IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No: 2533/2019

Reportable	**Yes / No**

In the matter between:

DESIRE VAN SENSIE **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

TILANA-MABECE AJ

[1] The plaintiff instituted an action for damages against the defendant for damages suffered in a motor vehicle collision that occurred on 18 January 2016 in Uitenhage, Eastern Cape. At the commencement of the proceedings, the parties advised the court that most of the heads of damages have been finalised save for the claim in respect of past hospital and medical expenses.

[2] The matter came before me as a stated case in terms of Rule 33 (1) of the Uniform Rules. Below I set out the stated case as placed before me:

'The following facts are common cause

2.1 Plaintiff was involved in a motor vehicle accident on 18 January 2016 at the corner of Union Avenue and Van der Stel Avenue, Uitenhage, Eastern Cape.

2.2 On 4 November 2022 an order was granted by the above Honourable court that, inter alia, defendant is liable to pay to Plaintiff 100% of her damages arising from the bodily injuries which she sustained in the motor vehicle accident which occurred on 18 January 2016.

2.3 Defendant admits that as a result of the collision Plaintiff sustained severe bodily injuries, inter alia:

2.3.1 A neck shoulder and back injury

2.3.2 A head injury

2.3.3 Various bruises and abrasions of the head

2.4 As a result of her injuries, Plaintiff:

2.4.1 She immediately lost consciousness after the impact.

2.4.2 Plaintiff received treatment at the scene of the collision by ambulance staff and was transported from the scene of the collision by ambulance to Cuyler Hospital in Uitenhage where she was stabilized and referred for x-ray and received a drip and medication and was admitted as an in-inpatient. (sic)

2.4.3 Plaintiff was initially seen by a general practitioner and later transferred to an Orthopaedic Surgeon for further care and treatment.

2.4.4 As an in-patient, Plaintiff received various medication in the form of analgesics and anti-inflammatories and was contentiously referred for x-rays and CT scans

2.4.5 A neck brace was placed on Plaintiff's neck to stabilize it.

2.4.6 Plaintiff received physiotherapy and on-going in-patient treatment until her discharge on 25 January 2017.

2.4.7 Plaintiff received medical treatment by various medical providers. (The aforesaid medical treatment received by Plaintiff as a consequence of the injuries she sustained in the collision are hereinafter collectively referred to as "the medical treatment").

2.5 In terms of the Discovery Rules:

2.5.1 Discovery Health was obliged to pay the hospital and medical expenses in respect of the medical treatment which Plaintiff received as a consequence of the injuries that she sustained in the motor vehicle collision on 18 January 2016.

2.5.2 By virtue of Plaintiff's membership of the Discovery Health, she is bound by the Discovery Health Rules.

2.5.3 Plaintiff was obliged to lodge a claim with the Defendant.

2.5.4 Plaintiff is obliged to reimburse the Discovery Health, any amounts recovered from Defendant which were paid by the Discovery Health

2.6 Plaintiff received medical treatment and incurred medical expenses ("the medical expenses arising from the injuries sustained in the collision on 18 January 2016.

2.7 A schedule of the medical expenses claimed in the sum of R37 792.83 (showing the service providers, the account numbers, the dates that the services were provided, the amounts clamed and the amounts paid by Plaintiff and Discovery Health) is attached hereto and marked "A".

2.8 Plaintiff, at the time of the collision and when receiving the aforesaid medical treatment, was a member of the Discovery Health Medical Scheme ("Discovery") with membership number 5636890.

2.9 Discovery paid the costs incurred in respect of the medical expenses in the sum of R34 534.27 to the relevant service providers.

2.10 Discovery paid the aforestated medical expenses pursuant to Plaintiff's membership of Discovery and by virtue of the contractual arrangement between itself and Plaintiff as well as owing to its statutory obligation in terms of the Medical Schemes Act No. 131 of 19198 and the Regulations thereto, and as further set out in Plaintiff's Medical Benefit Plan and in accordance with the Rules of the Discovery health Medical Scheme registered under the Medical Schemes Act No.131 of 7998,which were registered with the Registrar of Medical Societies on 19 November 2010 ("the Scheme Rules")

2.11 Defendant admits that past medical and hospital expenses in the sum of R34 534.27 were paid in respect of Plaintiff's medical treatment by Discovery to service providers.

