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

Case No.:8418/2020

In the matter between:

ABDULLAH JAFFER Applicant

and

ROAD ACCIDENT FUND Respondent

Case No.:4092/2021

In the matter between:

IAN HENRY RUDMAN Applicant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 20 MARCH 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] These two matters were heard together although they are not consolidated. Both matters are claims against the Road Accident Fund (RAF) based on road accidents in respect of which it is claimed that, but for the provisions of the Road Accident Fund Act 56 of 1996 (*"the RAF Act"*), the drivers would have been liable for damages incurred by the plaintiffs.

[2] In both matters, the plaintiffs' claims were for damages under the following headings: (a) past hospital and medical expenses; (b) future medical expenses; (c) past and future loss of earnings / earning capacity; and (d) general damages. By the time the matters were heard, all that remained for determination is the claim in respect of past medical expenses, the rest having been settled between the parties.

B. *Jaffer/RAF*

[3] In the case of Abdullah Jaffer (*"Jaffer"*), a collision occurred on 2 February 2019 when an unknown driver of a motor vehicle collided with him (Jaffer) whilst he was cycling. In paragraph 8 of the particulars of claim it is claimed that he suffered past hospital and medical expenses, in an amount reflected in a schedule attached to the particulars, which was to be amended should further vouchers become available. The plaintiff did indeed update the schedule, and by the time of the hearing the expenses claimed amounted to R786 620.71.

[4] The defendant's plea to paragraph 8 of the particulars of claim was set out as follows:

> 7.1 The Defendant bears no knowledge of the allegations contained herein does not admit same and the plaintiff is put to the proof thereof.
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> 7.2 Defendant reserves the right to lead evidence in rebuttal of any of these allegations.
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> 7.3 Defendant specifically pleads that Plaintiff is not at this stage entitled to non-pecuniary loss (general damages) in that defendant has not had an opportunity to correctly assess his claim under this head of damage and is accordingly not able to admit or reject it is a 'serious injury' claim as contemplated by the Act.
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> 7.4 Defendant has a reasonable time to invoke the provisions of Regulation 3(3)(d)(ii) to the Act and in the premises defendant requires that Plaintiff submit himself, at the cost of Defendant to a further assessment to ascertain whether Plaintiff's injuries are serious to be determined in terms of the method set out in the Regulations by a medical practitioner designated by the Defendant.

7.5 Defendant contends that this matter cannot proceed until Plaintiff has submitted himself to the further assessment as referred to herein, and as such that his matter be stayed pending the further assessment.

[5] A few days before the trial the plea was amended, unopposed, to add paragraphs 7.6 to 7.8 as follows:

"7.6 The defendant further pleads if the past medical and hospital expenses were paid by a medical aid the defendant will not be liable to compensate the plaintiff as the plaintiff suffered no loss by the indemnification of the medical aid.

7.7 The medical scheme is obliged to pay for the emergency medical care that was provided by a supplier, as it is a prescribed minimum benefit as envisaged in section 29 of the Medical Schemes Act and cannot be claimed back from the defendant.

7.8 The defendant further pleads that section 19(d)(i) of the Act applies in respect of claims paid by a medical aid, as a medical aid is not a supplier."

[6] Mr Jaffer was the only witness called in his case. He confirmed that he was born on 26 April 1979, and that he was involved in an accident on 2 February 2019 when a motor vehicle collided with him whilst he was cycling. He confirmed the injuries which are set out in his particulars of claim, the period of his hospitalization, as well as the surgery and treatment he received. On 6 June 2019 he lodged a claim with the RAF. His summons was issued on 10 July 2020, and the plea was received on 1 February 2021. He confirmed all the injuries he suffered as a result of the collision, namely:

6.1 Degloving injury to right ear, nose and scalp;
6.2 Left proximal humerus fracture;
6.3 Right fibula fracture;
6.4 Laceration on right upper arm;
6.5 Right radial nerve injury resulting in wrist drop and decreased function of right hand;
6.6 Cardia contusion;
6.7 Soft tissue injury to left leg;
6.8 Head injury.

