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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

***REPORTABLE***

**Case no.: 24228/16**

**MARGARITHA ISABELLA GUNTHER**

**Plaintiff**

**And**

**ROAD ACCIDENT FUND**

**Defendant**

**Date of hearing: 27 March 2024**

**Defendant's written note: 3 April 2024**

**Plaintiff's replying note: 5 April 2024**

**Judgment date: 6 June 2024**

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**JUDGMENT**

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**PANGARKER AJ**

**The Plaintiff's claim for past medical, hospital and related expenses**

1. On 23 August 2013 the plaintiff was involved in a motor vehicle collision on the R321 between Grabouw and Villiersdorp, when the vehicle in which she was travelling as a passenger collided with another vehicle and a truck. At the time, the plaintiff's husband was the driver of the vehicle, and as a consequence of the collision, he succumbed to his injuries and passed away at the scene. In her amended Particulars of Claim, the plaintiff pleads that the collision was caused by the sole negligence of the driver of the truck.

2. The plaintiff pleads that as a result of the collision, she suffered damages comprising of past medical and related expenses, future medical costs, future loss of earnings and general damages totalling R2 201 188, 23. A day before the trial date, the parties reached agreement on liability, future hospital, medical and related expenses, loss of income and general damages. I was informed in an updated Joint Practice Note that the parties had not settled the plaintiff's claim for past medical, hospital and related expenses and costs, thus the trial was to proceed on these limited issue only.

3. At the hearing on 27 March, counsel for the plaintiff handed up two proposed Draft Orders for consideration. Following on from the above introduction, it follows thus that the only issues in dispute at the time of the trial were the plaintiff's amended claim for past hospital, medical and related expenses, and costs. However, the defendant's approach subsequent to the hearing of evidence, dictated otherwise. The plaintiff was the only witness to testify in the trial in respect of her claim for past hospital and medical expenses.

### **The plaintiff's case**

4. The plaintiff testified that she was 67 years old and a retired school teacher. As a result of the collision in August 2013, she suffered the following injuries: a fracture of the right wrist and right thumb, a laceration to her left leg, fracture of the left knee joint, rib

fractures, a fracture of the C6 spinal vertebrae and a compression of the lumbar vertebrae.

5. A schedule setting out the expenses and vouchers related to the plaintiff's medical and hospital treatment received in relation to her injuries was handed into evidence during the trial and admitted as Exhibit A. The plaintiff was taken through the schedule and invoices, explaining what each one entailed. She was transported from the accident scene to the Vergelegen Medi Clinic where she underwent surgery<sup>1</sup> and was later discharged on 17 September 2013. The plaintiff confirmed the injuries which she sustained, the treatment received and medical expenses related to these treatments, (including prescription medication) some of which are set out briefly below.

6. On 4 December 2014, the plate and screws implanted in the plaintiff's right thumb and wrist were removed at Panorama Mediclinic<sup>2</sup>. A Pathcare account for blood tests during her hospital stay as an in-patient was also confirmed.

7. The plaintiff was taken through the following further invoices for treatment from medical service providers and confirmed the correctness thereof:

7.1 Dr F Wahl, orthopaedic surgeon, Vergelegen Mediclinic<sup>3</sup>;

7.2 Dr R Donald, anaesthesiologist – treatment to right index finger<sup>4</sup>;

7.3 Dr DD De Villiers, anaesthesiologist – right hand and tibia fracture<sup>5</sup>;

7.4 Dr KL Keet, anaesthesiologist – emergency admission<sup>6</sup>;

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<sup>1</sup> Exhibit A, Vergelegen Mediclinic tax invoice

