



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

JUDGMENT

Case no: 2540/2021

In the matter between:

JOHANN MARAIS

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Coram: CLOETE J

Heard: 4 & 5 March 2025, 19 May 2025

Delivered: 30 July 2025 (Delivered electronically)

ORDER

1. The defendant shall pay to the plaintiff, in respect of personally paid past medical, hospital and related expenses, a total sum of R1 465 152.18 (the "capital sum"), being the sum of R723 332.95 not in dispute between the parties, as well as the sum of R741 819.23;

2. Payment of the capital sum will be effected directly into the trust account of the plaintiff's attorneys of record by means of an electronic transfer within 180 (one hundred and eighty) calendar days from the date of this order (the first due date). If the defendant fails to make payment as aforesaid, the defendant will be liable for interest on any outstanding amount at the statutory rate per annum calculated from 14 (fourteen) days of this order;
3. In respect of past medical and hospital expenses paid for by the plaintiff's hospital plan, this issue is postponed sine die for later determination (by agreement between the parties);
4. In respect of future medical and related expenses arising from the collision, the defendant shall furnish the plaintiff with an undertaking, free of any limitations, caveats, restrictions, and specifications, in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for payment of 100% of the cost of future accommodation in a hospital or nursing home, or treatment, or rendering of services or supplying of goods in respect of accident-related injuries, after such costs have been incurred and upon proof thereof.
5. The defendant is to deliver the undertaking referred to in paragraph 4 above to the plaintiff's attorney of record within thirty (30) calendar days of date of this order;
6. Save to the extent provided in any prior order, the defendant is to pay the plaintiff's costs, including VAT, as between party and party on Scale B, and including also the costs of Counsel and the qualifying fees, if any, of the following experts:
 - a. Dr G Kirsten, General Practitioner
 - b. Dr F J D Steyn, Orthopaedic Surgeon
 - c. Dr R Martin, Radiologist
 - d. Ms Marion Fourie, Occupational Therapist
 - e. Dr Ed Baalbergen, Rehabilitation Practitioner
 - f. Dr Erika Steenberg, Clinical and Neuropsychologist

- g. Ms Norma Colley, Industrial Psychologist
- h. Mr Wim Loots, Actuary
- i. Mr Barry Grobbelaar of Forensys Engineering Dynamics, Accident Reconstruction Experts
- j. Ms Petra Coetsee, Architect
- k. Dr Ilse Breytenbach, Urologist

- 7. For purposes of paragraph 6 above, Mrs Janine Marais is declared a necessary witness;
- 8. Payment of the taxed or agreed costs reflected above shall be effected within 180 (one hundred and eighty) days of agreement or taxation (the second due date) and will likewise be affected by electronic transfer into the plaintiff's attorneys trust banking account; and
- 9. Should the taxed or agreed costs not be paid by the second due date the defendant shall be liable for interest at the statutory rate per annum from the second due date until date of payment.

JUDGMENT

Cloete J:

Introduction

[1] On 2 April 2019 the plaintiff, who was 29 years old at the time, sustained injuries in a motor collision. On 10 February 2021 he issued summons against the defendant ("RAF") for payment of damages and related relief in respect those injuries and their *sequelae*. The RAF conceded liability on the merits, leaving quantum in dispute. However, by the time the trial eventually commenced on 4 March 2025, and after the parties held a further meeting during the course of evidence at my request, all but 3 issues had been resolved. One of them, being the

plaintiff's claim for past medical and hospital expenses paid for by his hospital plan, has been postponed *sine die* by agreement, since there is currently an appeal pending on this issue in a similar matter before the Supreme Court of Appeal.

[2] The two other issues are the following, and which fall to be determined. The first is whether the RAF is liable for a disputed portion of the plaintiff's claim for privately paid past medical and similar or related expenses which it is now common cause were incurred as a direct result of the collision (for convenience I will simply refer to such expenses at times in this judgment as "medical expenses") and which, after the conclusion of evidence, the parties managed to further narrow down to R741 819.23. This amount includes the difference between the sums paid by the plaintiff's hospital plan and what the RAF alleges it should have paid in each instance as a prescribed minimum benefit ('PMB') or its sub-set of emergency medical care ('EMC'). The second is the terms of the statutory undertaking to be furnished by the RAF under s 17(4)(a) of the Road Accident Fund Act¹ ('RAF Act'). In this regard the RAF agrees that the plaintiff is entitled to a s 17(4)(a) undertaking in respect of all accident-related future medical expenses. It is only the terms thereof that could not be agreed.

[3] The first issue, relating to past medical expenses, centres around the RAF's refusal to accept liability based on what it pleaded in its belatedly amended plea as follows:²

'6.4 The Plaintiff's medical scheme is obliged to pay for the treatment of emergency medical care that was provided by supplier and or service providers, as it is a prescribed minimum benefit as envisaged in Section 29 of the Medical Schemes Act for which the medical aid scheme [is] statutorily obliged to pay and cannot be claimed back from the Defendant...