2.12 Defendant admits that past medical and hospital expenses in the sum of R3 258.56 were paid over by Plaintiff personally to service providers.

2.13 Defendant admits that the medical treatment paid by Plaintiff personally and by Discovery to service providers was reasonable and necessarily incurred in respect of plaintiff's injuries.

2.14 Defendant admits being liable to pay to Plaintiff the sum of R3 258.56 in respect of Plaintiff's claim for past hospital and medical expenses which were paid by Plaintiff personally to service providers.

SUBMISSIONS

3. Plaintiff contends that by virtue of the provisions of Section 17 of the Road Accident Fund Act,56 of 1996 as amended:

3.1 Defendant is liable to compensate all victims of motor vehicle accidents when injuries have been sustained as a result of the negligent driving of a motor vehicle, that this includes past hospital and medical expenses.

3.2 Plaintiff contends that the benefits that she received from her private medical aid scheme, Discovery, in respect of her past medical and hospital expenses do not exclude Defendant's liability to compensate a third party in terms of the Road Accident Fund Act.

3.3 Defendant contends that the Discovery Health Scheme was obliged in terms of Regulation 8 of the Medical Schemes Act, 131 of 1998 to render full payment, without deductible in respect of all prescribed minimum benefits and all emergency medical services as defined in Regulation 7 of the Medical Schemes Act.

3.4 As a consequence of the Discovery Health Scheme having made payment of Plaintiff's past hospital and medical expenses in terms of its statutory obligation, defendant is not in law liable to compensate Plaintiff for such relevant portion of the claim as were paid by the Discovery Health Scheme.

4. Defendant as a consequence of what is set out in paragraph 3 above denies being liable to Plaintiff in the sum of R34 534.27 in respect of Plaintiff's claim for past hospital and medical expenses paid by the Discovery Health Scheme to service providers.

DECISION REQUIRED

5. The Honourable court is accordingly requested to decide whether Defendant is liable to pay to Plaintiff the admitted amount of R34 534.27 for past medical and hospital expenses paid by Discovery Health.

6. The parties have agreed to the appropriate costs order on the facts of this matter to be on the scale as between party and party, with counsel's costs being allowed on Scale C in terms of Rule 69(7) of the Uniform Rules.'

[3] During argument, Counsel for the Plaintiff submitted that the decisions in this division with regards to the claim for past hospital and medical expenses have always favoured the plaintiff and that there is no reason for the court to deviate from that. He referred to a number of cases and also provided copies of judgments mostly from this division, for which I am grateful. No further material submissions were made other than the breakdown of the proposed order sought by the plaintiff.

[4] The defendant, relying on the latest judgment in *Discovery Health (Pty) Ltd vs Road Accident Fund and another*[1], denies being liable to the plaintiff for the payment of R34 534.27 for plaintiff's past hospital and medical expenses. According to the defendant Discovery Health Scheme was obliged in terms of Regulation 8 of the Medical Schemes Act 131 of 1988 to render full payment, without co-payment and without deductibles in respect of all prescribed minimum benefits and all emergency medical services as defined in Regulation 7 of the Medical Schemes Act. Consequently, Discovery, having paid the Plaintiff's past hospital and medical expenses in compliance with its statutory obligation, defendant is not liable to compensate the plaintiff for the part already paid by the medical aid.

[5] I am required to determine whether the Defendant is liable to pay the plaintiff the admitted amount of R34 534.27 for past medical and hospital expenses already paid by Discovery to the service providers based on the stated case and without hearing oral evidence.

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[1] (2023/117206) [2024] ZAGPHC1303 (17 December 2024).

[6] It is generally accepted that rule 33 of the Uniform Rules of Court seeks to facilitate the expeditious disposal of litigation. Regrettably, it has been noted the application of the rule often produces the opposite results. Notably, subrule 33(1) provides that the parties to the dispute may agree upon a written statement of facts in the form of a special case for adjudication. In such circumstances the court is obliged to adjudicate the special case presented to it.