<sup>2</sup> Exhibit A, p10-11

<sup>3</sup> Exhibit A, p23-25 – R5485,80

<sup>4</sup> Exhibit A, p26 – R3320

<sup>5</sup> Exhibit A, p27-28 – R8282,20

<sup>6</sup> Exhibit A, p29 – R12 244,20

- 7.5 L van Schalkwyk, physiotherapist – treatment for multiple rehabilitation from November 2013 to February 2014<sup>7</sup>;
- 7.6 Dr RB Schoombee, house doctor – initial consultation as the plaintiff was experiencing depression shortly after the collision and received anti-depressants<sup>8</sup>;
- 7.7 Dr DM Turner, anaesthesiologist – treatment on 4 October 2013 related to the plaintiff's index finger<sup>9</sup>;
- 7.8 Dr MC Wells, orthopaedic surgeon, Panorama Medi Clinic – contracture of joint, removal of internal fixative, tendon freeing (right hand)<sup>10</sup>;
- 7.9 Dr G Van Zyl, Cape Town Knee Unit<sup>11</sup>;
- 7.10 Morton and Partners Radiologists – left knee X ray<sup>12</sup>;
- 7.11 Various pharmacy invoices – prescription medication for muscle relaxants and anti-depressants<sup>13</sup>;
- 7.12 Blood transfusion services in hospital<sup>14</sup>.

8. The plaintiff stated that she was a member of GEMS medical aid at the time of the collision and her subsequent treatment. A family member submitted the claims on her behalf as she was hospitalised and unable to do so herself but she paid the surplus in respect of treatments which GEMS had not covered. The plaintiff testified that the

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<sup>7</sup> Exhibit A, p30-32 – R5124, 35

<sup>8</sup> Exhibit A, p33 – R264,50

<sup>9</sup> Exhibit A, P34 – R3890

<sup>10</sup> Exhibit A, p37 - R410, R2996

<sup>11</sup> Exhibit A, p38 – R464,60

<sup>12</sup> Exhibit A, p39 – R470, 12

<sup>13</sup> Exhibit A, p40-60 (Kruger Pharmacy, Caledon Pharmacy, Clicks, Goldstein Pharmacy, Medirite

<sup>14</sup> Exhibit A, p61

invoices and statements contained in Exhibit A support her claim for past medical and hospital expenses for treatment and medical services received as a result of the injuries she sustained in the collision, with the exception that pharmacy invoices reflecting allergy medication and antihistamines were excluded from the computation of her claim.

9. The plaintiff explained that the depression was brought on by the multiple operations she underwent, the loss of her husband and the physical adjustments as a result of the injuries which she sustained. The depression diagnosis was confirmed in the report by psychologist, Dr R Bredenkamp<sup>15</sup>.

10. Except to determine that the plaintiff personally paid the surplus of past medical expenses which were not paid by GEMS, cross examination by the State Attorney did not amount to anything of substance. The plaintiff was asked if she knew what the surplus amount was to which she responded that she did not know how much was paid. No questions were posed in respect of the treatment received, injuries sustained, the schedule of amounts and the correctness of the invoices and statements from service providers.

### **The defendant's request**

11. The plaintiff thereafter closed her case. The defendant called no witnesses and closed its case. The State Attorney sought an opportunity to file a written note on the plaintiff's claim, and alluded to a Directive issued by the defendant in relation to compensation for past medical expenses where those expenses were previously paid by a plaintiff's medical aid scheme. The plaintiff's counsel had no objection to the defendant's request and a timetable was set for April for receipt of the written submissions. Subsequent to receipt of the defendant's written submissions, the plaintiff's counsel provided a response thereto on 5 April 2024. Before addressing the submissions, I turn to the pleadings as it relates to the plaintiff's claim.

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<sup>15</sup> Pleadings, p121-133

## **The pleadings**

12. The Particulars of Claim were amended a few times since the action was instituted and the amendments relate mainly to the additional reports about the plaintiff's treatment as a result of the collision. Paragraph 10.1 of the Amended Particulars of Claim dated July 2023 states that the plaintiff suffered damages including past medical and related expenses as set out in the schedule which totalled R272 388, 23. The schedule is replicated in Exhibit A.

13. Given that the amendment occurred in July 2023 and the hearing took place in March 2024, there is nothing unusual about any amendment. The point is that even though annexure D sets out a total of R285 982, 53, in the event that it is found that the plaintiff has proved her claim, she would only be entitled to the amount proved, whether equal to or less than the amount claimed in her Amended Particulars of Claim, which is R272 388, 23. The Plea to the plaintiff's claim for past medical, hospital and related expenses is to simply acknowledge annexure D, but to plead no knowledge of the allegations, assertions and conclusions therein and as a consequence, the defendant puts the plaintiff to the proof thereof.