6.6 The Defendant further pleads that the personally incurred past medical and hospital expenses in respect of the balance of the claim in the sum of

¹ No 56 of 1996

² In terms of its amended plea filed after the conclusion of evidence but before argument, to which the plaintiff did not object.

R741 819.23 remains in dispute due to various internal policies and directives issued by the Defendant.’

[4] It emerged during the trial that the RAF rejected the plaintiff’s claim for past medical expenses currently before the court on 3 bases. First, the contention (not pleaded) that where supporting invoices do not strictly comply with its in-house requirements pertaining to International Classification of Disease (ICD) codes, such claims will be rejected. In *Fookwe v Road Accident Fund*³ this court found that contention to be without merit. *Fookwe* was not appealed by the RAF and in closing argument the RAF therefore did not persist with its reliance on that contention. The second is that the parties agreed in closing argument that the only “Directive” which now falls under scrutiny in the present case is what I will refer to as Directive 2⁴, apparently issued by the RAF to its employees on 13 April 2023, and again apparently, in which it instructed its employees not to make any payments to claimants for emergency medical care that was provided by a supplier, on the basis that this is a prescribed minimum benefit as envisaged in s 29 of the Medical Schemes Act⁵, and thus - according to the RAF - cannot be claimed back from the RAF. I say “apparently” because Directive 2 was not made available to this court. These “exclusions” were referred to during the trial as PMBs and EMCs. The third was that – although it is undisputed this had never before been brought to the plaintiff’s attention - certain expenses required ‘*further motivation*’.

The evidence

[5] The plaintiff and his wife, Mrs Janine Marais, testified in support of his case. Mr Nizaamodien Abdool, who is the senior bill reviewer and field case manager at the RAF’s Cape Town branch, testified on its behalf, and was also instrumental in assisting the parties to narrow the areas of dispute, for which I express gratitude. In

³ [2024] JOL 64365 [WCC]

⁴ The other Directives are Directive 1, apparently issued by the RAF on 12 August 2022, in which the RAF instructed its employees not to make any payment to claimants if their medical aid scheme had already paid for their medical expenses arising from a motor collision; and Directive 3, issued on 2 November 2023, in which the RAF informed its employees that s 19(d)(i) of the RAF Act applies in respect of claims paid by a medical aid scheme on the basis that a medical aid scheme is not a supplier. Directive 1 is the subject of the appeal currently pending before the Supreme Court of Appeal referred to at para 1 of this judgment. The RAF did not specifically plead Directive 3.

⁵ No 131 of 1998

addition, the RAF admitted the contents of *inter alia* the clinical notes pertaining to the plaintiff's treatment and the contents of all of the plaintiff's expert reports, which meant these experts were excused from testifying.

[6] In light of the clinical notes and expert reports, the parties agreed that the plaintiff sustained the following injuries as a direct result of the collision: a complete facet fracture-dislocation of T6 to T8 resulting in complete paralysis; fracture of the left scaphoid bone; contusion of the right hip with an avulsion injury of the iliopsoas tendon attachment; soft tissue injury, multiple abrasions and lacerations of the right ankle; soft tissue injury of the chest, collapse of one lung and rib fractures; resultant chronic pain; and resultant depression.

[7] The parties also agreed that the *sequelae* of the plaintiff's injuries included or include the following:

(a) Following the collision, the plaintiff was transported by ambulance to Netcare N1 Hospital, from where he was transferred to Christiaan Barnard Hospital. He received medical treatment, including a posterior decompression and fusion of T5 to T10. The plaintiff remained hospitalized until his discharge on 24 April 2019, whereafter he was transferred to the Vincent Pallotti Rehabilitation Centre, where he remained until 19 June 2019;

(b) Due to the magnitude of the plaintiff's injuries, the left scaphoid fracture was only diagnosed sometime after the accident, and in November 2019, the fracture was reduced and stabilized by means of a cannulated screw;

(c) The plaintiff also experienced persistent discomfort of the right hip and the inability to sit flat on both buttocks. Subsequently, he underwent an arthroscopic examination of the right hip in March 2021. A tenotomy of the iliopsoas tendon was performed, as well as a debridement of the joint together with capsule release. Post-surgery, the contracture of the soft tissues surrounding the right hip was released and he was able to sit normally;

(d) He developed a significant bladder infection at the end of January 2022, which required hospitalization for one week. He also has complete incontinence of the bladder and bowel and catheterizes his bladder every four hours, although he has had repeated bladder infections which require medication. Bowel incontinence is maintained with a specific programme;

(e) He presents with complete paralysis of both legs as well as of the abdominal musculature distal to T6. He is confined to a wheelchair and is unable to stand or walk on his own. Any movement of the legs elicits muscle spasms, which is partially controlled with medication. There is a total lack of sensation distal to T6;

(f) The plaintiff has complete neurogenic sexual dysfunction;

(g) He experiences chronic lower back and thoracic spine pain, but he avoids using medication to avert long-term side effects;

(h) The plaintiff experiences pain in the left wrist;

(i) He presents with a 20-degree flexion contracture of the ankle joints, secondary to contracture of the Achilles tendons. All movements of the lower limbs elicit muscle spasms;

