Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 942/2022
Date heard: 01-02-2024
Date delivered: 30-05-2025

In the matter between:

BOITUMELO ALFRED BEREND **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:

1. In this claim for damages against the Road Accident Fund as a result of injuries sustained by the plaintiff, Mr B A Berend, in a motor vehicle accident, all heads of damages have been settled between the parties except for past medical and hospital expenses.

2. Only the plaintiff and his wife Mrs K Berend testified. Mrs Berend, was a member of GEMS medical scheme at the time of the accident and the subsequent treatment of the plaintiff. The plaintiff is covered by GEMS as a dependant of Mrs Berend.

3. It is not in dispute that the plaintiff's past medical and hospital expenses amounted to R175, 148.70 and that these expenses have been paid in full by GEMS.

4. The stance taken by the Fund is that the plaintiff has, as a result of being a dependant on his wife's medical aid, suffered no loss in respect of the past medical and hospital expenses which were paid by GEMS.

5. Whilst acknowledging the fact that the issue of compensating a plaintiff/claimant for expenses paid by a medical aid scheme has been addressed in the matter of *Discovery Health (Pty) Ltd v Road Accident Fund and Another* [2022] JOL 57493 (GP), where the court found that the benefits received by a claimant from a third party, whether a private insurance policy or a medical aid scheme are not considered for purposes of determining the quantum of a claimant's claim against the defendant, the argument by Mr Mogano for the Fund is that the payment by GEMS was as a result of an agreement between it and Mrs Berend and not the plaintiff. That the plaintiff had no agreement with GEMs to pay the medical aid contributions and there being no indication that the plaintiff will reimburse GEMS, he would be unjustifiably enriched should the Fund be ordered to pay the claim for past medical expenses.

6. The argument is further that in the absence of a cession between Mrs Berend or GEMS and the plaintiff, there is no legal basis on which to find that the plaintiff has suffered any loss.

7. The argument raised by the defendant is in my view somewhat contrived in the light of the clear and unequivocal authority in this regard.

8. In *Zysset and Others v Santam Ltd* 1996(1) SA 273 (CPD), the legal position relating to delictual claims was set out as follows at 277 H to 279 C thereof:
"*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 aforegoing, 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) moneys 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. Nor, it would seem, are these the only benefits which are to be treated as res inter alios actae."

(own highlighting)

9. This principle was restated in the *Discovery Health* matter, where Mbongwe J held at paragraph 21 thereof that:

"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 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.

10. The *Discovery Health* judgment also deals with the exclusions and limitations of benefits as contained in the Road Accident Fund Act 56 of 1996 and concludes at paragraph 27 thereof that *". . . the RAF Act does not provide for the exclusion of benefits the victim of a motor vehicle accident has received from a private medical scheme for past medical expenses."*

11. In the recent matter of *Van Tonder v Road Accident Fund* (2023/013183) [2024] ZAGPJHC 1009 (7 October 2024), where the present issue was once again raised, the court held at paragraph 107 thereof that:
"The RAF's statutory duty to compensate for past medical expenses, as mandated by the Road Accident Fund Act, is not discharged by the involvement of a private insurer. The Act ensures that a claimant is indemnified for all reasonable medical costs incurred due to injuries sustained in a road accident, and the fact that a medical aid has stepped in to settle those costs does not alter the RAF's obligation to reimburse the claimant."

12. See also the matter of *Gunther v Road Accident Fund* (24228/16) [2024] ZAWCHC 153 (6 June 2025), at paragraphs 30 and 31 thereof, which state as follows:

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 emphasize, 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."***

(own highlighting)

13. In light of the authorities cited above it appears to me that the distinction which the Fund seeks to draw between the relationship between members and dependants viz a viz a medical aid scheme, is artificial and an attempt to renege on its statutory obligation to compensate the plaintiff for his proven medical expenses. The agreement entered into between Mrs Berend and GEMS is not only for the benefit of Mrs Berend but also for the plaintiff. GEMS would be able to claim back its expenditure, upon payment by the Fund, whether in terms of the agreement or on the basis of unjust enrichment from the plaintiff. The fact that GEMS had covered the medical expenses of the plaintiff is however a collateral issue which has nothing to do with the Fund and should be ignored in the calculation of damages.

The following order is made:

1. **The defendant shall pay an amount of R175 148.70 (ONE HUNDRED AND SEVENTY-FIVE THOUSAND ONE HUNDRED AND FORTY-EIGHT RAND AND SEVENTY CENTS) to the plaintiff in full and final settlement of the Plaintiff's claim for past hospital and medical expenses.**

2. **The aforementioned amount in the total sum of R175 148.70 (ONE HUNDRED AND SEVENTY-FIVE THOUSAND ONE HUNDRED AND FORTY-EIGHT RAND AND SEVENTY CENTS) shall be payable by direct transfer into the trust account of Adams & Adams, the details of which will be supplied to the Defendant by the Plaintiff's attorneys.**

3. **The plaintiff shall allow the defendant 180 (ONE HUNDRED AND EIGHTY) court days to make payment of the capital from date of this court order, failing which the plaintiff will be entitled to recover interest at the applicable legal rate.**

4. **The defendant is ordered to pay the plaintiff's taxed or agreed costs with respect to the Plaintiff's claim for past hospital and medical expenses on the Party and Party High Court scale, within discretion of the taxing master inclusive of but not limited to:**

    4.1 The fees of Counsel on the High Court scale, inclusive of counsel's full reasonable day fees for the 31st January, 1st February and 2nd February 2024 and the reasonable cost in respect of preparation of the Particulars of Claim and Heads of Argument;

    4.2 The above costs will also be paid into the aforementioned trust account,

5. It is recorded that the plaintiff's instructing attorneys do not act on a contingency fee basis.

6. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

6.1 The plaintiff shall serve the notice of taxation on the defendant;

6.2 The plaintiff shall allow the defendant 180 (ONE HUNDRED AND EIGHTY) court days to make payment of the taxed costs from date of settlement or taxation thereof;

6.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the applicable interest rate on the taxed or agreed costs from date of allocator to date of final payment.

6.4 The plaintiff shall not issue a writ prior to the expiry of the 180-day period.

[redacted]

CC WILLIAMS

JUDGE

For Plaintiff:	Adv D Jankowitz Adams & Adams c/o Stefan Greyling Inc
For Defendants:	Mr Mogano Office of the State Attorney