[7] He confirmed all the amounts, descriptions and dates reflected in the updated schedule of past hospital and medical expenses and vouchers, and that the medical personnel reflected in the schedule did indeed attend to him and issue invoices in the amounts reflected in the schedule. The

total amount of all those invoices is R786 620.71, and all the accounts relate to the same collision. None of his evidence was disputed. Mr Jaffer confirmed that he belongs to the medical aid, Bonnitas, and that they covered most of the expenses, save for an insignificant amount. In cross examination he testified that he was not aware that the RAF does not pay in circumstances where a medical aid has covered the losses.

C. *Rudman/ RAF*

[8] Mr Rudman similarly gave the only evidence in his case. He confirmed that he was born on 4 August 1961, and that the accident in his case occurred on 1 January 2018. He confirmed the injuries which are set out in his particulars of claim, as well as the period of his hospitalisation and surgery which was conducted upon him. He confirmed that an RAF claim was lodged on his behalf on 21 October 2020, and summons was issued on 9 March 2021. The RAF delivered a plea on 11 April 2022.

[9] An updated schedule was similarly submitted on his behalf, which set out his medical expenses, and he confirmed the amounts supported by the vouchers included in the bundle. He also confirmed treatment by the various medical personnel whose names are mentioned in the schedule, as well as treatment by them on the dates mentioned in the schedule. He confirmed that all the amounts reflected in the updated schedule, save for three amounts totaling approximately R2000.00, were covered by his medical aid, Discovery Aid. In total, the expenses reflected in the updated schedule amounted to R107 158.87. None of his evidence was disputed.

[10] As regards the heading of medical expenses, the damages in Rudman's case were set out in similar terms as those in Jaffer, save for differing amounts. Likewise, the RAF's plea was initially in the same terms as the plea in Jaffer, and it was later amended by inserting three paragraphs in similar terms as the amendment in Jaffer. Accordingly, the RAF's defence in both cases is identical.

D. ARGUMENT

[11] The argument between the parties resolved itself into the issues introduced by the amendments to the pleas, the main one being whether the RAF is liable to compensate the plaintiffs

in light of the fact that their medical and hospital expenses were, in the main, already paid by their medical aid schemes. Secondly, whether the medical schemes are obliged to pay for the emergency medical care that was provided by a supplier, as it is a prescribed minimum benefit as envisaged in section 29 of the Medical Schemes Act and cannot be claimed back from the defendant. Thirdly, that section 19(d)(i) of the Act applies in respect of claims paid by a medical aid, as a medical aid is not a supplier.

[12] The RAF relies exclusively on the recent majority decision of the Pretoria full bench in *Discovery Health (Pty) Ltd v Road Accident Fund and another ("Discovery Health 2")*.[1] In that case, Discovery Health had brought an application, for firstly, a declarator that the RAF was in breach of a court order handed down in October 2022 by Mbongwe J of the Pretoria High Court Division in *Discovery Health (Pty) Ltd v Road Accident Fund and Another ("Discovery Health 1")* [2]. The Mbongwe J order had declared unlawful an RAF directive, issued in August 2022, in which the RAF instructed its employees not to make any payments to claimants if their medical scheme has already paid for their medical expenses arising from a road accident. Discovery Health also sought a declarator that the RAF's reliance on two further directives it issued subsequent to Mbongwe J's order perpetuated its breach of that order. The majority held that there was no breach of Mbongwe J's order.