(j) The injury was catastrophic and would have been associated with severe emotional trauma, the plaintiff having been rendered permanently paralyzed. The plaintiff experiences chronic pain, and he is visibly depressed;

(k) The plaintiff requires future medical treatment for urinary tract infections, pressure sores, neurological complications, pathological fractures of the lower limbs, spasticity, contractures, neurogenic heterotopic calcification, gastrointestinal problems and bone-grafting of the left wrist. He also requires psychological counselling due to the catastrophic nature of the injuries sustained;

(l) The plaintiff requires home adaptations, a secondary wheelchair, a standing frame, and other adaptive devices. He also requires an automatic transmission vehicle, and assistance with household maintenance and gardening; and

(m) The plaintiff currently employs a carer from Mondays to Fridays for 5 hours per day. He will require a carer on a permanent basis.

[8] The evidence of the plaintiff and his wife was as follows. The plaintiff is a member of a Medihelp hospital plan and not a medical aid scheme. Essentially all that is covered by the plan are in-hospital expenses. All other expenses have to be paid by the plaintiff personally. Accordingly, as the plaintiff's wife put it 'so unfortunately...everything out of hospital, your day-to-day stuff, your wheelchairs, your medication, if you get certain operations...all of those costs we have to pay out of our own pocket'.

[9] The plaintiff's wife confirmed that all the expenses which remain in dispute were incurred as a direct result of the collision, were reasonably and necessarily incurred and that they were paid by the plaintiff or by her on his behalf out of their joint bank account. She also testified that after a lengthy battle with the hospital plan representatives she eventually managed to persuade them to cover the plaintiff's bladder medication and catheters as a PMB. However, the hospital plan refused to cover other expenses which quite obviously pertain directly to the plaintiff's bladder and bowel conditions and are ongoing expenses. Her approach to the hospital plan representatives to cover the cost of one of the plaintiff's wheelchairs was refused and referred by her to the ombudsman who confirmed that the hospital plan was not obliged to cover this expense. There was also a doctor's bill of about R53 000 which the hospital plan did not cover. This was incurred in the following circumstances. After the collision the plaintiff was transported by ambulance to the nearest hospital which could not accommodate him. He was then transported by ambulance to a hospital at N1 City. The young neurosurgeon who initially examined him there told the plaintiff's wife that he did not believe he had sufficient experience to perform the required emergency operation and that in the circumstances the plaintiff would be transferred to Christiaan Barnard Hospital. Accordingly, the expense was incurred as

one of necessity and not one of choice. Despite this the RAF refused to pay the amount on the basis that the total cost should have been paid in full by the hospital plan as a PMB.

[10] With reference to a detailed schedule, the plaintiff's wife also testified about the medication and equipment such as surgical gloves and lubricants which he requires on an ongoing basis, as well as regular doctors' appointments, pathologist expenses and the like necessary to monitor his condition. Other regular treatment required includes physiotherapy, biokinetic therapy and hydrotherapy to build and/or maintain sufficient strength for the plaintiff to manage himself daily, such as transferring from bed to chair and chair to shower bench, and to pick up his wheelchair when he is in his specially adapted vehicle. There are also other expenses incurred from time to time, for example, replacement of his wheelchair tyres in addition to which there are the carer's expenses.

[11] Her evidence was further that at the time of the collision she was 28 weeks pregnant with the couple's first child, who was subsequently born and is healthy. They had always planned to have another child as well. The plaintiff's complete neurogenic sexual dysfunction as a direct result of his paralysis caused by the collision, confirmed by a specialist and not disputed by the RAF, meant that the couple were forced to go the route of IVF treatment which despite two cycles failed since the embryo transfers were unsuccessful. She testified that the couple wish to continue trying to have another child.

[12] When asked in cross-examination why she believed the RAF should be liable for those items rejected by it on the basis that they were either PMBs or its sub-set EMCs she replied 'because it was related from the accident that left him a paraplegic; so those costs are definitely reasonable and it was necessary. I paid it from our joint account; there is an invoice and there is a proof of payment with my name on it that I paid from our joint account'. Importantly she confirmed that what the RAF refused to pay in each instance of a PMB/EMC defence is the difference between the PMB/EMC paid by the hospital plan and the total amount which the plaintiff paid. It was put to her that the stance of the RAF in rejecting these claims was that 'because you are part of a medical aid scheme, the medical aid scheme is

responsible for those expenses' to which she responded 'like I've testified before its a hospital plan. To be clear, if you're in hospital those expenses they will pay...all out of hospital expenses...they don't pay for that. Its not a fully comprehensive medical aid scheme; it's a hospital plan only'.

[13] Mrs Marais confirmed that at no stage had the RAF requested a copy of the hospital plan and its schedule of benefits applicable at the time of the collision way back in 2019, and it was also confirmed on behalf of the RAF that despite this it had approached the issue on the basis that the plaintiff was a member of a medical aid scheme, notwithstanding its acceptance by the time of the trial that this was factually incorrect, and that the basis for its rejection had neither been brought to the plaintiff's attention nor even pleaded until after the conclusion of evidence.