[7] The rule provides as follows:

> *'(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.*
>
> *(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party, or where a party sues or defends personally, by such party.*
>
> *(b) ……...*
> *(c) ……..…'*

[8] The general principle governing the conduct of a stated case in civil proceedings is that the parties are limited to the four corners of the stated case and without regard to the pleadings or oral evidence. The parties may not raise issues not agreed upon in the stated case and introduce new argument outside their stated case[2]. Likewise, the court is also confined to what is set out in the stated case.

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[2] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC).

[9] The perusal of the stated case as presented indicates that the document was not signed by both an advocate and an attorney on behalf of each party as stipulated in the rules. Instead, it was signed by the parties' attorneys only, Boqwana Burns Inc as plaintiff's attorneys of record and the State Attorney on behalf of the defendant. This is contrary to what Rule 33(2)(a) provides. Clearly the document presented as a stated case falls short of what the rule provides. The rule couched in peremptory terms and the failure to have the stated case signed by an advocate breached a peremptory provision. Notwithstanding, in the interest of justice, and in view of what I regard as substantial compliance in absence of prejudice I am compelled to exercise my discretion and condone the non-compliance.

[10] My approach is buttressed by the principles articulated by the court *in Ncoweni v Bezuidenhout*[3] where the court held:

> 'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice.'

The court went on to say:

> '[I]t is desirable to repeat what is of general application, namely, that the Court does not exist for the Rules but the Rules for the Court.'

[11] In *Trans-African Insurance Co Ltd v Maluleka*,[4] in upholding the dismissal of an application to cancel an admittedly defective summons, the court held:

> 'But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

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[3] 1927 CPD 130 at 130.
[4] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) ALL SA 382 A.

[12] The above stated dicta emerged from general principles of our common law applied prior to the coming into effect of the Constitution. In my view, they accord with the principles of the Constitution and supports the constitutional right to have disputes adjudicated in a fair public hearing.[5] It is generally accepted that overly technical approaches to hinder the courts deciding of genuine disputes between parties are to be strongly discouraged. In my view, the present matter clearly falls within the ambit of a peremptory requirement whose breach can be condoned.

[13] It is trite that a claim for patrimonial loss for bodily injury is compensatory in nature and does not embody a punitive element.[6] In principle a plaintiff is not entitled to receive double compensation, and the wrongdoer ought not to be relieved of liability by reason of some gratuitous event. Accordingly, a plaintiff is only entitled to compensation to the extent of the reduction of his patrimony caused by the wrongful and negligent act of the wrongdoer.

[14] The above stated principle was articulated in *Zysset and Others v Santam Ltd*[7] was articulated as follows:

> *'*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

[5] Section 34 of the Constitution.
[6] *Union Government v Warneke* 1911 AD 657 at 662 and 665-667.
[7] 1996 (1) SA 273 (C) at 277.

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.

[15] This has been the attitude adopted by our courts and in particular this division, in dealing with a claim for past hospital and medical expenses. In this case the defendant admits the past hospital and medical expenses paid by the medical aid in respect of the plaintiff's medical treatment but denies liability to reimburse plaintiff for same. The plaintiff placed its reliance on Section 17 of the Road Accident Fund Act and the previous judgments of this division supported by various judgments of the SCA.

[16] In this division there is a lengthy list of decisions on this issue against the RAF where the court found in favour of the plaintiff and ordered the defendant to pay to the plaintiff the medical costs based on the principle of subrogation and *res inter alios acta*. I have been provided with copies of judgments but for the present purposes reference will be made to a few. One of the cases is the unreported judgment in *Noxolo Lynette Malgas v The Road Accident Fund*[8] where van Zyl DJP made the following remarks:

> 'The question raised by the plea is whether the payment of the plaintiff's medical expenses by the medical aid relieve the Fund from paying compensation to the plaintiff in respect of her past medical expenses. There exists no reason to make any distinction between an ordinary insurance contract and the contract which existed between a medical scheme and its members. A medical aid is in essence simply another form of insurance. In D'Ambrosi v Bane (2006 (5) SA 121 (C) and others the court rejected the argument that payments received from a medical aid scheme should be treated as a benefit that must be deducted from the plaintiff's claim for compensation for future medical expenses. It found that a medical aid scheme, like the one the plaintiff in that case was a member of, was in substance a form of insurance. The court quoted with approval the following

[8] (126/2020) [2022] ZAECQBHC 50 (1 December 2022).

passage in Thomson v Thomson (2002 (5) SA 541 W): A medical aid scheme is, if not in law then in substance a form of insurance. One pays a premium against which there may be no claim or claims less than the value of the premiums, or claims which far exceed the value of premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme.'

