensation Commissioner was obliged to make in terms of COIDA, this does not mean that there might be no further awards. Here, both s 48(2) and s 73(2) of COIDA bestows on the Compensation Commissioner a discretion to make such further awards. When such awards are made, the respondent is likewise liable to reimburse the Director-General. According to the deponent to the opposing affidavit:

'It has happened in the past that a party in whose favour an art 43(a) undertaking had been given will claim from respondent and, unbeknown to respondent, also claim in terms of the provisions of COIDA. Respondent is then faced with the situation that it is obliged to compensate the Director-General, resulting in a double payment with no reasonable prospects of recovery.'

It is for this reason that the respondent requires proof that any claim the applicant might have has been disallowed in terms of COIDA, before the respondent is willing to make payment in terms of the art 43(a) undertaking."

[56] The court found (at 641C) that the accepted tender constituted a binding contract between the parties and (at 642B) "the respondent must carry out the terms of the settlement and is not entitled at this stage to attach an additional term to the certificate".

[57] The court also made the following point at 642G:

"The possibility of a double payment apart, it is difficult to see how it could be to the respondent's advantage in requiring the applicant to claim payment direct from the Compensation Commissioner, for once he had

paid the Director-General would then have a right of recovery against the respondent, which would thus be obliged to make payment in any event."

[58] Ms Williams contended that the said judgment does not serve as support of the plaintiff's case that she can elect to rather claim from the first defendant than under COIDA, since the order was merely granted on the basis of the terms of the settlement agreement. The point as to whether a plaintiff is entitled to make such an election, had not been raised. Ms Williams submitted that had it been raised, the outcome of the case may have been different.

[59] Mr Mullins contended that even though the point had not been raised, the court would not have enforced the agreement if the conclusion of the agreement was not legally valid.

[60] An aspect which was addressed in the judgment, but which was not addressed in argument on behalf of the respective parties, is the fact that the court, with reference to the matter of Van der Westhuizen v Multilaterale Motorvoertuigongelukkefonds [1998] 3 B All SA 674 (T), remarked at 642B that "it was open to the respondent to tender a certificate excluding liability to pay amounts claimable by the applicant under COIDA" and then held as follows at 642E of the judgment:

"In my view it was open to the respondent to have tendered to the applicant a suitably worded certificate, in order to protect itself against the eventuality of having to make double disbursements."

[61] It consequently seems to me, without making such a finding, that although the court found that it would be competent for a

third party to furnish an undertaking to compensate a plaintiff for future medical costs excluding liability for amounts claimable under COIDA, the court apparently did not consider the submission of a claim under COIDA and the rejection thereof by the Commissioner as a *sine quo non* for submitting such a claim against the third party.

Senator Versekeringsmaatskappy Bpk v Bezuidenhout

[62] Ms Williams relied on the judgment in **Senator Versekeringsmaatskappy Bpk v Bezuidenhout** 1987 (2) SA 361 (A) in support of the first defendant's second special plea. In that matter it was common cause that the respondent was a workman as intended in the Workmen's Compensation Act, 30 of 1941 and that the Workmen's Compensation Commissioner had already made awards to the respondent pertaining to damages for temporary complete disability, the capitalised value of a monthly pension and an amount in respect of medical and other expenses. The respondent's claim against the appellant was for future medical expenses in the determined amount of R3 950.00 and it was agreed that his general damages amounted to R12 000.00. All that was in dispute at the trial was whether in terms of s 8(1) of the Workmen's Compensation Act the award of the Workmen's Compensation Commissioner was to be deducted from the amount of R15 950.00.

1. Ms Williams pointed out that the court of appeal found that the court *a quo* applied the principles in **Klaas v Union and South West Africa Insurance Co Ltd**

1981(4) SA 562 (A) and decided that section 8(1)(a) of the Workman's Compensation Act intended no more than that a workman would not be allowed to recover double compensation and since the Commissioner in that case made no award in respect of future medical expenses and, apparently, no general damages, the respondent was entitled to compensation in respect thereof.

2. Mr Mullins, on the other hand, submitted that the said judgment supports the plaintiff's contention. He submitted that the said judgment and specifically its application of the principles enunciated in the Klaas-judgment is to the effect that a wrongdoer, such as the first defendant in the present matter, has no right to dictate to a victim, such as the plaintiff in the present matter, what should and what should not be recovered under COIDA. As long as the plaintiff is not going to be compensated twice for the same injuries, a claim may be instituted against the third party.