## **The doctrine of subrogation and the defendant's exclusion of liability argument**

14. The defendant relies on the Medical Schemes Act 13 of 1998 for its submission that a medical aid scheme is compelled to pay a member's expenses and cannot contract out of such obligation. It refers to section 17 of the Road Accident Fund Act 56 of 1996 (RAF Act) as amended and submits that the section envisages that the third party must have suffered loss or damage. Hence, so the argument goes, where a medical aid of a member paid his/her past medical expenses in terms of its statutory obligation to do so on behalf of the member, the medical aid cannot contract out of such

statutory obligation by entering into an agreement with its member to reclaim the amount paid on the latter's behalf.

15. The defendant submits that what is before the Court is in fact not the plaintiff's claim for past medical expenses but rather a claim brought on behalf of GEMS. The defendant's understanding is that where the plaintiff's medical aid paid the service providers on her behalf, she suffered no loss and cannot be bound contractually to claim the amount from the defendant.

16. The defendant argues further that the claim for past medical expenses is excluded by Regulations 7 and 8 of the Medical Schemes Act and section 19 (d)(i) of the RAF Act. The further argument is that the defendant is not opposed to the reimbursement of past medical expenses which the plaintiff paid directly and which does not fall within the definition of emergency medical care or prescribed minimum benefits in terms of the legislation.

17. Lastly, the defendant's view is that the plaintiff's claim is based on the doctrine of subrogation and that she cannot be compelled to reclaim from the defendant as such right cannot simply be created between the insurer and member under the subrogation principle. Insofar as the recent judgment of ***Discovery Health (Pty) Ltd v Road Accident Fund and Another***<sup>16</sup> is concerned, the defendant acknowledges its unsuccessful attempts to appeal the decision and admits that there are no judgments in its favour on this issue, yet I am asked to accept the defendant's submissions and dismiss the plaintiff's amended claim for past medical, hospital and related expenses.

## **Discussion and findings**

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<sup>16</sup> 2022 ZAGPPHC 765

18. In considering the submissions made by the defendant in the discussion which follows, I also consider the plaintiff's addendum submissions. At the outset I have to state that the defendant's stance in this matter was only made known when the State Attorney's written submission was received in April. There was most certainly no indication that the defendant would rely on the doctrine of subrogation and the exclusion of its liability in terms of section 19 of the RAF Act and the Regulations of the Medical Schemes Act.

19. Turning to the submissions, the doctrine of subrogation, which is part of our common law, provides that:

"...an insurer under a contract of indemnity insurance who has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject matter of the insurance."<sup>17</sup> Thus, in terms of the doctrine, the insurer steps into the shoes of the insured, meaning that the insurer subrogates the insured and is allowed to claim the loss from the wrongdoer<sup>18</sup>.

(my emphasis)

20. It must be noted that the insured may claim from the wrongdoer for the insurer's benefit because notwithstanding the indemnification received from the insurer, the wrongdoer is not released<sup>19</sup>. It follows that the reference to "*wrongdoer*" is a reference to the defendant in the sense that it is statutorily obligated in terms of section 17 (1) of the RAF Act to compensate the third party (plaintiff) for loss or damage suffered as a result of bodily injury to herself arising from the negligent driving of a vehicle by another person.

21. In my view, the first question to ask is whether the subrogation issue should have been pleaded or whether it was in order for the defendant to raise it in written

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<sup>17</sup> Rand Mutual Assurance Company Ltd v Road Accident Fund 2008 (6) SA 511 (SCA) par 17, referring to Ackerman v Loubser 1918 OPD 31

<sup>18</sup> Rand Mutual supra, par 17

<sup>19</sup> Amler's Precedents of Pleadings, Seventh Edition, LTC Harms, p234; Rand Mutual supra

submissions after the parties' respective cases were closed? To answer the question, I turn to **Banjo v Smith**<sup>20</sup>, which provides some clarity on the matter, as follows:

*[12] The involvement of the insurer in a lawsuit is irrelevant and therefore it is not necessary to plead such involvement. It has already been established that in subrogation claims the insurer takes the place of the insurer<sup>21</sup>. The historical practice in our courts is to allow the insurer to institute action in the name of the insured [Rand Mutual Assurance supra]. Logically, the parties to a suit have the same rights and duties as they would have had had the matter not been a subrogated claim. I agree with the plaintiff's submission that from a practical perspective the insurer's involvement in the suit is irrelevant. For this reason it is clearly not necessary for the plaintiff to plead the insurer's involvement in the suit.*

*[13] The plaintiff is only required to plead those facts which sustain a cause of action [see Bankorp Ltd v Anderson-Morshead 1997 (1) SA 251 (W) at 256I – J]. In the Nkosi case, the plaintiff was both the owner of the vehicle and the insured party. The case is factually distinguishable from the present matter and this may be the reason for the defendant's submission that nothing turns on the Nkosi case. However, the rule propounded in that case is that subrogation must be proved and specifically pleaded. Accordingly, the case is relevant and needs to be analysed. The fact that a given matter is a subrogated claim is not a fact that sustains a cause of action. It is merely a collateral fact and it is not necessary to plead and prove such a fact.*

*[14] There is authority for the proposition that subrogation does not need to be proved. In Ntlhabyane v Black Panther Trucking (Pty) Ltd and Another (A3083/08) [2009] ZAGPJHC 46 (1 September 2009), the plaintiff was the owner of the vehicle and also the insured party. The magistrate granted absolution from the instance on the misguided basis that the plaintiff had*

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<sup>20</sup> 2011 (2) SA 518 (KZP)

<sup>21</sup> I am of the respectful view that this might be an error in the judgment and that the sentence may have been intended to read "...the insurer take the place of the insured". The same possible error occurs in the PDF and Word version of the judgment on Saflii

*failed to prove subrogation in that she had failed to produce a copy of the insurance policy. On appeal, the court confirmed that subrogation did not affect the plaintiff's locus standi to institute action. The court held that there 'was neither a duty on the plaintiff to prove subrogation, nor to produce the policy of insurance.' I agree with that decision and in that respect the Nkosi judgment is clearly wrong and is not binding on future courts."*

(my emphasis)

22. The above paragraphs in **Banjo v Smith** make it clear that where a plaintiff institutes a claim, he/she need not plead that it is a subrogated claim as the insurer's involvement is irrelevant or collateral to the plaintiff's action. I have already set out the averments in the Plea to the current claim and frankly, there is no mention of what is contained in the written submissions.

23. Having regard to the dicta in **Banjo v Smith**, in this matter we do not have the plaintiff's pleading in issue, but a defence which rests on a subrogated claim to escape liability and a reliance on certain sections of the RAF Act and Medical Schemes Act to exclude the defendant's liability for past medical expenses. I hold the view that in such an instance, the defendant should have pleaded such defence(s) and not simply plead an acknowledgement of the schedule of expenses and putting the plaintiff to the proof of her claim. I am further fortified in my view that these defences should have been pleaded as Rule 18(4) makes it abundantly clear that the pleading should contain a clear and concise statement of material facts upon which the pleader relies for his/its defence, and while I am not dealing with an exception, the material facts upon which the late defences are based, are absent from the Plea.

24. By raising these apparent defences for the first time in written submissions after the parties had closed their respective cases, the defendant acted in a manner contrary to the Rules and frankly ambushed the plaintiff. I must emphasise that neither the schedule of expenses nor supporting invoices and vouchers or the plaintiff's testimony were ever disputed, which lead to the eventual conclusion that the past medical

expenses remained undisputed. The conduct of the defendant in firstly failing to plead these specific defences, and secondly, presenting them in written submissions after the conclusion of the trial, is to be deprecated. There is simply no reason why the defendant did not amend its Plea in terms of Rule 28. Nonetheless, I consider the submissions as presented in the discussion which follows.

25. The important point to note is that the plaintiff's claim for past medical and hospital expenses is not based on subrogation but is based on the provisions of section 17 of the RAF Act. The undisputed evidence is that GEMS honoured its obligations to the plaintiff and indemnified her as an insured under a contract of indemnity insurance by paying her past hospital and medical expenses which she incurred as a result of the injuries in the collision.