[17] Similarly in *Charlene Magdalene Minnies v Road Accident Fund*[9] the court as per Eksteen J held that a contract between the scheme and the member is in substance an indemnity insurance as explained in Thomson v Thomson above. The court went on to state (par 27):

'In the case of indemnity insurance agreements, such as that which existed between Ms Minnies and the scheme, three basic rules of law have emerged: that the wrongdoer is not entitled to benefit from the fact that the person wronged was insured; that the insured may not be enriched at the expense of the insurer by receiving both the insurance indemnity and the damages from the wrongdoer; and that the insurer replaces the insured; ie that the insured is subrogated by the insurer which entitles the insurer to claim the loss from the wrongdoer. The effect of these rules is that once the scheme has paid out the medical expenses, as it is obliged to do in terms of its contract with its member, it acquires the right under the principle of subrogation to recover its loss form the wrongdoer.''

[18] The same sentiments were echoed by Noncembu J in the unreported case of Lulama Somia Manyathela v Road Accident Fund case number 254/2021, also in the Eastern Cape Division. It should be noted that the common feature in the cases referred to above is the application of the common law principles applicable to insurance law and in particular the *res inter alios acta* and subrogation. It is clear from the reasoning in these cases that the court found no reason to differentiate between insurance and medical schemes. Notably, the above stated judgments

[9] (2675/2022) [2024] ZAECQBHC 18 (27 February 2024).

emanate from a court presided by a single judge. Unfortunately, a diligent search for a full court decision on this aspect from this division, did not yield positive results.

[19] I have not come across a judgment in this division or anywhere in the country, where a clear distinction was drawn between medical schemes and insurers save for the recent majority judgment in *Discovery Health (Pty) Ltd vs Road Accident Fund* and another[10]("Discovery judgment"). Like in the present case, at the heart of the matter was the RAF's liability to pay past medical and hospital expenses for road accidents victims that were already settled by medical aid scheme and the court had the following to say:

> 'While it may be permissible in everyday exchanges to refer to medical scheme benefits as health insurance, they are in fact a distinct entity from insurance; the nature of the contract between an insured and insurer is different from that between a scheme member and a medical scheme; the institutions that offer these two are governed by separate and distinct legislation. In fact, to equate a medical scheme and its benefits to an indemnity insurer is to cause all over again the very mischief that the Demarcation regulations were meant to address.'[11]

The court went on further to state that:

> 'It is time that we confront the reality that the principle of subrogation, which applies to insurance, does not apply in the context of medical schemes. In further considering the issue, one must take into account that the RAF is not an insurance entity and its sole means of income is not premiums as is the case with insurers but a fuel levy.'

[20] Medical schemes are governed by Act 131 of 1998 and are regulated by the Council for Medical Schemes. They derive their income from member contributions and investment returns. Whilst indemnity insurance is primarily governed by the Short-term Insurance Act 53 of 1998 (SITA) and their source of income comes from

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[10] Footnote 1.
[11] Discovery, fn 1, para 46.

the premiums paid by its members. Conversely, the defendant is not an insurance and derives its income from the fuel levy.

]21] It is common cause that Discovery paid the past hospital and medical expenses by virtue of the contractual arrangement between itself and the plaintiff. By so doing, Discovery discharged the obligation, towards its member, in terms of the law and the private contract entered into between the parties. Such a contract is only binding between the parties and not third parties like the defendant in this case. Therefore, Discovery cannot be compensated through the member what has been paid in discharge of its contractual and statutory obligation. This can be deduced from what the court said at paragraph 92 of the Discovery judgment, where it stated:

> 'The challenge facing Discovery Health and the medical schemes it represents goes beyond questions of interpretation of its rules. The rules published by the Discovery Medical scheme are only for its members and the scheme and not third parties like the RAF. The rule dealing with recovering from the RAF what the scheme has paid in discharge of its contractual and statutory obligations is a rule of Discovery Medical Scheme's own making. It cannot bind third parties, including the RAF. The Government Employees Medical Scheme (GEMS), the third largest scheme in the country, does not oblige members in its rules to claim any past medical expenses from the Fund. Conceivably, GEMS accepts that it cannot recover what it is statutorily required to pay by way of PMB's and EMC's from the RAF.'[12]