Road Accident Fund v Maphiri

- [63] Ms Williams also referred to and relied on the judgment in Road Accident Fund v Maphiri 2004 (2) SA 258 (SCA). She pointed out that the Supreme Court of Appeal analysed section 36 of COIDA and held as follows at para [7]:

"[7] The first and axiomatic principle, therefore, is that the object of the Act is to provide 'compensation' for disablement caused by occupational

injuries or diseases sustained or contracted by employees in the course of their employment. 'Compensation' is not the same as 'damages', a distinction drawn clearly by s 36. There may be a complete overlap, as in the case of hospital and medical expenses (although for the general purposes of the Act medical costs are not regarded as 'compensation'). There may also be a partial overlap, as in the case of loss of income (as a head of damages) and compensation for disablement under the Act. But then there may be no congruent relief, such as in the case of general damages for pain and suffering, which are claimable under the *lex Aquilia*, and for which there is no corresponding head of compensation in the Act."

- [64] Ms Williams submitted that a proper reading of section 36(1)(a) makes it plain that COIDA does not provide the plaintiff with a choice. It clearly states that an employee can claim compensation in terms of COIDA and the employee may, at the same time, also institute an action for damages in a court of law against a third party. She submitted that the legislature did not intend for the third party to be substituted in place of COIDA where an employee has been injured in the course and scope of his/her employment. Had this been the intention, then section 36(1)(a) would have read that the employee can claim compensation in terms of COIDA or the employee could institute action for damages against the third party. Ms Williams submitted that section 36 presupposes that compensation has been claimed from the Commissioner and simply ensures that the employee is not left without a remedy in respect of those damages which are not compensated in terms of COIDA. The employee cannot, however, recover from the third party the damages payable under COIDA.
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[65] Mr Mullins, on the other hand, accentuated the point made in paragraph 8 of the judgment:

“[8] The second point, which tends to be overlooked, is that the Act is not for the benefit of third parties, such as the RAF, who are liable in delict; it is for the benefit of the employee and the employer, and ‘premiums’ have to be paid for this ‘insurance’. This means that the starting point of any litigation under s 36 is a determination of the third party’s liability. ...”

[66] The remainder of the judgment deals with the question as to how the deduction of compensation awarded by the Commissioner from damages awarded against a third party by the court for purposes of compliance with section 36(2) should be applied. However, since the judgment relates to section 36(2) prior to its amendment already dealt with above, the court’s approach with regard to that calculation is, in my view, irrelevant for purposes of the present dispute. I do, however, hasten to add that, in my view, the following principles are still applicable:

“[9] The converse point has often been made and that is that s 36 does not increase the liability of the third party. Consequently, the full amount of its liability ... has to be divided between the employee and the Commissioner. ...”

[67] Harms, JA concluded his judgment with a reference to the said amendment and a remark, albeit apparently *obiter dicta*, which may eventually be considered to support the plaintiff’s proposition:

"[21] Last, it should be pointed out that s 36 in 1997 underwent some amendments which may either be substantive or merely cosmetic. In the past the amount which the Commissioner would have been liable for had to be deducted from the employee's claim; now it is the amount actually paid – at least that is what is said. The future obligations, such as future pension payments cannot be deducted. ..."

However, Harms, JA continued and pointed the contradictory provisions out:

"[21] ... But then ss (4) conveys a contrary intention. The same applies to ss (1)(b) which entitles the Director-General to claim, not only for monies actually paid but for those 'that he is obliged to pay'. Something appears to have gone wrong."

- [68] It should be pointed out that in the aforesaid matter the future medical costs were also settled between the parties by means of an undertaking in terms of article 43(a) (Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989).

Du Pisanie N.O. (o.b.o. JG Rabe) v De Jongh

- [69] In further support of the plaintiff's proposition Mr Mullins also relied on the judgment in **Du Pisanie N.O. (o.b.o. JG Rabe) v De Jongh** (2002) 5 QOD B4 – 109 (C), which matter dealt with the common law claim of the passenger (Rabe) against the driver (De Jongh) of a motor vehicle. With regard to the claim for future medical costs, it was argued on behalf of the defendant that since the said costs could be recovered from the Workmen's Compensation Commissioner, the defendant cannot be held liable for same. For purposes of the said

argument the defendant relied on section 8(1) of the Workmen's Compensation Act, 30 van 1941, which section, as already indicated earlier, was similar to section 36 of COIDA. Thring, J rejected the argument and held as follows at B4-135 to B4-136:

"Myns insiens moet hier nie uit die oog verloor word nie dat die eiser se onderhawige eis teen die verweerder 'n eis onder die gemene reg is, en nie 'n eis ingevolge die Ongevallewet nie. Die effek van art 8 van laasgenoemde Wet op hierdie saak is slegs dat, by die toewysing van skadevergoeding aan die eiser, hierdie Hof verplig word om rekening te hou met die bedrag wat waarskynlik deur die verweerder (wat vir doeleindes van die artikel 'n sogenaamde "derde party" is) aan die Ongevallekommissaris betaal sal moet word: en volgens art. 8(1)(b) sal die verweerder aan die Ongevallekommissaris slegs daardie bedrag verskuldig wees wat laasgenoemde as "skadeloosstelling wat by ingevolge hierdie Wet weens die ongeval verplig is om te betaal". 'n Werksman wat in 'n ongeval, soos in die Ongevallewet omskryf, beseer word is geregtig om beide 'n statutêre eis ingevolge die Wet teen die Ongevallekommissaris in te stel en, boonop, ook om gemeenregtelike skadevergoeding van die derde party as gevolg van wie se nalatige optrede hy beseer is, te eis. Die doel van art 8(1) is om te verhoed dat die werksman dubbel vergoed word, en dat die derde party dubbel betaal: sien Corbett, Buchanan & Gauntlett *The Quantum of Damages in Bodily and Fatal Injury Cases* Derde uitgawe, 23–25; *Wille & Another v Yorkshire Insurance Co Ltd* 1962 (1) SA 183 (D); en *Bonheim v South British Insurance Co Ltd* 1962 (3) SA 259 (A). Enige verhaalsreg wat die Ongevallekommissaris teen die verweerder mag hê word dus beperk tot die bedrag wat hy onder die Wet verplig word om aan Rabe as skadeloosstelling te betaal. Nou, wat hierdie vier items betref het die eiser namens Rabe afstand gedoen van enige reg wat laasgenoemde teen die Ongevallekommissaris vir skadeloosstelling onder die Wet mag gehad het: ten opsigte daarvan sal daar geen afdwingbare eis in die toekoms deur of namens Rabe teen die Ongevallekommissaris ingedien

kan word nie, en die Ongevallekommissaris sal gevolglik nooit teenoor Rabe daarvoor aanspreeklik wees nie. Daaruit volg dit dat daar geen gevaar bestaan dat die Ongevallekommissaris die koste van hierdie items onder art 8(1) van die verweerder ooit sal kan verhaal nie: die eiser verkies eenvoudiglik, en soos hy geregtig is om te doen, om hierdie onkoste van die verweerder gemeenregtelik te verhaal. In die omstandighede bestaan daar ook geen gevaar dat Rabe twee maal ten opsigte van hierdie items vergoed sal word nie. Dit volg dat mnr Le Roux se betoog myns insiens nie kan slaag nie, en dat hierdie vier items as gedeelte van die eiser se skadevergoeding toegelaat moet word.”
(Own emphasis)

[70] Although the **Du Pisanie**-judgment was reversed on appeal in certain respects, the aforesaid point was not raised on appeal.

[71] Ms Williams, however, contended that the present matter is distinguishable from the aforesaid judgment, since the Commissioner has already accepted responsibility for the payment of the plaintiff's future medical costs.

Janse van Rensburg v Road Accident Fund

[72] Mr Mullins, lastly, relied on the unreported judgment in **Janse van Rensburg v Road Accident Fund** (WLD, case no. 06/2041, 19 September 2007). In this matter the plaintiff instituted action against the Road Accident Fund for payment of damages for bodily injuries sustained in a motor vehicle accident. He was also entitled to and did in fact claim compensation in terms of COIDA. When the matter initially served before court it was postponed. When the matter later came before court again, the parties had in the *interim* agreed

on the *quantum* of the plaintiff's claim, which was not the case when the matter served before court for the first time. At the date of the hearing of the matter the plaintiff had received compensation in the amount of R3 772.96 from the Commissioner, but the claim had not yet been finalised and no final award had been determined.

