



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case NO: 5168/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
 SIGNATURE 2024/5/9 DATE	

In the matter between:

AARON MATEMBU BANDA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

ORDER

1. Judgment is granted in favour of the plaintiff for the payment of R150 700.19 as within 180 days hereof, in full and final settlement of the Plaintiff's claim against the Defendant.
 2. Draft order "X" is made an order of court.
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JUDGMENT

WINDELL J:

[1] The plaintiff in this case is Aaron Matembu Banda, a 62-year-old male. He instituted an action against the defendant, the Road Accident Fund (RAF), after he sustained injuries during a car accident which occurred on 24 January 2020.

[2] The RAF conceded 50% contributory negligence on the part of the insured driver on 30 November 2021. The parties resolved the plaintiff's claim for loss of earnings, general damages and future medical and hospital expenses by way of offer and acceptance dated 28 June 2023. The only issue left for determination is in respect of past hospital and medical expenses.

[3] The plaintiff claims payment of the amount of R150 700.19 (being R301 400.39 minus 50%) and have provided the RAF with the schedule and vouchers in support of his claim. The plaintiff did not testify, nor did he call any witnesses. Instead, permission was requested to adduce evidence by way of affidavits in terms of Rule 38(2) of the Uniform Rules of Court. The defendant did not object and the request was granted.¹

[4] In his affidavit, the plaintiff confirmed that he was involved in an accident on 24 January 2020. As a result of the accident, he sustained, inter alia, a fracture dislocation of his right hip and a chest injury with fractured ribs. After the accident had occurred, he was taken by ambulance to the Life Glynnwood Hospital, where he was assessed and stabilized. He confirms the treatment he received and that he incurred medical and hospital expenses in an amount of R301 400.39. The plaintiff also furnished the defendant with the clinical notes and records of Glynnwood Trauma, as well as the

¹ Rule 38(2) of the Uniform Rules of Court provides as follows: 'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.' Also see *Madibeng Local Municipality v Public Investments Corporation* 2008 (6) SA 55 SCA at 61F-H.

hospital records of Glynnwood Hospital. These records comprehensively detail the plaintiff's injuries and the medical care provided as a consequence.

[5] The plaintiff further confirmed that he is a member of Bankmed Medical Aid ('Bankmed'), who made payment on his behalf of his medical expenses. He confirmed that he is, as a member of Bankmed, under a contractual obligation to recover the medical expenses from the RAF (who stepped into the shoes of the wrongdoer) and to repay the amount recovered to the medical aid, once he is successful with his claim.²

[6] The plaintiff also furnished the RAF with an affidavit deposed to by Tsholofelo Tshidi, an administrator of Discovery Health Medical Scheme, who administers claims submitted to Bankmed, confirming that the medical expenses in respect of the collision which occurred on 24 January 2020, were paid by Bankmed on behalf of the plaintiff.

[7] The plaintiff also obtained affidavits deposed to by the following medical experts, who had regard to contents of the Life Glynnwood hospital records, and who discuss and confirm the treatment administered to the plaintiff as a result of the injuries sustained in the accident in their respective medico-legal reports: Dr M De Graad (Orthopaedic Surgeon); Prof LA Chait (Plastic Surgeon); M Naidoo (Psychiatrist); K Gumming (Occupational Therapist); and J Becker (Industrial Psychologist). The RAF did not retain any concurrent experts to refute the opinions expressed in the reports in question. The reports thus stand uncontested.

² The Plaintiff has uploaded an agreement entered into between himself and the medical scheme Bankmed which requires the Plaintiff to lodge a claim on behalf of Bankmed in respect of the medical and hospital expenses paid by Bankmed on behalf of the Plaintiff.

[8] Despite the affidavits introduced into evidence, the RAF disputes the authenticity of the hospital records and the treatment that the plaintiff received. The RAF persists with this denial whilst it also (a) acknowledges that it has the original hospital records in its possession; (b) has already accepted liability for the plaintiff's injuries and sequelae resulting from the accident, and (c) and accepted that the plaintiff will require future treatment as a consequence.