[22] Most importantly, the findings of the court relating to *res inter alios acta,* subrogation and the transplantation of insurance law principles to medical scheme are hard to ignore. Consequently, I align myself with the majority decision in the Discovery judgment. I am saying this not losing sight of the principle of stare decisis. It is important to note that the practice of the doctrine of precedent does not negate the need for the courts to reach decisions on the basis of sound legal reasoning and value judgment and in particular, where circumstances have changed necessitating a departure from the long well-established principle. Sometimes a more flexible

[12] Paragraph 92 discovery judgment.

approach to the practice of precedent is warranted. Moreover, in my approach, I have also taken into consideration the provisions of section 39 and 173 of the Constitution of the Republic of South Africa and various case law as it will appear below.

[23] In dealing with the issue of *stare decisis* the Constitutional Court in Turnbull-Jackson v Hibiscus Coast Municipality and Others[13] had this to say:

> "The doctrine of precedent decrees that only the *ratio decidendi* of a judgment, and *not obiter dicta*, have binding effect. The fact that *obiter dicta* are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as *obiter* what is otherwise binding precedent. Only that which is truly obiter may not be followed. But, depending on the source, even *obiter dicta* may be of potent persuasive force and only departed from after due and careful consideration."

[24] Whilst in S v Ndhlovu[14] the court observed as follows:

> '[t]he doctrine of stare decisis is such an easy haven in which to take refuge that it often stultifies any attempt to reconsider an old established principle which may be wrong. ... I would prefer to consider (counsel's) ... argument on its merits, and if, in the circumstances, I was persuaded that his argument was right, I would think this Court should have no hesitation but to adopt it, notwithstanding the vast body of opinion against his argument'.

[25] Also, in National Chemsearch (SA) (Pty) Ltd v Borrowman[15] the court noted:

> "[i]nfunctioning under a 'virile, living system of law', a judge must not be fainthearted, and when he is morally convinced that justice requires a

[13] [2014] ZACC 24.
[14] 1979 4 SA 208 (ZR) 215.
[15] 1979 3 SA 1092 (T) 1101.

departure from precedent he will not hesitate to do so; but on the other hand he must guard carefully against being over-bold in substituting his own opinion for those of others, lest there be too much chopping and changing and uncertainty in the law".

[26] As indicated earlier in this judgment, the decisions of this division emanate from single judges and as a single judge, I am entitled to differ from the judgments of other single judges. In this instance, I am persuaded by the Discovery judgment that the earlier decisions in this division are now wrong and the correct approach is to follow in the steps of the full court in the Discovery judgment. In terms of that judgment there is a difference between medical schemes and insurers, and therefore, insurance law principles ought not to be automatically transplanted to medical schemes. Additionally, an agreement between a medical scheme and a member is only binding *inter partes*. In my view, the findings in the Discovery judgment suggest that the precedents no longer fit the present and that necessitates a deviation from the norm. Consequently, the plaintiff's claim for past hospital and medical expenses cannot succeed.

[27] Turning to the issue of costs, the parties agreed that costs be awarded on a party and party scale with Counsel's fees being allowed on Scale C in terms of Rule 69(7) of the Uniform Rules. The general principle is that costs should follow the cause unless there is a reason to deviate. I have indicated at the beginning of the judgment the inherent challenges that come with the stated case. Taking into consideration the shortcomings in respect of Rule 33(2) and the need for guidance and authority in the light of conflicting judgments on the matter, it is fair that each party pays its own costs.

[28] In the result, I make the following order:

28.1 The non-compliance with Rule 33(2)(b) is condoned.

28.2 The plaintiff's claim for past hospital and medical expenses is dismissed.

28.3 Each party to pay its own costs.

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S TILANA-MABECE
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Date Heard: 13 February 2025
Date Delivered: 13 May 2025

Appearances

For the plaintiff:	Mr Frost
Instructed by:	Boqwana Burns Inc.
	GQEBERHA
For the Defendant:	Ms Naidoo
	State Attorney
	GQEBERHA