26. Turning then to the recent **Discovery Health** judgment, it is notable that a similar argument was advanced by the RAF which was the respondent in that application. On the subrogation issue and RAF's contention that it is absolved from paying compensation where a medical aid scheme (the insurer) has compensated the insured (the plaintiff/claimant), Mbongwe J in **Discovery Health** held that:

*"[21] In terms of our law, benefits received by a claimant from the benevolence of a third party or a private insurance policy are not considered for purposes of determining the quantum of a claimant's damages against the first respondent. The reason for this is merely because a benefit that accrues or is received from a private insurance policy origin from a contract between the insured and the insurance company for the explicit benefit of the claimant and its receipt does not exonerate the first respondent from the liability to discharge its obligation in terms of the RAF Act. In Zysset and Others v Santam Ltd 1996 (1) SA 273 (C) at 277H – 279C the set out the principle in the following words:*

*"The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed...Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the*

*object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action.*

*Notwithstanding the foregoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of the account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contract of insurance for which he has paid the premiums and (b) money and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff."*

(my emphasis)

[22] In *Ntlhabyane v Black Panther Trucking (Pty) Limited and Another* 2010 JDR 1011 (GSJ) the court expressed the principle in the following terms:

*"a plaintiff's insurance, her indemnification in terms of it, and the consequent subrogation of her insurer are all matters of no concern to the third party defendant."* "

27. From paragraph 21 of **Discovery Health**, it is evident that the benefit accruing to the insured from the contract which exists between her and the insurer does not absolve the defendant from its liability to that claimant in terms of the RAF Act. Furthermore, it cannot be stated any clearer than it was in **Zysset and Others v Santam Ltd**<sup>22</sup> that a benefit or advantage received by the claimant should resultantly have a corresponding diminution in the damages awarded to the claimant. The idea is that a plaintiff should not be placed in a position where she receives double compensation in the form of damages, and the determination of when a plaintiff would receive double compensation

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<sup>22</sup> 1996 (1) SA 273 (C) 277H-279C

is concerned with aspects such as public policy, justice and reasonableness<sup>23</sup>. The considerations are, therefore, that whilst a claimant should not receive double compensation, at the same time, the wrongdoer is not to be absolved of its liability to the claimant/plaintiff for compensation due to loss caused by injury to her as a result of the collision.

28. Also held in **Zysset**, benefits which a claimant receives under an insurance policy (where she pays a premium) are to be left out of the reckoning/account as it is collateral in that it is based on the doctrine *res inter alios acta*, a common law doctrine which states that a thing done between certain parties ought not to prejudice a third party<sup>24</sup>. Put simply, whether the claim is subrogated is a collateral issue, and has nothing to do with the issue at hand, being the plaintiff's claim against the defendant which is statutorily obligated to compensate victims who have suffered damage or loss arising from injury caused by the negligence or wrongful act of the driver or owner of a motor vehicle.

29. On the statutory obligation and liability to compensate a plaintiff, the SCA in **Road Accident Fund v Abrahams**<sup>25</sup> clarified the position as follows:

*“Section 21(1) abolishes the right of an injured claimant to sue the wrongdoer at common law. Section 17(1), in turn, substitutes the appellant for the wrongdoer. It does not establish the substantive basis for liability. The liability is founded in common law (delictual liability). Differently put, the claim against the appellant is simply a common – law claim for damages arising from the driving of a motor vehicle, resulting in injury. Needless to say, the liability only arises if the injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle.”*

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<sup>23</sup> Standard General Insurance Co Ltd v Dugmore NO 1997 (1) SA 33 (SCA) at 42B

<sup>24</sup> Dictionary of Legal Words and Phrases, Second Edition, RD Claassen, Vol 4 R-63

<sup>25</sup> 2018 (5) SA 169 (SCA) par 13; see also Engelbrecht v Road Accident Fund & Another [2007] 6 SA 96 (CC)

30. Furthermore, the submission that the medical aid has contracted out of its obligation to pay medical expenses is nonsensical, to say the least. It is clear that the defendant wishes to penalize the plaintiff for using her medical aid at the time of the collision to cover her medical and hospital expenses, yet the argument ignores the authority cited above which states that her insurance is no concern of the defendant as it is a collateral issue. Secondly, to emphasise, the benefits which the plaintiff receives under the insurance contract (in this instance, the medical aid scheme contract), are left out of the reckoning in the determination of her claim for damages against the defendant.

