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

JUDGMENT

REPORTABLE

Case No: **5213/2021**

In the matter between:

LISA BASSON

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

**Neutral citation: *Lisa Basson v Road Accident Fund* (Case No. 5213/2021)
[2025] ZAWCHC ... (30 May 2025)**

Heard: 16 May 2025

Delivered electronically: 30 May 2025

SALIE AJ

INTRODUCTION:

- 1] The plaintiff instituted an action for damages against the defendant for damages suffered in a motor vehicle collision that occurred on 9 March 2019 at or near Sandbaai, Hermanus, Western Cape.
- 2] The plaintiff suffered a pelvic fracture (CT scan showed multiple bilateral pelvic fractures involving the inferior pubic ramus, the left superior pubic ramus, the right anterior acetabular wall, extending into the right hip joint, together with a short fracture through the right sacral iliac; burns to the left shoulder and an injury to the left thigh.
- 3] At the commencement of proceedings, the parties informed the court that the only issue for determination is the liability of the defendant to pay past and hospital and medical expenses.

THE AMENDED PLEA:

- 4] At the hearing defendant introduced its amended plea by consent between the parties. It reads as follows:
 - a) ***“The defendant denies liability for these expenses (medical expenses, past hospital and medical expenses) and the plaintiff is put to the proof thereof.***
 - b) ***The defendant pleads that in terms of the Medical Schemes Act 131 of 1998, which provides that a medical aid scheme is compelled to pay certain expenses incurred by its members and consequently he is unable to contract out of such obligation.***
 - c) ***The defendant pleads that the plaintiff's medical aid, Discovery Health, cannot contract out of such an obligation to pay these expenses; by entering into an agreement with the plaintiff to claim back the amount it has paid on behalf of the member.***

- d) ***The defendant pleads that the medical scheme is compelled to disburse medical treatment to the plaintiff as a prescribed minimum benefit and he is entitled to under the Medical Schemes Act, hence no loss is suffered by the plaintiff as the third party in the action.***
- e) ***The defendant pleads that these expenses claimed by the plaintiff constitutes emergency medical care which falls within a basket of care listed in Regulation 8 of the Medical Schemes Act, which basket of care is further defined as prescribed minimum benefits, which Discovery Health has undertaken to pay on behalf of the members.***
- f) ***The defendant specifically pleads that Discovery is prohibited from contracting out of its statutory obligations under Medical Schemes Act, No. 131 of 1998, (The Medical Schemes Act) in terms of Section 29(o) and (p) of the same Act, which is tantamount to an exclusion of the defendant's liability in terms of Section 19(d)(1) of the RAF Act."***

5] The key question premised on the amended plea and later amplified in the stated case which must be answered, *in casu*, is whether a case has been made by the defendant based on policy consideration of fairness, equity and reasonableness to disavow plaintiff's claim for her past hospital and medical expenses.

STATED CASE:

6] The parties presented a stated case in terms of Rule 33(1) of the Uniform Rules. In essence, the stated case which I deem necessary to reproduce, states the following:

1. *“On or about 9 March 2019, the plaintiff sustained certain injuries in a motor vehicle accident.*
2. *As a result of the injuries and the sequelae thereof, the plaintiff incurred hospital- and medical expenses in the sum of R265 609.97.*
3. *The parties agree that an amount of R60 756.63 is due and owing to the Plaintiff. Thus, the amount of past medical and hospital expenses in dispute is R204 853.34*
4. *The parties agree that for purposes of argument, the past medical and hospital expenses in dispute and paid by Discovery Medical Scheme, constitutes Prescribed Minimum Benefits (PMB) and Emergency Medical Care (EMC), in accordance with the Medical Schemes Act, no. 131 of 1998 [“the Act”].*
5. *At all material times:*
 - 5.1. *the plaintiff was a member of a medical aid scheme, to wit, Discovery;*
 - 5.2. *the hospital- and medical expenses were paid by Discovery;*
 - 5.3. *the plaintiff has contracted with Discovery to reimburse the scheme for any amount paid by the defendant for past hospital- and medical expenses.*
6. *The defendant disputes its liability to compensate the plaintiff for the past hospital- and medical expenses (Other than the agreed amount of R60 756.63) on the following grounds:*
 - 6.1. *The Act provides that a medical aid scheme is compelled to pay certain expenses incurred by its members and is consequently unable to contract out of such obligation;*
 - 6.2. *Plaintiff’s medical aid cannot contract out of the obligation to pay these expenses by entering into an agreement with its member to claim back the amount paid on behalf of the member;*