[13] The court in *Discovery Health 2*, however, made a few pronouncements on which the RAF now relies in this case for its amended plea. How ever one may construe that judgment, its one significant feature is a detailed discussion of what were termed 'the second and third directives', which were apparently issued by the RAF on 13 April 2023 and 2 November 2023, respectively. On a reading of the majority judgment, those directives provided the impetus for its conclusions on the issues now relied upon by the RAF in these proceedings. It was in the context of deciding whether or not the second and third directives fell foul of the Mbongwe J order that the remarks were made. Neither of those directives are before me. Neither was pleaded or produced in evidence. In fact, upon my inquiry, I was informed that the RAF refused to make them available

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[1] *Discovery Health (Pty) Ltd v Road Accident Fund & another* (2023/117206) [2024] ZAGPHC 1303 (17 December 2024). (*"Discovery Health 2"*)

[2] *Discovery Health (Pty) Ltd v Road Accident Fund and Another* [2022] ZAGPPHC 768; 2023 (2) SA 212 (*"Discovery Health 1"*).

to the Court, on account of their confidentiality. There is accordingly no basis in this judgment to apply those directives or to rely on them.

[14] As for the first directive which was the subject of *Discovery Health 1*, it too finds no application in these proceedings. It was not disputed before me that its application was with effect from 2 August 2022 to 28 November 2022.[3] The two present matters pre-date that timeframe because the accident in the case of Rudman occurred on 1 January 2018 and his RAF claim was lodged on 21 October 2020, whilst in the case of Jaffer the accident was on 2 February 2019 and his RAF claim was lodged on 6 June 2019. The result is that the RAF cannot rely on any of the directives discussed in *Discovery Health 1* and *Discovery Health 2*.

[15] Furthermore, *Discovery Health 2* did not overturn the findings in *Discovery Health 1*. In fact, both the SCA and the Constitutional Court[4] refused to grant the RAF leave to appeal against the order and judgment in *Discovery Health 1*, and a result, its conclusions are final and *res judicata*. *Discovery Health 2* itself is the subject of an appeal to the Supreme Court of Appeal, although it is not clear when the determination will take place.

[16] Some of the key findings in *Discovery Health 1*[5] were the following: (a) that section 17 of the RAF Act imposes an obligation on the RAF to compensate victims of motor vehicle accidents where bodily injuries have been sustained or death has occurred as a result of the negligent driving of a motor vehicle; (b) that a claim for compensation against the RAF is a delictual claim and is therefore subject to the general rules concerning the quantification of damages for personal injury; (c) that the compensation to which a claimant is entitled is the difference between their patrimonial situation before and after the delict has been committed; (d) that the benefits received by a claimant from a private insurance policy are not considered for the purposes of determining the quantum of a claimant's damages against the RAF. This is because a benefit that accrues or is received from a private insurance policy originates from a contract between the insured claimant and the insurer for the explicit benefit of the claimant. The receipt of such a benefit by the claimant does not exonerate the RAF from the liability to discharge its obligation in terms of the RAF Act; (e) that

[3] See *Discovery Health 2*, footnote [97].
[4] On 31 March 2023 the SCA refused leave to appeal on the grounds that there were no prospects of success, and the Constitutional Court's refusal of leave to appeal was on 18 October 2023.
[5] See para [109] of *Discovery Health 2* and the footnotes mentioned therein.

the RAF Act excludes or limits the RAF's liability in certain instances. It does not, however, provide for the exclusion from its liability where benefits for the same injuries have been received by victims of motor vehicle accidents from a private medical scheme for payment of past medical expenses arising from those injuries; (f) that medical aid scheme benefits which a claimant has received, or will receive, are not deductible from their claim against the RAF for past and future hospital and medical expenses; and (g) that the RAF is not entitled to seek to free itself from its obligation to pay full compensation to victims of motor vehicle accidents under section 17 of the RAF Act.

[17] These findings in *Discovery Health 1* were premised, not only on section 17 of the RAF, but on the common law, as is evident from the judgment's application of *Erasmus Ferreira & Ackermann v Francis*[6], *Zysset and Others v Santam Ltd*[7], *Ntlhabyane v Black Panther Trucking (Pty) Limited and Another*[8]; *D'Ambrosini v Bane*[9] and *Rayi NO v Road Accident Fund*[10].