31. Ultimately, the agreement between the plaintiff and GEMS is binding and is sanctioned in terms of section 32 of the Medical Schemes Act. The issue of subrogation is not relevant and whether the medical aid proceeds against the plaintiff at some later stage, is not the defendant's concern anyway. The argument related to subrogation clearly ignores the authorities and legal principles and is simply bad in law. The plaintiff has proved that the medical expenses which she incurred were as a result of and incurred due to the treatment she received for her accident related injuries and the determination of her claim falls full square within section 17 of the RAF Act, as correctly argued by the plaintiff's counsel.

32. On the exclusion of liability argument and reference to section 19(d)(i) of the RAF Act and Regulations 7 and 8 of the Medical Schemes Act, the defendant also seeks to escape liability for the plaintiff's past medical expenses. The defendant wishes to convince the Court that because the plaintiff's medical scheme is obliged to pay for emergency medical care provided by a supplier as it was a prescribed minimum benefit in terms of the Medical Schemes Act, the medical aid scheme has no reimbursement right in terms of the latter Act, and the defendant consequently is not liable as section 19(d)(i) of the RAF Act excludes its liability. It is frankly difficult to follow the defendant's reasoning on this aspect.

33. Nonetheless, I refer to **Road Accident Fund v Abdool Carrim and Others**<sup>26</sup>, which was also referred to and considered recently by Cloete J in **Van Tonder v Road Accident Fund**<sup>27</sup>. Notwithstanding the findings in these two judgments, the defendant persists with its submission that section 19(d)(i) of the RAF Act applies in the circumstances of the plaintiff's claim. While this matter does not deal with a supplier's claim *per se*, the reasoning by the SCA in **Abdool Carrim** at paragraphs 11 and 12 of the judgment, is equally applicable here. In summary, the SCA held that the supplier's right to claim from the RAF was conditional upon the plaintiff's valid and enforceable claim and it (the supplier's claim) was not unenforceable against the RAF because of an agreement concluded with someone other than an attorney as referred to in section 19 of the RAF Act.

34. Section 19(d)(i) of the RAF Act would render the plaintiff's claim unenforceable against the defendant if the plaintiff entered into an agreement with someone other than an attorney or with a person or representative as defined in section 19(c)(ii). However, as per **Abdool Carrim**, section 19(d)(i) was enacted to protect claimants from entering into "*champertous agreements*"<sup>28</sup> but, as seen above, the SCA found that suppliers' agreements did not fall under section 19(d)(i).

35. In **Van Tonder**, Cloete J found that the reasoning in **Abdool Carrim** applied equally to the position related to the agreement between the claimant or plaintiff and his/her medical aid, and consequently rejected the defendant's argument related to the exclusion of RAF's liability in terms of section 19(d)(i). I fully agree with this reasoning, and in my view as well, section 19(d) of the RAF Act finds no application to the agreement between the plaintiff and her medical aid scheme. To hold otherwise would also be contrary to the legal principle referred to above in **Zysset** and **Discovery Health** that the benefit which the plaintiff receives from an agreement with her

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<sup>26</sup> [2008] ZASCA 18 par 3, see also par 11-13

<sup>27</sup> [2023] ZAWCHC 305 para 10-12

<sup>28</sup> Abdool Carrim *supra*, par13

insurance company does not absolve or exonerate the defendant from discharging its obligation to her in terms of the RAF Act<sup>29</sup>.

36. As its last line of defence, the defendant reasons that due to Regulations 7 and 8 of the Medical Schemes Act, the plaintiff is not entitled to claim back the amount for emergency medical care, which is a prescribed minimum benefit, and in terms of Regulation 8 (1) “...any benefit option that is offered by a medical scheme must pay in full, without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit conditions”. It argues that the Medical Schemes Act does not provide for the plaintiff to claim back these amounts on behalf of the medical aid.