- 6.3. *the medical aid scheme is compelled to disburse medical treatment to Plaintiff as prescribed minimum benefits that she is entitled to under the Act and hence Plaintiff has suffered no loss as the third party in this action;*
- 6.4. *the expenses claimed constitute emergency medical care, which falls within the ambit of care listed in Regulation 8 of the Act, which care is further defines as prescribed minimum benefits which the medical aid scheme has undertaken to pay on behalf of its members;*
- 6.5. *the medical aid scheme is prohibited from contracting out its statutory obligations under the Act in terms of Section 29(o) and (p), which is tantamount to an exclusion of Defendant's liability in terms of Section 19(d)(i) of Act 56 of 1996.*
- 7. *In essence, the defendant pleads in relation to Section 19(d)(i) that, because the plaintiff as a member of the medical aid scheme (as opposed to an insurer) has agreed to reimburse such scheme any amounts paid over by the scheme to service providers, such amount or an agreement falls within the exclusionary provisions of the sub-section and outside the scope of the principle of subrogation.* (emphasis added)

PLAINTIFF'S CONTENTIONS:

- 7] The plaintiff contends, by virtue of the provisions of Section 17 of the Road Accident Fund Act, 56 of 1996 ("the RAF Act"), as amended, and read together with the *proviso* that the plaintiff contracted with Discovery to reimburse the scheme with any amount paid by the defendant in relation to past hospital and medical expenses.
- 8] The plaintiff also relied on the minority judgment of **Discovery Health (Pty) Ltd v Road Accident Fund and Another 2023 (2) SA 212 (GP)**

(“discovery health 2”),¹ in that the defendant is, in law, liable to compensate the plaintiff in respect of past medical and hospital expenses which the medical aid paid on behalf of the plaintiff. In this regard, the plaintiff had relied on a number of judgments in this Division,² enforcing her claim.

DEFENDANT’S CONTENTIONS:

- 9] In short, defendant relies on the majority judgment in **Discovery Health (Pty) Ltd v Road Accident Fund and Another, Case No.: 2022/016179, 27 October 2022 (“discovery health 1)**, and the statutory obligation on the Medical Aid Schemes Act, namely Section 29(o) and (p), together with the alleged exclusion of defendant’s liability in terms of Section 29(d)(a) of the RAF Act, where the following is stated at [20] to [21]:

“[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

¹ Discovery Health (Pty) Ltd v Road Accident Fund, Case No. 2023/117206 [2024] ZAGPPHC 1303; [2025] 2 All SA 113 (GP); 2025 (3) SA 225 (GP) (17 December 2024)

² Van Tonder v Road Accident Fund (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023); Fookwe v Road Accident Fund (23481/2016) [2024] ZAWCHC 115 (20 April 2024); Ganthi v RAF, 6 June 2024; Essack NO v RAF, 4 February 2025; Jaffer v RAF, 20 March 2025; Strubel v RAF, 10 April 2025

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 Joss 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."

[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."

- 10] Defendant contends further that the expenses claimed constitute emergency medical care, which falls within the ambit of care listed in Regulation 8 of the

Medical Schemes Act, 131 of 1998 (“the Act”) and ought not to be deducted from the common law claim, and relies on the following passage:

“[92] 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.”

- 11] In addition to the above, defendant contends that the medical aid scheme is prohibited from contracting out of its statutory obligation under the Act, in terms of Section 29(o) and (p), which is tantamount to an exclusion of defendant's liability in terms of Section 19(d)(i) of the RAF Act.

DISCUSSION:

- 12] It is trite that a claim for patrimonial loss for bodily injury is compensatory in nature and does not embody a punitive element.³
- 13] 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 fortuitous event. Accordingly, plaintiff is entitled to compensation to the extent of the reduction of his patrimony caused by the wrongful and negligent act of the wrongdoer.

