

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2020/12687

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE 09/05/2025


SIGNATURE

In the matter between:

NTOKOZO FRANCINA MACHI

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

NGENO, AJ

- [1] This is an application for leave to appeal against a portion of the judgment of this court delivered on 03 February 2025. The application is in respect of an order where the court dismissed the plaintiff's claim for past medical expenses.

- [2] The basis of the court's refusal to award past medical expenses was the agreement that was concluded between the medical scheme and the applicant. The applicant and the medical scheme had agreed that upon settlement of the past medical expenses by the respondent, the settlement amount would be paid over to the medical scheme.
- [3] It was common cause that the medical expenses for the treatment of the applicant's injuries were settled by the medical scheme. In paying for the medical expenses for and on behalf of the applicant, the court reasoned that the medical scheme was discharging a statutory and contractual obligation and cannot recover from the respondent through its member for discharging such obligations.
- [4] The court relying in *Zysset and Others v Santam Ltd*¹, reasoned that payment made by the medical schemes on behalf of its members can never be in the nature of deductible social benefits because such benefits arise from the membership of such member which constitutes a type of indemnity insurance and such matters are between the member and the scheme alone. Any benefit that would be derived from such membership accrues for the benefit of the member alone.
- [5] The court concluded that the payment of the past medical expenses to the applicant and although already settled by the medical scheme would be a benefit that accrues to the applicant only. The court took issue with the fact that there was an agreement to pay over the settled medical expenses to the medical scheme upon settlement by the respondent. Such payment in the court's view would result in the benefit accruing to the medical scheme and not the applicant. Relying on the Full Court's judgment in the *Discovery Health*² matter, the court also concluded that the medical scheme was not entitled to such payment because the principle of subrogation does not apply to it.

¹ 1996(1) SA 273 (C)

² Discovery Health(Pty) Ltd v Road Accident Fund and Another (2023/117206) [2024] ZAGPPHC 1303(17 December 2024).

- [6] The application for leave to appeal is premised on the above reasoning. The applicant contends that the court erred in refusing to award the claim for past medical expenses and has set out various grounds upon which she relies for that contention.
- [7] In order to succeed in application for leave to appeal, the applicant must meet the requirements set out in Section 17 of the Superior Courts Act.³ The applicant's grounds of appeal are based on the provisions of section 17(1)(a)(i) and (ii) of the Superior Courts Act. In order to succeed under these provisions, the applicant must demonstrate that there are reasonable prospects of success in the appeal or there is some other compelling reason why the appeal must be heard including conflicting judgments on the matter under consideration.⁴
- [8] It is important to note that it is not necessary for the applicant to meet both requirements set out under the provisions of section 17(1)(a)(i) and (ii). It suffices to meet either one of those requirements.
- [9] In *MEC for Health, Eastern Cape v Mkhitha*⁵, the Supreme Court held as follows:
- “Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not

³ Superior Courts Act, 2013

⁴ Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 2013

⁵ 2016 ZASCA 176

enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

- [10] In her submissions, the applicant contends that her application meets the two requirements of section 17(1)(a)(i) and (ii) because the judgment of the Full Court relied upon by the *court a quo* is a subject of appeal and is currently before the Supreme Court of Appeal.
- [11] She contends that the Full Court in its judgment in the application for leave to appeal has accepted that its interpretation of the Road Accident Fund Act, its application of the principles of *res inter alios acta*, the non-deductibility of collateral benefits and the purpose of the statutory medical aid cover raises important and difficult questions of law. The applicant argued that in granting leave to appeal to the Supreme Court of Appeal, the Full Court acknowledged that the matter meets the threshold in section 17(1)(a) of the Superior Courts Act
- [12] The applicant further contends that until the matter receives definitive appellate attention, the question of whether medical scheme payments precludes recovery by a member remains an open legal question. There is a plethora of authorities that these payments do not preclude recovery by a member because they are not in the nature of social deductibles. The question that remains open in my view is first, whether the medical schemes can claim from their members what they have paid in discharge of their statutory and contractual obligations and second, whether the principle of subrogation applies to medical schemes. These questions require the attention of the appellate court.
- [13] In its decision to grant leave to appeal to the Supreme Court of Appeal, the Full Court in its judgment reasoned as follows:

*“It has been pointed out already, that the minority judgment did not discuss nor express a view regarding the sustainability of the *res inter alios acta* and subrogation principles but confined the adjudication of the breach of Mbongwe J order to the *res judicata* principle only. The Superior Courts have not authoritatively decided the sustainability of these principles in the context of third*

party claims involving the RAF and medical schemes and it is thus prudent that leave to appeal be granted.

An additional aspect is the standing of Discovery, a medical schemes administrator, to institute such litigation and not the medical scheme itself. These are important issues that call for clarification by the superior Courts. The majority was clear that Discovery has no such standing. The majority found that the principle of subrogation, which has its location and application in indemnity insurance law, finds no application in delictual claims against the RAF, which is a social benefit scheme, funded by public funds and not an insurer. The majority further found that medical schemes have no claim against the RAF after discharging their contractual and statutory duty towards their member. Discovery asserts that the majority erred. The application of these principles requires the attention of the SCA, and it is our view that there are compelling reasons that suggest that leave should be granted. We agree simply because these are important principles of our law and it is in the interests of justice that leave be granted to enable the superior Courts to provide a definitive view and necessary guidance to lower Courts.

- [14] In its opposition to the application, the respondent contended that the appeal concerns a narrow but firmly settled legal issue and there exists no basis for interference either by the Full Court or Supreme Court of Appeal. It further contended that the appeal on the Full Court's judgment is still pending and the law as laid down by the Full Court remains binding until reversed by a higher court.
- [15] I am not persuaded by the respondent's argument for the simple reason that the outcome of the appeal of the Full Court's judgment will definitely have an effect on the applicant's matter. In coming to its decision, the *court a quo* relied heavily on the Full Court's judgment and considered itself bound by it on the basis of the doctrine of precedent.

- [16] In any event, counsel for the respondent conceded during argument that there are some compelling reasons why the appeal should be heard. He did so after he was questioned by the court on whether the existence of conflicting judgments listed in the Full Court's judgment on leave to appeal do not justify that the appeal should be heard.
- [17] Having concluded that there are questions that require the attention of the appellate court and having taken into account the reasons of the Full Court's decision to grant leave against its judgment to the Supreme Court of Appeal, I am persuaded that there are compelling reasons why the appeal should be heard. I am also satisfied that the applicant has established a sound rational basis for believing that another court would likely reach a different conclusion.
- [18] I am of the view that leave should be granted to the Supreme Court of Appeal because the judgment of the Full Court relied upon by the *court a quo* is a subject of appeal which is currently pending before that court.
- [19] In the result, I make the following order:
- 19.1 Leave to appeal is granted to the Supreme Court of Appeal.
- 19.2 Costs shall be costs in the appeal.


T NGENO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

Heard on	:	05 May 2025
Judgment delivered on	:	09 May 2025
For the Applicant	:	Adv N Ferreira Instructed by Tsietsi-Dlamini & Mahlathi Attorneys Alberton
For the Respondent	:	Mr. C Mashao Instructed by Z & Z Ngogodo Attorneys, Johannesburg