[73] The agreement between the parties relating to the *quantum* was that the plaintiff's total common law damages were to be taken to be as follows:

"(a)	Past medical and hospital expenses:	R3 772.95
(b)	Loss of earnings and earning capacity:	R20 000.00
(c)	Future medical and related expenses:	RAF statutory undertaking in terms of s 17(4)(a)
	Assumed for illustrative purposes to be an amount of R26 227.05:	R26 227.05
(d)	General damages:	R50 000.00
	TOTAL	R100 000.00"

[74] It was argued on behalf of the plaintiff that on a proper construction of section 36 of COIDA, no inroad was envisaged by the legislature into the plaintiff's right to have his claim adjudicated at that stage. The court subsequently held as follows:

"25. In my view the position in the present case is unambiguous. The clear wording of section 36(2) enjoins a court to '*have regard to the*

compensation paid in terms of COIDA when considering, *inter alia*, a claim against the Road Accident Fund.

26. '*Paid*' means paid at the time when the court has to determine an award of damages against a person other than the employer of the employee concerned; *in casu* the Road Accident Fund.

27. Accordingly, in the present case, the sum of R3 772.95 has to be deducted, leaving a balance of R70 000,00, payable by the defendant, together with costs."

[75] The defendant was also ordered to furnish the plaintiff with an undertaking in in terms of section 17(4)(a) in respect of future medical and related expenses.

[76] I have already dealt with certain aspects contained in the affidavit of Mr Sibi. In addition, Mr Sibi also made certain averments which relate to the potential merits of the second special plea. In this regard he stated as follows in paragraphs 16 and 17 of his affidavit:

"16.

Ms van der Merwe had made an election to claim from the Commissioner and has done so since 2009. No plausible reason exists as to why Ms van der Merwe cannot continue to do so.

17.

There exists no provision in COIDA which permits an employee such as Ms van der Merwe to terminate benefits payable under COIDA at her own will."

[77] Ms Williams contended that since the plaintiff did not file an affidavit in response to the affidavit of Mr Sibi, the aforesaid

averments stand uncontradicted and therefore have to be accepted as correct. However, Mr Mullins submitted that Mr Sibi made no factual allegations and only stated his interpretation of the law, which did not necessitate any reply.

- [78] I agree with Mr Mullins. Mr Sibi merely expressed his opinion on the interpretation of COIDA and the absence of a reply thereto does not result in his opinion having to be accepted as correct. It does however form part of the totality of the information before me which I will take into consideration for considering the potential merits of the second special plea.

B. Conclusion on the consideration of the potential merits of the second special plea:

- [79] With regard to the cogency of the second special plea, I am satisfied that on the basis of the totality of the aforesaid considerations, namely the evidence contained in the application papers, the legislation, the case law and the different contentions advanced on behalf of the respective parties, the second special plea does have substance. In my view the potential merits of the second special plea constitute an arguable issue for purposes of a separate hearing should the Rule 33(4) application be successful.

C. Application of the other factors and principles applicable to a Rule 33(4) application on the facts of the present matter:

Prospects of an appeal on the separated issue.

- [80] In the answering affidavit it is stated that should the second special plea be upheld at first instance during a separate hearing thereof, the plaintiff will appeal such since it will have an unfounded devastating financial and practical impact on her.
- [81] It was pointed out in the answering affidavit that when the plaintiff was successful with her application for condonation in terms of section 3(4) of Act 40 of 2002, the first defendant sought leave to appeal and when that was refused by the presiding Judge, the first defendant unsuccessfully petitioned the Supreme Court of Appeal. In addition, it is alleged in the answering affidavit that by the same token that the plaintiff will appeal an order which upholds the second special plea, it is probable that the first defendant would also appeal should the second special plea be dismissed. The last-mentioned allegation was not responded to in the replying affidavit.
- [82] In my view it indeed appears to be very probable that, should the merits of the second special plea be adjudicated separately, the unsuccessful party would appeal the outcome. That would result in the parties then having to come back to court once the appeal has been finalised in order for the remaining issues on quantum to be adjudicated, which may even be followed by a further appeal.
- [83] I consequently have to agree with Mr Mullins that the prospects of a dual appeal process should a separation of issues be granted, will inevitably lead to a considerable delay in the finalisation of the trial, which militates against the
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granting of a separation in terms of Rule 33(4). The mere fact that there may have been delays in the proceedings up to date is, irrespective of which party may have caused same, does not detract from the significant delay which will be caused by a dual appeal process.

Are the issues raised by the second special plea discrete or inextricably linked to the remaining issues – will there be overlapping of evidence?

[84] In paragraph 8.4.2 of the answering affidavit the contents of prayer 4.3 of the Notice of Motion, hence, part of the declarator which the first defendant will seek should the second special plea eventually be upheld, was pointed out, followed by the following averments:

"8.4.2 The defendant ... seeks the following in prayer 4.3:

'The applicant will only be liable to compensate the respondent for such expenses for which the Compensation Commissioner is not liable.'