[14] The remaining disputed portion of the plaintiff's claim of R741 819.23 was rejected by the RAF for *inter alia* the following reasons⁶:

(a) Chairman Industries: Alto manual standing wheelchair: R110 900: reason: 'there is no clinical indication for the use of this device';

(b) Enabled Sport: Sports wheelchair and harness gloves: R70 430.60: reason: 'the provider is not a medical professional';

(c) Biokineticist account: R118 821.80: reason: 'substantial overlap between the physiotherapist and the biokineticist regarding treatment';

(d) Physiotherapy account: amount claimed not stipulated: reason: 'the request for weekly physiotherapy is declined. An allowance for 6 treatments will be allowed for pain management'; and

(e) Standing frame: R13 000: reason: 'RAF revisited previously approved standing frame and denied the amount on 26 March 2025 due to lack of clinical evidence'.

⁶ This was contained in a letter dated 26 March 2025 from the plaintiff's attorney together with various annexures after the conclusion of evidence but prior to argument.

[15] The above amounts total R313 152.24 and the amount rejected for Enabled Sport includes VAT in respect of the plaintiff's claim for the sports wheelchair and harness gloves. The difference between the amount still claimed of R741 819.23 and R313 152.24 is R428 666 99, which as I understand it was rejected as a PMB or its subset of EMCs, or because there was either no ICD code or a non-specific ICD code in respect of the item concerned despite proof of payment; and as far as the claim for IVF treatment is concerned, the RAF advised the plaintiff that he is required to provide the following for the 'further assessment of the case: a detailed gynaecologist report on the claimant's wife's fertility status [and] documentation indicating that the facility where the IVF was conducted is accredited to provide the service'.

[16] Prior to the collision the plaintiff was employed as a physical education teacher at a primary school. He testified that he also coached rugby, and played cricket, action cricket and action netball. He was a registered Western Province rugby referee and coached cricket at his local club of which he was a member. The sports or racing wheelchair (and harness gloves) as it was also called, the cost of which was disallowed by the RAF, is the wheelchair that enables him to participate in sport, including athletics and marathons. His evidence was that he also uses the wheelchair on a daily basis for exercise and to participate in competitions. The company from which he acquired the wheelchair was owned by Mr Ernst Van Dyk, a former para-athlete and Paralympian. Given his prior athletic prowess he was obviously accustomed to regular physical activity before the collision. Having been so active, the consequences of his catastrophic injury have been devastating, not only to his physical but also his mental and emotional well-being. For him to be as mobile as possible has directly benefited him in this regard, and the racing wheelchair is an integral part of helping him to cope.

[17] He also testified that the manual standing wheelchair purchased from Chairman Industries (whose owner is also wheelchair bound) allows him to "stand" in an upright position, which not only helps with his bowel routine but assists with attempting to maintain healthy organ function given that he is otherwise sitting or lying down 24 hours per day. In addition, it helps him to be more mobile, for

example reaching to open cupboards and the like. Even though he is only able to stand with this chair for a maximum of an hour at a time 'it helps a lot'. His evidence was further that part of his rehabilitation at the Vincent Pallotti unit, as well as his biokinetic treatment, involved the use of such a chair.

[18] In relation to the wheelchair he purchased from Chairman Industries, this claim was rejected by the RAF on the basis that it was too expensive when, according to the RAF, the plaintiff had a number of cheaper options available to him. It is noted in this regard that the RAF did not tender any amount which in its view was reasonable. It simply disallowed the full amount. The plaintiff testified that he chose this particular wheelchair 'because of the weight of the wheelchair and to help me when I'm driving and alone operating my vehicle. So the chair is easier to handle and operate to get it into...and out of the vehicle'. His evidence was further that the wheelchair weighs 4.5 kilograms as opposed to the weight of his previous wheelchair of between 13 and 14 kilograms. Given that he is obliged to rely solely on upper body strength, the benefit of a lighter chair is self-evident when getting into and out of a vehicle since it is much easier to lift. He also testified that there are in fact extremely limited options available to procure anything cheaper of the same or similar weight. Currently it is the only chair of its type that can be purchased in South Africa. The same applies to the standing manual wheelchair.

[19] His testimony was further that the standing frame, previously accepted by the RAF as a valid claim but rejected at a much later stage 'due to lack of clinical evidence' gives him the benefit of interacting physically with his active, 5 year old son, reduces the ever present risk of pressure sores, and minimises his muscle spasms. As far as the claims for physiotherapy and biokinetic therapy are concerned, he had only been informed at the meeting held at my request during the trial (ie, for the first time at that meeting) that the RAF required a formal motivation for this treatment beyond a period of time which the RAF itself considers reasonable (seemingly irrespective of the particular circumstances of the plaintiff). Quite obviously, given the elapse of about 6 years since the collision, this is a factual impossibility in relation to the bulk of those expenses. He explained why he required both types of treatment on an ongoing, regular basis:

‘The first year I started out you have to start getting your posture back, learn how to sit, all that stuff, and I went for rehabilitation on my hand, the left scaphoid injury. I had one operation, which I went to the physio, went back to the doctor, it was unsuccessful. I had to go back for another surgery, which obviously kept the physio and bio work going. The second surgery was done, I went for more physio and bio work, also to work with your upper body strength and get all the necessary things from a bio in strength and conditioning work to help you in your everyday living.’