³ **Union Government v Warneke 1911 AD 657 at 662 and 665 - 667**

- 14] The approach to the deductibility of benefits has been restated on several occasions and can now be settled, in that benefits resulting from damage caused event are generally deducted, however, there is no clear prudential basis for deciding what benefits are collateral; the enquiry mainly involves considerations of public policy and equity.⁴
- 15] It is common cause that Discovery paid the past hospital and medical expenses by virtue of a contractual arrangement between itself and the plaintiff. By doing so, Discovery discharged its contractual obligation towards the plaintiff in terms of law and the private contract entered into between the parties. Such a contract is only binding between the parties to the contract, and not third parties, such as the defendant in this matter.⁵
- 16] It bears emphasis that, pursuant to Section 29(2) of the Medical Aid Schemes Act, the medical aid shall, in the event of a failure to repay any debt due to the medical aid scheme, be entitled to cancel the contract of its member.⁶ The defendant has accepted that plaintiff, upon a successful prosecution of her claim, had contracted with Discovery to reimburse the scheme for any amount paid by the defendant in relation to the past medical expenses.⁷
- 17] The majority in **Discovery Health 2**,⁸ concludes that Discovery Health has never claimed to be an insurer, much less an indemnity insurer, nor is it its

⁴ **Road Accident Fund v Lechner** (711/10) [2011] ZASCA 240 (1 December 2011), at [12]; **Zysset v Santam Ltd** 1996 (1) SA 273 (C) at 279C; **Standard General Insurance Co Ltd v Dugmore** NO 1997 (1) SA 33 (SCA) at [41]

⁵ Stated Case, sub-paras 5.1 to 5.3

⁶ Section 29(2): “(2) *A medical scheme shall not cancel or suspend a member’s membership or that of any of his or her dependants, except on the grounds of— (a) failure to pay, within the time allowed in the medical scheme’s rules, the membership fees required in such rules; (b) failure to repay any debt due to the medical scheme; (c) submission of fraudulent claims; (~ committing any fraudulent act; or (e) the non-disclosure of material information.*”

⁷ Stated Case, sub-para 5.3

⁸ **Discovery Health 2023 (2) SA 212** (“**Discovery Health 2**”): “[23] The liability of the RAF is excluded or limited in certain instances: 23.1 The provisions of section 18 expressly exclude benefits received under COIDA or the Defence Act from the calculation of the claimant’s damages in terms of the RAF Act. This is in circumstances where the victim of a motor vehicle accident is also entitled to compensation under the Compensation for Occupational Injuries and Diseases Act 103 of 1993 (“COIDA”), or the Defence Act 42 of 2002 (“Defence Act”).”

case that it represents insurers. It bears emphasis, that inasmuch as Discovery Health has not claimed to be an insurer, much less, an indemnity insurer⁹ this matters not -as in my view it remains an incorporated medical aid society governed by its own rules and regulation, ie., that only a member, duly registered, would be entitled or disentitled to its benefits as per the terms of the contract concluded.

- 18] I respectfully agree with the Minority Judgment in **Discovery Health 2**,¹⁰ wherein Opperman J states:

“... Whether the payment by the medical aid scheme was made pursuant to its contractual or its statutory obligations does not seem to me to be relevant to what the RAF’s statutory obligations are, which is to pay claims. To carve out from the term “expenses” the portions labelled prescribed minimum benefit costs and emergency medical condition costs and to contend that such lesser, ‘carved out’ costs are excluded because they derive from another statute not a private contract, in my view, cannot hold.”

- 19] Further, Opperman J concludes that the Medical Aid Schemes Rules are given statutory force and are binding upon a scheme and its members by virtue of Section 32 of the Medical Aid Schemes Act:¹¹

“[115] Medical aid schemes’ rules are given statutory force and are binding upon the scheme and its members by virtue of section 32 of the MSA. Discovery Health contends, and it was not disputed on the papers before us, that it is a standard requirement of medical aid

⁹ *Discovery Health v Road Accident Fund 2*, at [46]: “Certain benefits are considered while others are not considered in the calculation of the claimant’s claim for damages against the first respondent. It is trite that social-security benefits a claimant receives from the state are deductible from compensation the first respondent is liable for. The reason for this is founded on the principle that delictual damages are meant to restore the claimant to the position he was in prior to the commission of the delict and that he should not unduly benefit by receiving double compensation for his/her loss (see *Zysset v Santam Ltd 1996 (1) SA 273 (C)* at 277H-279C.”