"8.4.3 ... The Commissioner places strict limits on what he is prepared to pay for. Suppliers must be prepared to supply services at the Commissioner's relatively low tariffs. Sometimes the Commissioner doesn't pay suppliers, or pays them late, resulting in interruption in the plaintiff's supply of much-needed medicines. When the plaintiff submitted a quotation for the cost of conversion of her motor vehicle, the quotation was ignored. Doctor's (entirely reasonable and justified) recommendations for the supply of physiotherapy and an electric wheelchair were rejected by the Commissioner. Add so forth.

- 8.4.4 Quite clearly, a resolution of the special plea in favour of the defendant wouldn't put an end to the issues in this regard. Prayer 4.3 says as much.

It would then still be necessary for the parties to work out what equipment and what services dealt with in the [expert] reports and joint minutes are encompassed within the Commissioner's medical aid in terms of section 73(2) and which are not. See in this regard paragraph 8.6 below, for more detail.

- 8.4.5 So, even if one were to separate issues as sought by the defendant, that wouldn't obviate the need for evidence from experts and from the Commissioner as to what the Commissioner does and doesn't supply. For that reason, if the special plea is upheld, then the issues to which it gives rise would still be inextricably bound up with the quantum generally (not so, of course, if the special plea is dismissed).

- 8.4.6 In the premises, I respectfully submit that the special plea doesn't involve issues that are entirely discrete from the quantum, and at least from the defendant's point of view, it is bound up with the quantum to a considerable extent.

- 8.4.7 ...

- 8.5 ... If the special plea is dismissed ... then one will still have to deal with the quantum and the evidence of all the experts. But even if the special plea is upheld, that wouldn't obviate the importance of that evidence. In the first place, and as pointed out in paragraph 8.4.6 above, one would still have to work out what items of equipment and treatment recommended by the experts are supplied by the Commissioner and what items aren't. In the second place, questions of treatment and equipment, and the extent to which treatment and equipment ameliorates the

plaintiff's situation, still will arise, because they are interwoven with general damages.

So one might have a situation in which the special plea is upheld (and the appeal process in connection therewith is exhausted), and all the evidence is still required. That would hardly be convenient, not to mention that the evidence might then in turn lead to another appeal process."

Reference was then made in the answering affidavit to the judgment of **Sasol Synthetic Fuels (Pty) Ltd & Others v Lambert & Others** 2002 (2) SA 21 (SCA) at para [10], where the court held as follows:

"... in a case where a 'third party' is involved the workman may be entitled, in the form of compensation plus damages, to the amount of his full common-law damages ...[T]he 'third party' may be liable to the workman and the ... commissioner taken together for the full amount of common-law damages ..."

The answering affidavit then continued as follows:

"8.6.6 The foregoing being so, *if* the special plea is good (which I respectfully suggest this very exercise illustrates it is not), ... in determining what the plaintiff is compelled to recover in terms of medical aid, and what she is entitled to recover from the defendant, one would have to conduct a quantitative and qualitative exercise with regard to the medical aid.

If limiting the plaintiff to treatment by practitioners who are prepared to work at the Commissioner's tariff falls short of the common law measure of damages, then the plaintiff would be ~~entitled to better treatment at normal tariffs, for which the~~ defendant will have to pay. If the Commissioner limits the plaintiff

to a particular type of manual wheelchair, and the common law afford her a better range, then again the defendant would have to pay. If the Commissioner refuses to pay for physiotherapy but the common law says that physiotherapy is required, likewise. And so one could go on."

The deponent then dealt with specific examples of costs which the Commissioner refused to pay, despite the fact that the said costs were for purposes of treatments and other necessities which were recommended by experts.

[85] In the replying affidavit it was pointed out that the plaintiff failed to attach any supporting documentation to confirm that the Commissioner has in fact outright denied and or refused any medication or equipment. In reply to the first defendant's request for further particulars and request for better discovery in terms of rule 35(3), no such documents were provided either.

[86] Mr Mullins, in his oral argument, pointed out that Mr Sibi did not deal with the first defendant's allegations regarding treatment and costs which had been declined by the Commissioner. He submitted that one would expect that Mr Sibi would have attempted to show the contrary, which he failed to do.

[87] In my view the fact of the matter is that it is evident from the totality of the application papers that the Commissioner, although he accepted liability and undertook to pay the reasonable future medical expenses of the plaintiff, that undertaking is still restricted by applicable limits. As correctly

pointed out in the answering affidavit, this fact is also evident from prayer 4.3 of the Notice of Motion.