[20] In cross-examination the plaintiff confirmed that there is no cheaper available racing chair in South Africa. He was told the reason for rejection of the claim is that Enabled Sport, which supplied it, is not registered as a healthcare provider with the Health Professions Council of South Africa (HPCSA) and, in terms of the RAF’s internal policy this automatically disqualifies the claim, despite the common cause fact that the chair was purchased as a direct result of the collision and was both reasonable and necessary. Although the plaintiff was not receiving physiotherapy or biokinetic treatment at the time of testifying, his undisputed testimony was that both would nonetheless again be required from time to time in future.

[21] Given what is stated earlier in this judgment, it is only necessary to deal with the evidence of the RAF’s witness, Mr Abdool, which is directly relevant to the remaining disputed issues. He testified that despite the RAF being liable for expenses ‘linked’ to a motor vehicle accident ‘all medical expenses should be provided by a medical practitioner, someone who is registered with ...the HPCSA.’ He clarified this by stating that ‘all service providers that provide medical health services need to be registered’. His evidence was further, with regard to an expense incurred due to an emergency medical condition ‘(t)he RAF is of the opinion and has the stance because the nature of the injuries are linked to an emergency medical condition, an EMC, therefore they are subject to the Medical Schemes Act...they remain the responsibility of the medical aid scheme’, (my emphasis) and the same applies to any other expense qualifying as a PMB under a medical aid scheme.

[22] As far as further motivation for any expense item is concerned, Mr Abdool’s evidence was that the RAF’s medical executive committee makes the decision on

whether an item should be allowed and that a motivation is usually required for a costly or specialised item : ‘It is meant as a protective mechanism so that ...the claimant does not get something they don’t need and the RAF does not [make] payment that they don’t need’. He accepted the uncontested evidence of the plaintiff and his wife that this had never before been conveyed to them; and that the RAF did not dispute any of the contents of the expert reports. It must also of course be emphasised that the RAF previously had no difficulty in accepting liability for the plaintiff’s standing frame, despite no alleged ‘motivation’ having been requested, only to reject it later (a) without requesting a motivation; and (b) ‘due to lack of clinical evidence’. Moreover, Mr Abdool confirmed that what I will refer to as the secret Directive 2 would not have been known to the plaintiff unless he had consulted with ‘someone from the RAF to get that information’. Of course, the plaintiff could not reasonably have been expected to request information about something he had no idea even existed; and this court has already rejected the RAF’s argument that its internal Directives apply retrospectively in *Fookwe*⁷.

[23] Mr Abdool did not dispute any of the following. Both occupational therapists (ie, including the RAF’s own expert) agreed in their joint minute that the plaintiff requires, inter alia, the wheelchairs and standing frame about which he testified as well as all the incontinence products referred to in the other expert reports. The report of the clinical psychologist confirmed that he needs to actively engage in the disabled sporting community and requires training with a biokineticist and coaches for this purpose. This in itself indicates that the purposes of biokinetic treatment and physiotherapy are different despite the belated attitude of the RAF that there is a substantial overlap in these two types of treatment. He also accepted that an EMC cannot exist on an indefinite basis since it is an emergency medical condition. He stated that ‘clinically there is a case to be made’ for all the expenses paid by the plaintiff and which the RAF rejected; agreed that there is a difference between a medical aid and a hospital plan for expenses covered; and that the only matter standing in the way of payment are the RAF’s internal secret Directives. But for those, it would not have been necessary for the matter to proceed to trial.

⁷ At paras 22 to 27.

[24] His testimony was further that to the best of his recollection Directive 2 does not contain a list of PMBs, but only refers to the list 'that already exists within the Medical Schemes Act'. He accepted however that paraplegia is not one of the listed PMBs in the Act. According to him Directive 2 makes no mention of limiting the cost of *sequelae* of a PMB to the acute phase only. The irrational attitude of the RAF is aptly summed up in the following passage of his evidence:

'MR ABDOOL: ...so with regards to the injuries you've got the spinal cord injury then you have the other two injuries. These all occur at the same incident, right. So, the spinal cord is an emergency medical condition. The other two are also conditions sustained in the accident.

MS HEERINK: Yes.

MR ABDOOL: So, we look at the patient as a whole.

MS HEERINK: ...but what you do now is three years later when he goes for an x-ray you disallow it and you take it right back to the accident and you say it is a PMB which it is not because not even paraplegia is a PMB.

MR ABDOOL: Yes.

MS HEERINK: You would agree with me that is unreasonable? ...

MR ABDOOL: The link is purely because of the injuries sustained in the accident, remember.

MS HEERINK: Yes, but you are saying that, had Mr Marais had a medical aid, which we know he does not. He has a hospital plan but the second secret Directive says had he had a medical aid, look at what are the PMBs and other acronyms and if it falls in there we are not going to pay because the medical aid should have paid. Am I right?