[18] Barely a week before this trial resumed, the same issues that are raised in these proceedings were raised before Nuku J of this Division, in the matter of *Esack N.O. v Road Accident Fund*[11]. There, the RAF similarly introduced amendments to its plea which are in similar terms to those introduced in these proceedings, placing substantial reliance on *Discovery Health 2*. And similar to the present matters, the RAF argued that the plaintiff had suffered no loss in respect of past hospital and medical expenses because he was compensated by his medical aid which was statutorily obliged to do so. Rejecting these arguments, the court had regard to the development of the common law principle of *res inter alios acta*[12] which is fully developed in our law, in terms

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[6] *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA). See para [20] of *Discovery Health 1*.

[7] *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C). See paras [21] and [26] of *Discovery Health 1*.

[8] *Ntlhabyane v Black Panther Trucking (Pty) Limited and Another* 2010 JDR 1011 (GSJ) See para [22] of *Discovery Health 1*.

[9] *D'Ambrosini v Bane* 2006 (5] SA 121 (C). See para See para [27] of *Discovery Health 1*.

[10] *Rayi NO v Road Accident Fund* (9343/2000) [2010] ZAWCHC 30 (22 February 2010). See para [28] of *Discovery Health 1*.

[11] *Esack N.O v Road Accident Fund* (12926/2017) [2025] ZAWCHC 27 (4 February 2025).

[12] Literally meaning '*a matter between others is not our concern'*.

of which a claimant's right to compensation arising from the RAF Act may not be diminished by third-party payments, in this instance a medical aid.

[19] The court in *Esack*, declined to follow the majority *Discovery Health 2* decision for several reasons, one of which was that it did not follow the *stare decisis* principle by following decisions of the Supreme Court of Appeal and the Constitutional Court. Notable amongst those was the Supreme Court of Appeal decision of *Bane v D'Ambrosi*[13], which had concluded that the Medical Schemes Act did not have the effect of depriving plaintiffs of their claims for hospital and medical expenses in delictual actions. And to the extent that the *Discovery Health 2* decision went against that authority, it gave no reason therefor. But in any event, as the judgment in *Esack* indicates[14] the case in *Discovery Health 2* was not required to, and in fact did not, decide the issue of deductibility of payments made by a medical aid scheme from compensation to be paid to road accident victims. It is therefore clear, based on the very recent authority from this Division, that the defences raised by the RAF, which were introduced by way of the amendments, cannot avail it.

[20] Moreover, there is considerable authority emanating from this Division on the lawfulness of RAF directives which purport to reject medical expense claims in respect of which medical aid schemes had already paid. Two such judgments are *Van Tonder v Road Accident Fund*[15] and *Gunther v Road Accident Fund*[16]. In both cases, the RAF relied on the first directive already adverted to earlier. The court in *Van Tonder* traced the case law regarding the RAF's rejection of medical expense claims in respect of which medical aid schemes had already paid, and concluded that the case authorities went against the position adopted by the RAF in the directive. And, despite applications for leave to appeal all the way to the Constitutional Court, the RAF was unsuccessful. It is worth noting that in *Van Tonder* the same arguments raised in *Esack* and now before me were raised[17], and the court deprecated the attitude of the RAF in the litigation given that the

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[13] *Bane v D'Ambrosi* 2010 (2) SA 539 SCA.
[14] At para 17.
[15] *Van Tonder v Road Accident Fund* (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023) Cloete J.
[16] *Gunther v Road Accident Fund* (24228/16) [2024] ZAWCHC 153 (6 June 2024) Pangarker AJ.
[17] See paragraphs 6 onwards.

Constitutional Court had refused its application for leave to appeal by 18 October 2023 and that there was ample authority against the position adopted in the first directive.