[88] In the answering affidavit it was stated that the plaintiff, at date of the filing of the affidavit, has employed 19 experts and filed a total of 42 expert reports at a cost of approximately R482 257.00. These allegations were noted in the replying affidavit. The first defendant has employed 6 experts. The Further Amended Index: Plaintiff's Expert Summaries (dated 30 September 2021) and the Amended Index: Defendant's Expert Summaries (dated 11 May 2021) were attached to the replying affidavit. They reflect that the expert reports of the plaintiff, at the time, consisted of 533 pages and those of the first defendant 148 pages. In terms of the founding affidavit 8 joint minutes have been filed at the time of the filing of the founding affidavit and further joint minutes are expected to be filed.

[89] Suffice it to say, that it is evident that the nature and extent of the totality of the expert evidence, especially should one or more of the parties be uncooperative, will be extensive.

[90] In my view a separate hearing of the second special plea will not shorten the proceedings. As correctly pointed out in the answering affidavit, should a separation of issues be ordered and should the second special plea be adjudicated even without evidence, which is in any event completely improbable, irrespective of whether the second special plea be upheld or dismissed, all the evidence pertaining to the quantum will still have to be presented. However, the

prospects of a dual appeal and the concomitant significant delay then comes into play again. Such a delay will also result in the necessity of obtaining updated reports from at least some of the experts.

[91] Should a separation be granted and the expert evidence and that of the Commissioner be presented, a resolution of the second special plea in favour of the first defendant, would not obviate the need for evidence from the very same experts and the Commissioner as to what medical aid, services and equipment will be needed and which of those are not encompassed in the Commissioner's medical aid in terms of section 73(2). Should the second special plea be dismissed, the evidence pertaining to quantum, including the expert evidence, will still have to be presented.

[92] In my view it is evident that the issues to be determined for purposes of the second special plea are interwoven with and/or similar and/or partly similar to the issues pertaining to the quantum of the plaintiff's claim against the first defendant. A separation of the hearing of the second special plea will undeniably lead to the overlapping and/or duplication of evidence, including expert evidence.

[93] A separate hearing of the second special plea will result in the undue lengthening of the trial and the incurring and wasting of costs, which will be unfair to both parties.

D. Conclusion on the Rule 33(4) application

- [94] In my view the disadvantages to all parties concerned should a separation be granted, far outweigh the advantages, if any, thereof. A separate hearing of the second special plea will not result in the curtailment and expeditious disposal of this matter; to the contrary.
- [95] I am consequently not satisfied that it is convenient and proper for the second special plea to be heard separately.
- [96] The Rule 33(4) application consequently stands to be dismissed.

Costs:

- [97] In their respective oral arguments Ms Williams and Mr Mullins were *ad idem* that the costs should follow the outcome, which costs should include the costs of two counsel, where employed.
- [98] On two previous occasions when the two applications served before court, namely on 17 February 2022 and 10 March 2022, the costs were reserved by agreement between the parties. I was not the presiding Judge on those two occasions and have no knowledge of the circumstances which led to the parties to have agree to the respective orders. I was also not addressed on those two costs orders during the hearing of the present application. In my view those costs should
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consequently remain reserved and are to be excluded from the present order as to costs.

Order:

[99] I consequently make the following order:

1. The applicant's/first defendant's application in terms of Rule 33(4) that the second special plea raised in its amended plea be separated and that it be adjudicated before any other issues in the trial on the quantum of the action, is dismissed.
2. It is declared that the abovementioned special plea is to be adjudicated simultaneously with the trial on the quantum of the action.
3. The adjudication of the declaratory order sought in terms of prayer 4 of the Notice of Motion dated 17 December 2021 stands over to be adjudicated simultaneously with the adjudication of the second special plea and the trial on the quantum of the action.
4. The applicant/first defendant is ordered to pay the costs of the application (excluding the reserved costs of 17 February 2022 and 10 March 2022, which costs remain reserved), which costs are to include the costs of two counsel where employed.



C. VAN ZYL, J

On behalf of the applicant/first defendant:

Adv. RT Williams SC

Assisted by:

Adv. S Mahomed

Instructed by:

State Attorney

BLOEMFONTEIN

On behalf of the first respondent/plaintiff:

Adv. JF Mullins SC

Assisted by:

Adv. PJJ Zietsman SC

Instructed by:

Honey Attorneys

BLOEMFONTEIN