MR ABDOOL: Yes.'

[25] It was also his evidence that this was the first time he has been confronted with a hospital plan as opposed to a medical aid. He agreed that even in respect of PMBs listed in the Medical Schemes Act, this is not a list cast in stone, since each medical aid scheme could nonetheless have its own stipulations, such as benefits limited to rates charged by contracted-in medical professionals. Thus potentially, even had a PMB relied on by the RAF applied, not every cent of the plaintiff's claim would have been paid. Mr Abdool was also referred to various portions of the RAF

website⁸, and agreed that no mention is made there of PMBs and the like. All that is stated on this score is that the RAF will pay past medical expenses 'which are related to medical expenses that have already been incurred at the time of settlement ... [provided that they are] ... reasonable, necessary and directly related to the injuries sustained in the motor vehicle accident [and proven]'. To sum up therefore, on the evidence of Mr Abdool the RAF paid no regard, both to what it communicates to the public on its website, and to the factual circumstances of the plaintiff's hospital plan cover but instead adopted a one size fits all approach based on its own secret Directive 2. This only needs to be stated to be rejected as misconceived.

[26] Turning now to the RAF's statutory undertaking in respect of future medical expenses, coupled with a 'basket of care' which was handed in as Exhibit E, and described by Ms Heerink (counsel for the plaintiff) as a 'combination of the statutory [s 17(4)] undertaking ... and then this contractual, it almost looks like a medical aid, where they break up what treatment you can get for specific injuries'. She pointed out to Mr Abdool that the document makes provision for three of the plaintiff's injuries but not all of them, namely only for his paraplegia, the injury to his right hip and the fracture of his left scaphoid (thus excluding the other admitted injuries to his right ankle and chest and undisputed psychological treatment required). Mr Abdool also agreed that the document makes no mention of limitations in respect of ICD codes for wheelchairs, medication and PMBs, including EMCs. He further agreed that the document makes provision for many of the same expense items claimed by the plaintiff which were at the same time disallowed by the RAF in respect of past medical expenses. Although it was his understanding (he does not deal with future medical expenses) that the expenses to be incurred by the plaintiff 'would have to meet the same administrative burden' he fairly accepted that the document is entirely silent on these being requirements for payment to be made by the RAF. He also agreed that the plaintiff's wife, as she had testified, has good reason to be extremely concerned about the cost of his future medical expenses and the attendant risk that the RAF might not cover them.

⁸ Exhibit C : (<https://web.facebook.com/RoadAccidentFund>)

[27] As regards IVF treatment, Mr Abdool was referred to the expert report of rehabilitation practitioner Dr Baalbergen (of the Vincent Pallotti Rehabilitation Unit) in which he confirmed that due to the injuries sustained by the plaintiff (thus entirely unrelated to the plaintiff's wife as the RAF would now have it) IVF would be required, and that allowance should be made for 3 attempts. Accordingly on the expert evidence accepted by the RAF itself, the latter should (in addition to the previous two failed attempts) cover the cost of the third attempt without any further motivation being required. Mr Abdool also accepted that had there been other options available to the plaintiff, Dr Baalbergen, who was involved in the management of the plaintiff's rehabilitation from the outset, would no doubt have said so. The report of the expert urologist, Dr Breytenbach, dated 28 March 2024, supports the opinion of Dr Baalbergen of the plaintiff's condition from a clinical perspective. Although Mr Abdool attempted to suggest pre-conditions and other potential options, he is not an expert in the field, and the RAF adduced no evidence by an appropriate expert to contradict the opinions of Dr Baalbergen and Dr Breytenbach. In these circumstances I am persuaded that the RAF failed to advance a valid defence to this portion of the plaintiff's claim.

Discussion

[28] It is well established that as a general rule the patrimonial damages for which a defendant is liable are calculated on an ordinary delictual basis: *Erasmus Ferreira and Ackerman v Francis*⁹. In *Dhanabakium v Subramanian & Another*¹⁰ the court restated the legal position that 'it is a sound rule to construe a statute in conformity with the common law rather than against it, except where and insofar as the statute is plainly intended to alter the common law'. The *Dhanabakium* decision was followed in *Hlumisa Investments Holdings (RF) Ltd & Another v Kirkinis & Others*¹¹ where it was held that '[a] further factor to bear in mind is the presumption that statutory provisions are not intended to alter or exclude the common law unless they do so expressly or by necessary implication. Where possible, statutes must be read in conformity with the common law. This enhances legal certainty and

⁹ 2010 (2) SA 228 (SCA) at para 16

¹⁰ 1943 AD at 167

¹¹ [2020] 3 All SA 650 (SCA) at para 44

recognises the value of the common law, which has developed systematically over time’.

[29] Section 17(1) of the RAF Act obliges the RAF to compensate third parties such as the plaintiff, for any loss or damage suffered as a result of the negligent or wrongful conduct of the driver of a motor vehicle. The Constitutional Court explained the position as follows in *Law Society of South Africa v Minister of Transport* ¹²:

‘... the scheme insures road users against the risk of personal injury and their dependants against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying **common-law fault-based liability**. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent.’