[9] The RAF seemingly denies its liability for payment of the plaintiff's past hospital and medical expenses because a portion of these expenses have been paid on behalf of the plaintiff by Bankmed. As far as it could be discerned, the RAF's defence is premised upon two arguments: First, notwithstanding that the claim is brought by the plaintiff, it is not the plaintiff's claim. The claim is on behalf of the medical scheme and all monies received must be paid back to the medical scheme in terms of the contract signed between the parties. Thus, no loss was in fact suffered by the plaintiff. Second, section 29 of the Medical Schemes Act 131 of 1998 compels a medical aid scheme to pay emergency medical expenses, listed in Regulation 8 of the Medical Schemes Act, as a prescribed minimum benefit under the Medical Schemes Act. Because Bankmed is statutorily *obliged* to pay those expenses, the plaintiff suffered no loss. As a result, even if the RAF compensated the plaintiff, the plaintiff will not be obliged to claim on behalf of Bankmed or to reimburse Bankmed.

[10] Firstly, the defence relating to the Medical Schemes Act, was not raised in the papers. The plaintiff thus had no opportunity to answer to it in the pleadings. It is trite that a party should refrain from introducing a new basis for opposition to the relief sought if doing so would be unjust to the opposing party, unless that ground is explicitly

addressed in the pleadings.³ The introduction of this new ground evidently prejudices the plaintiff as he was denied the opportunity to canvass this issue in the pleadings. The reliance on the Medical Schemes Act is plainly an attempt by the RAF to supplement its case and cannot be allowed.

[11] Secondly, although Bankmed is directly implicated in the defence, as it deals with its obligations to the plaintiff and the allegation that the plaintiff cannot be compelled to contract into such provision to claim back from the RAF monies disbursed by Bankmed, it is not a party to the proceedings and the contractual obligations between it and the plaintiff is not on trial (*res inter alios acta, aliis neque nocet, neque prodest*, ('a thing done, or a transaction entered into, between certain parties cannot advantage or injure those who are not parties to the act or transaction')).⁴

[12] Thirdly, this is an old argument dressed up in new clothes, which our courts have rejected on numerous occasions. The RAF is required by section 17(1) of the Road Accident Fund Act 56 of 1996 to provide compensation to third parties, including the plaintiff, for any damages or losses incurred due to the negligent or unlawful actions of the driver of a motor vehicle. Ordinary delictual principles govern the calculation of patrimonial damages for which the RAF is liable (subject to specific express exclusions and limitations that are not pertinent to the present issue).⁵ Certain

³ *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 23D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) 290E-H). *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 30.

⁴ See *Erasmus Ferreira & Ackerman v Francis* 2010 (2) SA 228 (SCA) at para 15.

⁵ This position has been explained by the Constitutional Court in *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para [25] as follows: 'the scheme insures road users against the risk of personal injury and their dependants against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying common-law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal

benefits which a plaintiff may receive are however to be left out of account as it is completely collateral. In *Zysset and Others v Santam Limited*,⁶ the court referred to the 'classic examples': (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy.

[13] Similarly, in *Mooideen v The Road Accident Fund*,⁷ the court confirmed that the medical aid's payment of medical expenses was an irrelevant collateral transaction, and the RAF was not entitled to raise the medical aid scheme indemnification as a defence and therefore benefit from the payment. The court held that:

'Plaintiff thus, on behalf of the deceased's estate, in terms of the rules which I have said out of Discovery and the common law of insurance, can recover from the defendant as if there had been no indemnification at all. The recovery made by the deceased estate is a matter between the plaintiff and Discovery and has, therefore, raised *res inter alios acta*.'⁸

[14] The court in *Rayi NO v Road Accident Fund*,⁹ was confronted with the same question as in the present matter, namely whether the RAF was obligated to reimburse the plaintiff for previous hospital and medical expenses, given that those costs had already been paid by the plaintiff's medical aid. Zondi J, held as follows:

'[12] It is clear to me that a procedural remedy which is available to the supplier of goods or services in terms of section 17(5) of the [RAF] Act is not available to Bonitas. It paid past medical expenses on behalf of the plaintiff. It did not supply goods or

bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent.'

⁶ 1996 (1) SA 273 (C) at 278C-D.

⁷ Unreported judgment of the Western Cape Division under case number 17737/2015, delivered on 11 December 2020.