37. Unless I am mistaken, this argument is based on the subrogation refrain upon which the defendant seems to hang its hat to escape its legislative obligation to compensate the plaintiff for her loss occasioned by bodily injury sustained in the collision. In my view, the reliance on Regulations 7 and particularly Regulation 8, is ill-fated. I say this because it cannot be that these Regulations supersede the legal principle which I have referred to above that the benefit which accrues and is received from the private insurance company (medical aid scheme), for the plaintiff's explicit benefit, does not exonerate the defendant from the liability to discharge its obligation to the plaintiff in terms of the RAF Act<sup>30</sup>.

38. In addition, the defendant has simply ignored existing authority, including **Rayi NO v Road Accident Fund**<sup>31</sup>, another judgment from this Division, wherein the Court stated that:

*“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*

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<sup>29</sup> See section 17

<sup>30</sup> See Discovery Health, par 21

<sup>31</sup> [2010] ZAWCHC 30

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.”

(my emphasis)

39. The argument and defence that the plaintiff has suffered no loss because she received an indemnification from GEMS in respect of her past medical and hospital expenses is simply bad in law. As is common knowledge, the benefit which the plaintiff received from her medical aid scheme in terms of their contract was at her own expense in that she was required to pay premiums. The argument that the claim is based on subrogation and that it was settled, not only ignores the law as stated in **Rayi** but is ill-conceived and without merit.

40. Furthermore, the defendant's liability is neither limited nor excluded as sections 18 and 19 of the RAF Act do not apply in these circumstances. Lastly, the reference to section 29(1)(o) and (p) of the Medical Schemes Act is simply vague as the section provides for or refers to the matters for which the rules of the medical aid scheme shall apply, and the relevance of the section to the apparent defences raised, remains unclear.

41. In conclusion, the eleventh hour defences, which were not pleaded, are without merit and dismissed. I fully agree with the findings in the ***Discovery Health*** matter, which the defendant has seen fit to ignore even though in paragraphs 25 to 27 of its written submissions, it acknowledges that there are no judgments in its favour indicating that payment by it of a plaintiff's past medical expenses “*should not take place*”<sup>32</sup>. In the same breath, the defendant requests that I take cognizance of its arguments which were advanced in this matter, and which were much the same in the ***Discovery Health***

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<sup>32</sup> Defendant's submissions on

and **Van Tonder** matters. I might add that similar arguments were raised in the unreported **Malgas v Road Accident Fund**<sup>33</sup>, which were also dismissed.

42. Having regard to the above, I am satisfied that the plaintiff has neither unduly benefitted from receipt of the benefit from GEMS in respect of past medical expenses incurred as a result of being injured in the collision, nor will she receive double compensation. Secondly, the benefit she received from her medical aid as described above is excluded from the reckoning of the calculation of the amount of compensation due by the defendant to her in terms of the RAF Act. I say this because as indicated in **Rayi**, the plaintiff's obligation to her medical aid only arises once there is a successful recovery of her past medical expenses from the defendant.

43. In conclusion, I find that the plaintiff has proved that she is entitled to be compensated for the past medical expenses incurred and related medical services employed as a result of her injuries sustained in the collision. As to costs, the only issue related to the suggested order of costs in the cause as indicated by the defendant in its Draft Order B. I raised concerns with the State Attorney on this issue in view of the fact that a new trial date was obtained and only a day before the trial date, the defendant made an offer in respect of loss of income and the other heads of damage (except for the disputed past medical expenses).

44. There really is no motivation nor basis for a costs in the cause order. The plaintiff was prepared for trial on both days and the submission that the defendant waited until the last minute to settle is not without merit. The email correspondence filed of record indicate that attempts were made to get hold of the State Attorney to confirm the new trial date of 27 March 2024, all to no avail.

45. Ultimately, the past hospital, medical and related expenses should also have settled but the defendant persisted with an ill-conceived reliance on the doctrine of subrogation and the exclusion of the defendant's liability, in the face of very clear

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<sup>33</sup> Case number 126/2020, Eastern Cape Local Division, Gqeberha, delivered by Van Zyl DJP on 1 December 2022

authority which not only indicates that the doctrine is not a defence to such claim but also that these very defences were rejected by the various Courts I refer to. The failure to plead these defences and consider the ***Discovery Health*** and ***Van Tonder*** findings knowing full well that there are currently no judgments favouring the defendant's views, are viewed with disapproval.