[30] The purpose of the RAF Act was elucidated by the unanimous decision in *Engelbrecht v Road Accident Fund and Another*¹³ as follows:

‘...the stated primary concern of the Legislature in enacting these statutes is, and has always been, “to give the greatest possible protection to persons who have suffered through a negligent or unlawful act on the part of the driver or owner of a motor vehicle”’.

[31] On the statutory obligation and liability to compensate a plaintiff in an RAF claim the Supreme Court of Appeal in *Road Accident Fund v Abrahams* ¹⁴ clarified the position as follows:

¹² 2011 (1) SA 400 (CC) at para 25

¹³ 2007 (6) SA 96 (CC) at para 23

¹⁴ 2018 (5) SA 169 (SCA) at para 13

‘Section 21(1) abolishes the right of an injured claimant to sue the wrongdoer at common law. Section 17(1), in turn, substitutes the [RAF] for the wrongdoer. It does not establish the substantive basis for liability. The liability is founded in **common law** (delictual liability). Differently put, the claim against the appellant is simply a common law claim for damages arising from the driving of a motor vehicle, resulting in injury. Needless to say, the liability only arises if the injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle.’

PMBs and EMCs

[32] What distinguishes the present matter from many others is that the plaintiff does not claim reimbursement of any amounts paid directly to suppliers by his hospital plan. That issue, as indicated at the commencement of this judgment, has been postponed *sine die* pending a decision by the Supreme Court of Appeal in a similar matter, albeit in the context of a medical aid scheme. It is therefore not necessary to consider the many judgments handed down by our courts in respect of the principle of subrogation versus the internal Directives of the RAF. Here the defence of the RAF, despite its belatedly amended plea in respect of Directive 2, is in truth different, as appears from the evidence summarized above. The defence is that because the RAF considers, without more, that the plaintiff’s hospital plan (which it has never had sight of at its own election) should have covered some of his expenses as PMBs and/or EMCs, he is therefore not entitled to payment. This stance by the RAF, in the face of the undisputed testimony of the plaintiff and his wife to the contrary, and the fairly made, significant concessions of Mr Abdool, flies in the face of the basic principles of delictual liability at common law and explained by our highest courts to fall on the shoulders of the RAF. Put differently, the RAF remains liable under the common law for such expenses.

Section 17(4)(a) undertaking for future medical, similar and related expenses

[33] The RAF admits, or can no longer dispute, that the plaintiff requires future medical and similar treatment and will have future expenses, which include the following:

- (a) Treatment for urinary tract infections, pressure sores, neurological complications, pathological fractures of the lower limbs, spasticity, contractures, neurogenic heterotopic calcification, gastrointestinal problems and bone-grafting of the left wrist;
- (b) Psychological counselling due to the catastrophic nature of the injuries sustained;
- (c) Home adaptations, a secondary wheelchair, a standing frame and other adaptive devices, as well as an automatic transmission vehicle and assistance with household maintenance and gardening; and
- (d) A carer on a permanent basis (currently from Mondays to Fridays for 5 hours per day).

[34] Section 17(4)(a) of the RAF Act provides that ‘where a claim for compensation under subsection (1) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof, or the provider of such service or treatment directly, notwithstanding section 19(c) or (d), in accordance with the tariff contemplated in subsection (4B)’.

[35] In *Knoetze obo Malinga v Road Accident Fund*¹⁵ it was held that s 17(4)(a) is designed to remove contingencies created by estimating the future costs of medical and ancillary expenses and then to recalculate those costs to a present value, further estimating that it would be sufficient to cover expenses over the lifetime of a claimant. Such an undertaking thus envisages an “as-and-when” payment scheme of

¹⁵ [2022] JOL 57029 (GP) at para 13

actual expenses, removing all contingent permutations. Expenses are therefore paid as they eventuate. The court also held¹⁶ that, once a plaintiff proves his/her claim as contemplated in the subsection, he/she is entitled to claim an order catering for a direction to the RAF to furnish such an undertaking and a court is entitled to grant such an order.

[36] In *Barnard NO v Road Accident Fund*¹⁷ it was held that '[t]he provision of an undertaking serves not only to avoid the difficulties of quantification of such claims, it serves also to provide a claimant who will require future treatment or the rendering of services with a measure of security of access to such services that payment of a lump-sum award cannot provide. This, in my view, serves to protect the dignity of claimants. That the statutory scheme of compensation for victims of road accidents serves as a form of social security is well recognized. An interpretation of s 17(4)(a) which is consonant with the values of human dignity and equality must be favored if there is any ambiguity in the proper construction to be placed on the section'. (my emphasis)

[37] In *Kubheka v Road Accident Fund*¹⁸, the court, referring to *Knoetze*, ordered the RAF to furnish the plaintiff with a s 17(4)(a) undertaking for payment of 100% of the costs of future accommodation in a hospital or nursing home, or treatment, or rendering of a service or supplying of goods to the plaintiff resulting from the motor vehicle collision in question, and to compensate the plaintiff in respect of such costs after the costs have been incurred and upon proof thereof.