⁸ See also *Morne van Heerden v Road Accident Fund*, Case number 845/2020 Eastern Cape Division, Gqeberha handed down on 4 October 2022; *Noxolo Lynette Malgas v Road Accident Fund*, Case number 126/2020 Eastern Cape Division, Gqeberha handed down on 1 December 2022.

⁹ [2010] ZAWCHC 30 (22 February 2010)

provide services on behalf of the plaintiff. Bonitas can therefore not claim directly from the defendant the expenses it incurred on behalf of the plaintiff in terms of section 17(5) of the Act.

[13] Bonitas can recover from the defendant the payment it made on behalf of the plaintiff and for which the defendant is primarily responsible by way of an action based on the principle of subrogation. It may sue the defendant in its own name or in the name of the plaintiff. (Rand Mutual Assurance Co Ltd v Road Accident Fund [2008] ZASCA 114 at para 24). Subrogation embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance...

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

[16] The obligation which the undertaking imposes on the plaintiff towards Bonitas does not arise until such time that there is a successful recovery of the past medical expenses by the plaintiff from the defendant. The defendant primarily remains liable to the plaintiff for the payment of the past medical expenses and the liability of Bonitas to the plaintiff for the past medical expenses is secondary to that of the defendant. The defendant should pay the past medical expenses to the plaintiff who should upon receipt of payment account to Bonitas in terms of the undertaking. (Emphasis added)

[15] These principles have been part of our law for years and bears the weight of precedent. Our courts have recognized that medical aid scheme benefits are a form

of indemnity insurance and should accordingly be disregarded for the purposes of an award for damages, in accordance with the principle of *res inter alios acta*.¹⁰ The fact that a medical aid provides a minimum benefit to its members is inconsequential and does not impact the legal position, as access to the benefits is contingent upon membership in the medical aid. The benefits are exclusively available in exchange for premium payments and provide protection against injury or damage. As remarked in *Zysset and others v Santam Limited*, 'the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion incoming to the assistance of the plaintiff.'¹¹

[16] As per the agreement entered into between Bankmed and the plaintiff, the plaintiff is obliged to claim the past medical expenses, incurred in connection with the accident, and paid on his behalf by Bankmed, from the RAF. Evidently, this is due to the fact that the Scheme bears no liability for accident-related expenses in situations where a member may pursue legal action against a third party. The RAF in this case is the other party from which these costs are reimbursed.

[17] The fact that Bankmed has already paid for past medical expenses does not affect the liability of the RAF. The *res inter alios acta* principle prohibits the RAF from subtracting the sums paid by medical aid for the plaintiff from the total amount owed to the plaintiff for previous medical expenses. In the circumstances, the plaintiff's claim must succeed.

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

¹⁰ See *Lawson v The Road Accident Fund* (unreported judgment of this court under case number 12399/2017, delivered on 15 December 2022); *Thomson v Thomson* 2002 (5) SA 541 (W); *D'Ambrosi v Bane* 2006 (5) SA 121 (C); *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA).

¹¹ *Supra*

1. Judgment is granted in favour of the plaintiff for the payment of R150 700.19 as within 180 days hereof, in full and final settlement of the Plaintiff's claim against the Defendant.
2. Draft order "X" is made an order of court.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 May 2024.

APPEARANCES

Counsel for the plaintiff:	Advocate N. Diederichs
Instructed by:	A Wolmarans Incorporated
Counsel for the defendant:	Ms S. Ameersingh
Instructed by:	Office of the State Attorney, Johannesburg
Date of hearing:	13 February 2024
Date of judgment:	9 May 2024

X

09/05/2024

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

ON THIS THE 9th DAY OF MAY 2024
BEFORE THE HONOURABLE JUSTICE WINDELL J

In the matter between:

BANDA; AARON MATEMBU

and

THE ROAD ACCIDENT FUND

(Claim number: 502/128790787/21/1 [5005903])

Defendant

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG	CASE NO. 2021/5168
Private Bag X7, Johannesburg 2000	
2024 -05- 13	Plaintiff
QLD-JMB-013	
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG	

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her Secretary. The date of this Order is deemed to be 9 MAY 2024.

~~DRAFT ORDER~~

Having read the papers and after having heard counsel on behalf of the Parties

IT IS RECORDED THAT

1. On 30 November 2021 the merits were resolved on the basis that the Defendant shall pay **50%** of the Plaintiff's proven or agreed damages.