46. The plaintiff's counsel was correct to submit that the defences or issues raised at such a late stage were all meritless. A punitive costs order was not requested but had it been, I would have given serious consideration to granting such order in the circumstances where the defendant failed to plead specific defences, alternatively, failed to amend its Plea; raised defences (which should have been pleaded) in heads of argument; advanced submissions which were not supported by law in this Division (and others), and which were plainly ill-conceived and unmeritorious, all to escape its statutory obligation to compensate a plaintiff such as in this matter. The order which follows includes the agreed terms related to general damages and loss of income as referred to earlier in the judgment.

### **Order**

In view of the above findings and taking into account the agreement between the parties, I grant the following orders:

1. The defendant is liable to pay 100% of the plaintiff's damages arising from her injuries sustained in a motor vehicle accident which occurred on 23 August 2013, as set out below:
  - 1.1 R750 000 in respect of general damages;
  - 1.2 R148 199 in respect of loss of income;
  - 1.3 R272 388, 23 in respect of past hospital, medical and related expenses.

2. The defendant shall provide a 100% undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 as amended, to compensate the plaintiff the costs related to the plaintiff's future accommodation in a hospital, nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff after the costs have been incurred and on proof thereof in respect of the injuries she sustained in the accident.
3. The defendant shall pay the plaintiff's taxed or agreed costs, including the costs of 7 August 2023 and 22 February 2024 when the matter was previously set down for trial, on the High Court scale, as between party and party, including for the sake of clarity, but not limited to:
  - 3.1 The costs attended upon obtaining payment of the capital amounts referred to above;
  - 3.2 The qualifying expenses of the following experts:
    - 3.2.1 Dr T Le Roux (orthopaedic surgeon);
    - 3.2.2 Ms H van Staden (occupational therapist);
    - 3.2.3 Ms C de Villiers (clinical psychologist);
    - 3.2.4 Dr R Bredenkamp (counselling psychologist);
    - 3.2.5 Ms L Hofmeyr (industrial psychologist);
    - 3.2.6 Professor T Zabow (psychiatrist);
    - 3.2.7 Mr PW Ennis (actuary);
  - 3.3 Costs of plaintiff's counsel on scale C.
4. The defendant shall pay the capital amounts referred to in paragraph 1 above directly into the plaintiff's attorneys' trust account within 180 calendar days from the date of this order, however, the defendant will be liable for interest on the capital amount at the applicable interest rate as from 14 court days from date of this order to the date of final payment. The plaintiff shall not proceed with a warrant of execution prior to the expiry of the aforesaid 180-day period.

5. Payment of the taxed or agreed costs set out in paragraph 3 above shall be effected directly into the plaintiff's attorneys' trust account subject to the following conditions:

5.1 In the event that costs are not agreed, the plaintiff agrees to serve the notice of taxation on the defendant;

5.2 The defendant shall make payment of the costs as taxed or agreed within 180 calendar days from the date of taxation or agreement of the costs;

5.3 The plaintiff shall not proceed with a warrant of execution prior to the expiry of the aforesaid 180-day period.

6. The plaintiff's attorneys' trust banking account details are as follows:

|                 |                      |
|-----------------|----------------------|
| Account Holder: | Heyns & Vennote Inc. |
| Bank:           | ABSA                 |
| Account Number: | 0[...]               |
| Branch Code:    | 6[...]               |
| REF:            | C[...]               |

7. It is recorded that the plaintiff and attorney of record will comply with section 4(1) and (2) of the Contingency Fees Act 66 of 1997 and will file the required affidavit with the Registrar of the Court.

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**M PANGARKER**  
**ACTING JUDGE OF THE HIGH**

**COURT**

**For Plaintiff:      Adv A du Toit**

**Instructed by:**     **Heyns & Vennote Inc.**  
                             **Bellville**  
                             **Ms CS Van Heerden**

**For Defendant:**    **State Attorney**  
                             **Cape Town**  
                             **Ms C Thomas**