[38] In *Mathemelo v Road Accident Fund*¹⁹ the court (also referring to *Knoetze*) held that the content of such an undertaking must follow the wording of the subsection. In reaching this conclusion it further had regard to *Marine & Trade Inc. Co. Ltd v Katz*²⁰ in which it was held, albeit in the context of a statutory undertaking in an insurance claim, that a court has no discretion to alter the wording of such an undertaking in the absence of consent by both parties, since this '... could well give

¹⁶ fn 15 above, at paras 16 to 26

¹⁷ [2019] JOL 42656 (ECP) at paras 29 to 30

¹⁸ [2023] JOL 61455 (GJ)

¹⁹ [2023] JOL 60956 (GP) at paras 20 to 24

²⁰ 1979 (4) SA 961 (A) at 972 B-E

rise to lengthy expensive disputes between the parties ... and in any event, may still necessitate speculation or guesswork by the trial Court about what hospitalization, treatment, etc will become necessary in the future'. The court then concluded that the RAF was to provide the plaintiff with an undertaking in line with the declaratory order issued in *Muller obo Human v Road Accident Fund* to the following effect²¹:

'It is declared that Respondent, when invoking section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 as amended, and electing to compensate a road accident victim with an undertaking, that such undertaking should adopt the wording of section 17(4)(a) and **must be free from any limitations, caveats, restrictions and specifications ...**'

[39] In this matter, rather than providing the plaintiff with the required s 17(4)(a) undertaking, the RAF unilaterally opted for a "*basket of care*"-specified document listing the treatment allowed in respect of only certain of the injuries sustained by the plaintiff. The RAF Act does not provide for a unilateral 'contractual' undertaking, particularly in circumstances where such undertaking limits the plaintiff's access to treatment and payment of ancillary expenses for accident-related injuries. The 'undertaking' which the RAF seeks to impose upon the plaintiff is simply wrong in law, and he is not obliged to accept it.

[40] **The following order is made:**

1. **The defendant shall pay to the plaintiff, in respect of personally paid past medical, hospital and related expenses, a total sum of R1 465 152.18 (the "capital sum"), being the sum of R723 332.95 not in dispute between the parties, as well as the sum of R741 819.23;**
2. **Payment of the capital sum will be effected directly into the trust account of the plaintiff's attorneys of record by means of an electronic transfer within 180 (one hundred and eighty) calendar**

²¹ Para 1 of the order made on 8 September 2023 in *Muller obo Human & 2 Others v The Road Accident Fund* [Case No 066777/2023], Gauteng Division, Pretoria.

days from the date of this order (the first due date). If the defendant fails to make payment as aforesaid, the defendant will be liable for interest on any outstanding amount at the statutory rate per annum calculated from 14 (fourteen) days of this order;

3. In respect of past medical and hospital expenses paid for by the plaintiff's hospital plan, this issue is postponed sine die for later determination (by agreement between the parties);
4. In respect of future medical and related expenses arising from the collision, the defendant shall furnish the plaintiff with an undertaking, free of any limitations, caveats, restrictions, and specifications, in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for payment of 100% of the cost of future accommodation in a hospital or nursing home, or treatment, or rendering of services or supplying of goods in respect of accident-related injuries, after such costs have been incurred and upon proof thereof.
5. The defendant is to deliver the undertaking referred to in paragraph 4 above to the plaintiff's attorney of record within thirty (30) calendar days of date of this order;
6. Save to the extent provided in any prior order, the defendant is to pay the plaintiff's costs, including VAT, as between party and party on Scale B, and including also the costs of Counsel and the qualifying fees, if any, of the following experts:
 - a. Dr G Kirsten, General Practitioner
 - b. Dr F J D Steyn, Orthopaedic Surgeon
 - c. Dr R Martin, Radiologist
 - d. Ms Marion Fourie, Occupational Therapist
 - e. Dr Ed Baalbergen, Rehabilitation Practitioner
 - f. Dr Erika Steenberg, Clinical and Neuropsychologist
 - g. Ms Norma Colley, Industrial Psychologist

- h. Mr Wim Loots, Actuary
 - i. Mr Barry Grobbelaar of Forensys Engineering Dynamics,
Accident Reconstruction Experts
 - j. Ms Petra Coetsee, Architect
 - k. Dr Ilse Breytenbach, Urologist
7. For purposes of paragraph 6 above, Mrs Janine Marais is declared a necessary witness;
8. Payment of the taxed or agreed costs reflected above shall be effected within 180 (one hundred and eighty) days of agreement or taxation (the second due date) and will likewise be affected by electronic transfer into the plaintiff's attorneys trust banking account; and
9. Should the taxed or agreed costs not be paid by the second due date the defendant shall be liable for interest at the statutory rate per annum from the second due date until date of payment.

J I CLOETE
JUDGE OF THE HIGH COURT

Appearances

For Plaintiff: Adv A Heerink
Instructed by: Van der Spuy Cape Town (Ms L Willemse)

For Defendant: Mr F Goosen
Instructed by: State Attorney, Cape Town.