¹⁰ At [113]

¹¹ Dissenting judgment of Opperman, at [115]

schemes' rules for their members to reimburse the medical scheme for payments in respect of past medical expenses recovered from the RAF, which obligation does not arise until such time that there is a successful recovery of the past medical expenses by the claimant from the RAF. The statutory obligation on the medical aids to pay PMB's and EMC's does not detract from the RAF's obligation to do what its statute obliges it to do as the Mbongwe J decision¹² affirmed. The provisions of the MSA and the RAF Act should be interpreted together and harmoniously in order to avoid conflicts. To interpret the MSA in the manner suggested in the first judgment would lead to the result that the one Act, the MSA, authorises reimbursement and the other, the RAF Act, prohibits it."

- 20] In **Lechner**,¹³ the SCA was called upon to characterize the benefit that the claimant received from a foreign insurance company which, in essence, was constituted in terms of the German Social legislation and in terms whereof plaintiff in that matter was required to repay what she had claimed from the RAF in the event of her being successful in a delictual claim. The SCA concluded as follows:

"[19] I accept that the premiums paid by Ms Lechner bore no direct relationship to the risk insured. In this sense the scheme to which she belonged differed from the usual private medical schemes. But it is beyond dispute that she enjoyed benefits as a voluntary member at the time of her accident. The fact that she later at times became a compulsory member after her accident, which was forced upon her because of the injuries she sustained in the accident, cannot in my view change the situation. Crucially, as I have mentioned, she received her benefits in return for her contributions. Had she ceased paying contributions, her benefits would also have ceased, or later been

¹² **Discovery Health (Pty) Ltd v Road Accident Fund and Another**, Case No.: 2022/016179, 27 October 2022 ("Discovery Health 2")

¹³ **RAF v Lechner** (711/10) [2011] ZASCA 240 (1 December 2011)

suspended. In my view this is sufficient to render the benefits received from the KKH res inter alios acta as far as the Fund is concerned.

[20] Moreover, as Mr Potgieter accepted on behalf of the Fund, there is no question of Ms Lechner receiving double compensation by virtue of the German legislation referred to earlier. Instead he submitted that the ultimate question in this matter is whether the Ms Lechner's expenses are to be paid for by the South African or German taxpayer. He further submitted that it would be contrary to public policy for this country's taxpayers to reimburse the KKH for expenses incurred in the execution of its statutory mandate."

21] Defendant's argument that the plaintiff's medical aid scheme was compelled to settle plaintiff's medical bills as prescribed minimum benefits, and having done so, plaintiff had not suffered any loss as a third party, falls to be rejected for the following reasons:

- a) firstly, **Discovery Health 1**¹⁴ conclusively dealt with the three directives which deprived plaintiffs from claiming past medical expenses. These arguments had been dealt by Mbongwe J who concluded that plaintiffs were entitled to their past medical expenses. That matter had become *res judicata* insofar as defendant is concerned, as the SCA as well as the Constitutional Court refused the RAF leave to appeal:
- b) secondly, *in casu*, the RAF advanced the argument that it did not rely on any directive dealt with in **Discovery Health 1**; hence I am bound by the terms of the contractual relationship entered into between the parties as ensconced in the stated case.
- c) thirdly, plaintiff is entitled to damages against the defendant and placed in the same financial position had the collision not occurred.

¹⁴ (2022/016179) [2022] ZAGPPHC 768 (26 October 2022) ("Discovery 1")

In my view RAF Act must trump the Medical Schemes Act which in essence caters for the consolidation, registration of medical aid schemes and the protection of the interests of its members. In essence it is a regulatory body exercising oversight over medical schemes.