2. On 27 June 2023, the Parties agreed to a further interim settlement of the Plaintiff's claim as follows

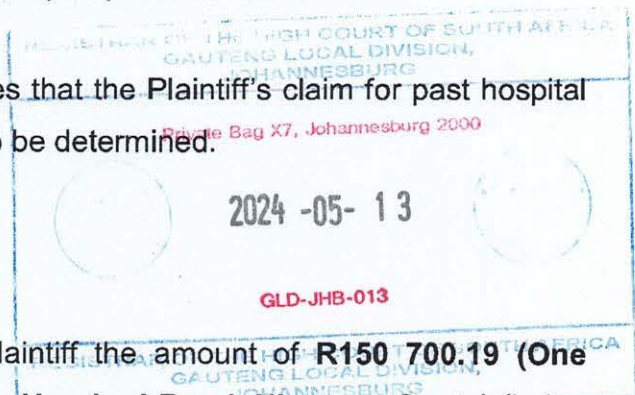
2.1 the Defendant agreed to pay the Plaintiff an amount of **R489 639.20** (Four Hundred Eighty-Nine Thousand, Six Hundred Thirty Nine Rand, Twenty Cents) (being R979 278.40 minus 50% merits apportionment) in settlement of the Plaintiff's claim in respect of loss of earnings and general damages.

2.2 The Defendant agreed to provide the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 and in terms of all the expert reports filed, wherein the Defendant undertakes to pay **50%** of the Plaintiff's costs in respect of future accommodation of the Plaintiff in a hospital or nursing home, or treatment of, or rendering of a service, or supplying of goods to the Plaintiff arising out of the injuries sustained in the motor vehicle collision that occurred on **24 January 2020** after such costs have been incurred and upon proof thereof.

3. It was agreed between the Parties that the Plaintiff's claim for past hospital and medical expenses remains to be determined.

IT IS ORDERED THAT

4. The Defendant shall pay the Plaintiff the amount of **R150 700.19 (One Hundred Fifty Thousand, Seven Hundred Rand, Nineteen Cents)** (being R301 400.39 minus 50% merits apportionment) within 180 (*one hundred and eighty*) days hereof, in full and final settlement of the Plaintiff's claim against the Defendant.
5. In the event of the aforesaid amount not being paid within 180 days from date of this order, the Defendant shall be liable for interest on the amount at the prevailing interest rate, calculated from the 15th calendar day after the date of this Order to date of payment in line with prevailing legislation.



6. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale in respect of both the merits and quantum, up to and including **13 February 2024**, and notwithstanding, and over and above the costs referred to in paragraph 5.2.1 below, subject thereto that:

6.1 In the event that the costs are not agreed:

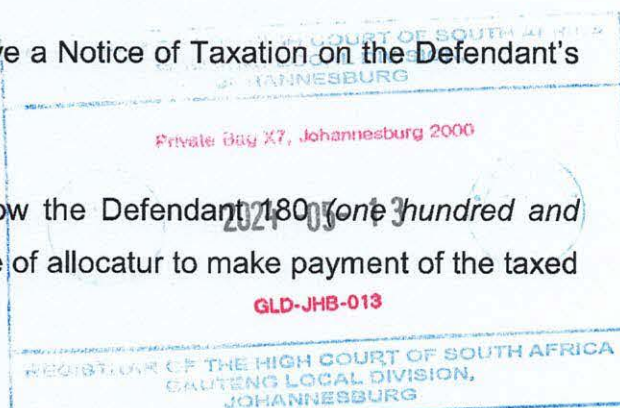
- 6.1.1 The Plaintiff shall serve a Notice of Taxation on the Defendant's attorney of record;

- 6.1.2 The Plaintiff shall allow the Defendant ~~180~~ *(one hundred and eighty)* days from date of allocatur to make payment of the taxed costs; and

- 6.1.3 Should payment not be effected on ~~180~~ *(one hundred and eighty)* days from date of allocatur, the Plaintiff will be entitled to recover interest at the prevailing interest rate on the taxed or agreed costs from 15 *(fifteen)* days from date of allocatur to date of final payment.