[21] The same arguments were raised in *Gunther*, and the court similarly dismissed the RAF's defence which also relied on the *Discovery Health* 2 majority decision as well as Regulations 7 and 8 of the Medical Schemes Act read with section 19(d)(i) of the RAF Act, which are the bases of the plea amendments in the present cases. That case too set out a very comprehensive study of the case law, including *Van Tonder*, which went against the RAF's position adopted in the first directive.

[22] There is accordingly no doubt that the arguments raised by the RAF in the present matters go against long-established authorities, and that they must accordingly fail. As for the RAF's reliance on the *Discovery Health* 2 majority judgment, as indicated earlier, not only does that judgment go against these established authorities, but this Division has declined to follow it. I consider myself bound by these authorities.

[23] The claims for medical expenses in both matters have otherwise been proved by the plaintiffs, and they must accordingly succeed.

[24] There is also no reason why costs should not follow the result. I accordingly grant orders in the terms of the draft orders handed up on behalf of the plaintiffs, the contents of which are set out below.

E. JAFFER ORDER

[25] In the result, the following order is granted:

CAPITAL (PAST MEDICAL EXPENSES):

1. Pay to the Plaintiff's attorneys the sum of **R786 620,71 (Seven Hundred & Eighty-Six Thousand Six Hundred & Twenty Rand & Seventy-One Cents)** ("the capital") by way of an electronic transfer into the Trust account, details of which are set out in paragraph 8 hereunder.

2. The Defendant shall be liable for interest on the above capital amount from 14 (fourteen) days from the date of this Order being granted until date of final payment at the relevant prescribed rate of interest applicable.

COSTS:

3. The Defendant shall pay the Plaintiff's taxed or agreed costs on High Court Attorney-Client scale.

4. Any taxed or agreed costs incurred on the obtaining of payment of the amount and costs referred to in paragraphs 1, 2 and 3 above.

PAYMENT PROVISIONS:

5. Payment of the taxed or agreed costs reflected above shall be paid within 180 (One Hundred and Eighty) days from date of settlement of the costs.

6. The Defendant shall be liable for interest on the taxed or agreed costs from 14 (fourteen) days of the date of allocatur until date of final payment at the relevant prescribed rate of interest applicable.

TAXATION OF COSTS:

7. The parties agree that the Plaintiff will be entitled to have the costs provided for in this Order taxed by the Taxing Master of the High Court. Plaintiff shall, in the event that costs are not agreed, serve a Notice of Taxation on the Defendant's representative.

F. RUDMAN ORDER

CAPITAL (PAST MEDICAL EXPENSES):

1. Pay to the Plaintiff's attorneys the sum of **R107 158,87 (One Hundred & Seven Thousand One Hundred & Fifty-Eight Rand & Eighty-Seven Cents)** ("the capital") by way of an electronic transfer into the Trust account, details of which are set out in paragraph 8 hereunder.

2. The Defendant shall be liable for interest on the above capital amount from 14 (fourteen) days from the date of this Order being granted until date of final payment at the relevant prescribed rate of interest applicable.

I. COSTS:

3. The Defendant shall pay the Plaintiff's taxed or agreed costs on High Court Attorney-Client scale.

4. Any taxed or agreed costs incurred on the obtaining of payment of the amount and costs referred to in paragraphs 1, 2 and 3 above.

i. PAYMENT PROVISIONS:

5. Payment of the taxed or agreed costs reflected above shall be paid within 180 (One Hundred and Eighty) days from date of settlement of the costs.

6. The Defendant shall be liable for interest on the taxed or agreed costs from 14 (fourteen) days of the date of allocatur until date of final payment at the relevant prescribed rate of interest applicable.

i. TAXATION OF COSTS:

7. The parties agree that the Plaintiff will be entitled to have the costs provided for in this Order taxed by the Taxing Master of the High Court. Plaintiff shall, in the event that costs are not agreed, serve a Notice of Taxation on the Defendant's representative.

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N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicants	:	Adv P Eia
Instructed by	:	A Batchelor & Associates Incorporated A Batchelor
For the respondent	:	State's Attorney Office RAF Attorney C Thomas