The RAF's ARGUMENT IN TERMS OF SECTION 19 OF THE RAF ACT:¹⁵

This argument had been dealt with authoritatively in **Fookwe v Road Accident Fund (23481/2016) [2024] ZAWCHC 115 (29 April 2024)**, at [10] – [11]: in which the court stated the following;

“[10] The RAF's argument in relation to s 19(d)(i) is that because the plaintiffs, as members of their medical aid schemes, agreed to reimburse such scheme any amounts paid over by the scheme to service providers, this amounts to an agreement falling within the exclusionary provision of that subsection. In Road Accident Fund v Abdool-Carrim and Others at issue was the proper interpretation of s 17(5) read with s 19(d) of the RAF Act...

[12] Support for the above interpretation is to be found in the main purpose of the Act referred to earlier and also to the accessory nature of the supplier's claim. In my view, the Fund's interpretation of the effect of s 17(5) is incorrect. It is not necessary to substitute 'supplier' for 'third party' in s 19(d) to give efficacy to the subsection. On the contrary the substitution places it at odds with the Act's purpose, and from the Fund's perspective, achieves nothing. For if a third party's claim is valid and enforceable and the supplier's is not, the Fund would still be liable to compensate the third party who in turn remains contractually liable to the supplier. The consequence is that a third party may be faced with a claim with a supplier without

¹⁵ Road Accident Fund Act 56 of 1996 (“the RAF Act”)

having been paid and would be denied the benefit of s 17(5) without any fault on his or her part. This result could hardly have been what the draftsman intended. Moreover it is illogical for the third party claim to be valid and enforceable but the supplier's accessory claim not (except where the supplier has not complied with the prescribed formalities).

[13] It is understandable that the legislature would seek to protect third parties, many of whom are indigent, from entering into champertous agreements, which is probably what s 19(d) intends to achieve. But there is no apparent reason to restrict the contractual freedom of suppliers, many of whom are professional people, institutions or companies from contracting with whoever they choose to process their claims. They should be capable of looking after themselves.” (my emphasis) (footnotes excluded)

22] I conclude that the defendant's Section 19(d) defence falls to be rejected, more particularly in light of the **Abdool-Carrim judgment** *supra*. I am of the view that the provisions of Section 19(c) and (d) of the Raf Act are to be read conjunctively which, in essence, prevents a person other than an attorney from profiting in any manner from the handling of third party claims against the Raf. I am fortified in my view in that on an objective reading of the provisions of Section 19(c) and (d) of the Raf Act, the contract entered into between the plaintiff and Discovery Health is contractually and legally valid and enforceable.

23] Plaintiff accordingly succeeds in her claim for her past medical expenses. and in turn Discovery health would be entitled to reclaim the past medical expenses from the plaintiff paid in terms of the policy governing their contractual relationship.

COSTS:

24] In light of the misconceived arguments of the defendant, plaintiff is entitled to her costs on the attorney and client scale and

25] I make the following Order:

- (a) Defendant shall pay to the Plaintiff the capital sum of **R265 609.97 (Two Hundred and Sixty-Five Thousand Six Hundred and Nine Rand Ninety-Seven Cents)** by way of an electronic transfer into her attorneys' trust account, the details of which are set out hereinunder, payment to be effected within 180 (one hundred and eighty) days from date of this order;
- (b) Defendant shall pay Plaintiff's taxed or agreed costs on the High Court Scale, as between attorney and client, including any taxed or agreed costs incurred in the obtaining of payment of the capital sum and/or costs and counsel's fees for the hearing on 6 & 16 May 2025 on scale B;
- (c) payment of the taxed or agreed costs shall be effected within 180 (one hundred and eighty) days from date of agreement or taxation;
- (d) Defendant shall be liable for interest on the taxed or agreed costs from 14 (fourteen) days from date of agreement of *allocator* until date of final payment at the relevant prescribed rate of interest applicable.
- (e) Plaintiff's attorney's trust banking details are as follows:

BANK:	First National Bank
ACCOUNT:	Kruger & Co. Inc.
BRANCH:	Parow
BRANCH CODE:	200 510
ACCOUNT NO:	5[...]

MOHAMED SALIE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Advocate Henry McLachlan

Instructed by: Kruger & Company

For defendant: Brett-Elliot Lategan

Instructed by: Office of the State Attorney, Cape Town