6.2 Such costs shall include, **subject to the discretion of the Taxing Master:**

- 6.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraph 4 above;
- 6.2.2 The costs of and consequent to the appointment of counsel, including, but not limited to the following: for trial, including, but not limited to counsel's full fee for **13 February 2024**, and the preparation and reasonable attendance fee of counsel.
- 6.2.3 The costs of all medico-legal, radiological, MR, sonar, pathologist, actuarial and addendum reports and/or forms obtained, as well as such reports and/or forms furnished to the



Defendant and/or its attorneys, as well as all reports and/or forms in their possession and all reports and/or forms contained in the Plaintiff's bundles, including, but not limited to the following:

6.2.3.1 Dr M De Graad (Orthopaedic Surgeon);

6.2.3.2 Prof LA Chait (Plastic Surgeon);

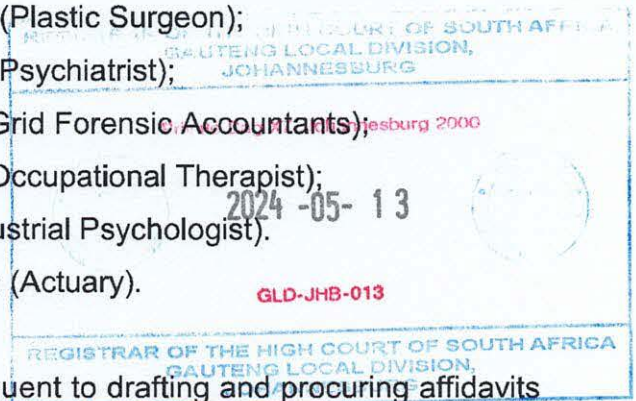
6.2.3.3 Dr M Naidoo (Psychiatrist);

6.2.3.4 K Stemmett (Grid Forensic Accountants);

6.2.3.5 K Cumming (Occupational Therapist);

6.2.3.6 J Becker (Industrial Psychologist);

6.2.3.7 GW Jacobson (Actuary).



6.2.4 The costs of and consequent to drafting and procuring affidavits from the expert witnesses in paragraph 6.2.3 with a view to applying for default judgment, as well as the expert witnesses' charges in respect thereof;

6.2.5 The reasonable costs incurred by and on behalf of the Plaintiff in attending the medico-legal examinations of both parties' experts;

6.2.6 The costs of and consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 3 (three) copies thereof;

6.2.7 The Plaintiff is declared a necessary witness and therefore the Plaintiff's reasonable travelling expenses to attend the trial, as allowed by the Taxing Master; and

6.2.8 The costs of and consequent to the holding of a pre-trial conference.

7. The amounts referred to in paragraph 4 will be paid to the Plaintiff's attorneys, A Wolmarans Incorporated, by direct transfer into their trust account, details of which are the following

NAME OF ACCOUNT HOLDER:

NAME OF BANK & BRANCH:

ABSA BANK, NORTHCLIFF

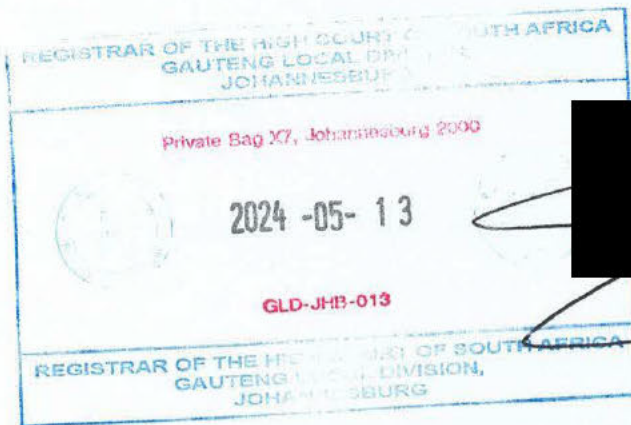
ACCOUNT NUMBER:

BRANCH CODE:

TYPE OF ACCOUNT:

REFERENCE:

8. The Plaintiff did not enter into a contingency fee agreement with the Plaintiff's attorneys of record.



BY ORDER OF THE COURT

REGISTRAR OF THE HIGH COURT
~~PRETORIA~~

Appearance for Plaintiff:

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Appearance for Defendant:

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