



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

Case number: 8881/2018

In the matter between:

S[...] A[...] J[...]

Plaintiff

and

RAYMOND BLANCKENBERG

Defendant

JUDGMENT DELIVERED ON 3 DECEMBER 2025

VAN ZYL, AJ:

Introduction

1. This case involves an action against the plaintiff's erstwhile attorney. The plaintiff claims damages for the alleged under-settling of his claim against the Road Accident Fund (RAF), essentially on the basis that the defendant, in breach of his

agreement with the plaintiff,¹ alternatively, in breach of his legal duty towards the plaintiff to advance the latter's interests,² settled his RAF claim for a so-called section 17(4)(a)³ undertaking only.⁴

2. Merits and *quantum* were separated during pre-trial negotiations, and the trial continued on the merits only.

The plaintiff's claim against the RAF

3. It is common cause that the plaintiff, who born on 4 March 1991, was involved in a motor vehicle collision on 20 September 2008 at Groot Drakenstein, near Franschhoek in the Western Cape. The plaintiff was about 17 years old at the time. He was a passenger on the vehicle.
4. As a result of the collision, the plaintiff sustained a fracture of the talus bone in the ankle, resulting in osteoarthritis and osteonecrosis or non-union.
5. In October 2008 the plaintiff, assisted by his mother, contacted the defendant, who practises under his own name as an attorney, to pursue a personal injury claim with the RAF. This resulted in the conclusion of a written mandate labelled a "*power of attorney*", in terms of which the plaintiff appointed the defendant to be his attorney and agent in the institution of his personal injury claim against the

¹ The relationship between an attorney and a client is based on the contract of mandate, which imposes fiduciary duties on the attorney: *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 469B; *Incorporated Law Society, Transvaal v Meyer and another* 1981 (3) SA 962 (T) at 971D.

² *Hirschowitz Flionis v Bartlett and another* 2006 (3) SA 575 (SCA) para 28: "*This being an instance of mere economic loss resulting from omission ... the incidence of the legal duty to act without negligence is a matter of legal policy. The decision whether the duty exists depends on various factors, including prevailing ideas of justice and where the loss should fall. This enquiry involves applying the general criterion of reasonableness having regard to the legal convictions of the community as assessed by the Court.*"

³ Referring to section 17(4)(a) of the Road Collision Fund Act 56 of 1996: "(4) Where a claim for compensation under subsection (1)-(a) 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- (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or (ii) the provider of such service or treatment directly, ..."

⁴ The particulars of claim contain various allegations of breach, but the parties subsequently agreed upon this narrow issue for determination.

RAF.

6. The defendant lodged a claim against the RAF on 20 February 2009. During October 2011, the RAF issued an undertaking under section 17(1)(a) of the Road Accident Fund Act 56 of 1996 to the plaintiff.
7. The undertaking states that the RAF *“records that it was agreed between the parties during settlement negotiations that the CLAIMANT shall be entitled to 100% ... if [his] proven damages, emanating from this collision, as contemplated under Section 17 of the Act”*. It further states that the RAF *“undertakes under Section 17(4)(a) ... to compensate the CLAIMANT, or the provider of the service or goods directly, for the costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or the supplying of goods to the said CLAIMANT after the costs have been incurred and on proof thereof”*.
8. Six years later, during May 2017, the plaintiff terminated the agreement with the defendant and requested the return of his file. He subsequently appointed his current attorney of record, who sent the defendant a letter of demand and then issued summons against him for the relief claimed in this action.
9. The plaintiff and the defendant painted two different pictures on the central issue as to whether the defendant settled the matter with the RAF for a section 17(1)(a) undertaking and nothing more. The difference between the parties lies in whether the undertaking issued on 21 October 2011 was issued unilaterally by the RAF and the matter therefore remained open for settlement (the defendant’s contention), or whether the defendant settled the plaintiff’s case based on the undertaking after agreeing thereto (the plaintiff’s version).

The pleadings

The plaintiff’s pleaded case

10. The plaintiff’s case was pleaded broadly. In his amended particulars of claim, the plaintiff pleaded that the terms of his agreement with the defendant included,

amongst others, that the defendant would arrange for medical examinations by doctors and other experts for medico-legal opinions on the plaintiff's behalf, which the defendant deemed necessary for the prosecution of the claim. The defendant would negotiate a settlement and settle plaintiff's personal injury claim on such terms and conditions as would be determined, and sign any release or discharge in respect of any settlement concluded.

11. The plaintiff pleaded further that the following were implied or tacit terms of the agreement as understood and accepted by plaintiff, *"alternatively, Defendant was at all relevant times under a legal duty to Plaintiff consisting of the following"*:

11.1. The defendant would perform the services of a professional practising litigation attorney with the necessary degree of professional skill, care, expertise, and judgment which could reasonably be expected of professional practising litigation attorneys.

11.2. The defendant would maintain the highest standard of honesty and integrity.

11.3. The defendant would not perform the services in a negligent manner.

11.4. The defendant would at all relevant times consult or advise the plaintiff of the prospects of success of his claim and/or the acceptability of any settlement proposals prior to instituting such claim and/or accepting such settlement; and

11.5. The defendant would not accept a settlement offer without obtaining instructions from the plaintiff to do so.

12. Pursuant to the conclusion of the agreement the defendant completed the required documents, obtained the required information in respect of the plaintiff's claim, and submitted a claim to the RAF.

13. The defendant, however, wrongfully breached the terms of the agreement;

alternatively, failed to comply with his legal duties, in that he acted intentionally, alternatively, negligently, in that he, *inter alia*:

- 13.1. Failed to perform the services of a professional practising litigation attorney with the necessary degree of professional skill, care, expertise, and judgment which could reasonably be expected of him.
 - 13.2. Failed to maintain the highest standard of honesty and integrity in his dealings with the plaintiff or in handling the plaintiff's claim.
 - 13.3. Failed to appoint properly qualified experts for medico-legal reports on the plaintiff's injuries sustained as a result of the collision.
 - 13.4. Failed to consult or advise the plaintiff of the prospects of success of his claim and/or the acceptability of any settlement proposals prior to instituting such claim and/or accepting such settlement; and
 - 13.5. Accepted a settlement offer without obtaining instructions from the plaintiff to do so.
14. As a result of these breaches, so the plaintiff pleaded, the plaintiff's personal injury claim against the RAF was "*extinguished*" and the plaintiff did not receive any; alternatively, fair, and proper compensation in respect thereof. As a result, the plaintiff suffered damages in the amount of R5 576 940.00,⁵ which amount the plaintiff would have received had the defendant not acted contrary to the agreement; alternatively, his legal duties, and which amount was within the contemplation of the parties when entering into the agreement.
15. The plaintiff terminated the agreement with the defendant in May 2017, and requested the return of his documents.

The defendant's pleaded case

⁵ As indicated, it is not at this stage necessary to determine the *quantum* of the plaintiff's damages.

16. The defendant pleaded, in brief, as follows to the plaintiff's allegations:

- 16.1. An undertaking was received from the RAF, but no capital sum or any other funds were recovered.
- 16.2. He performed the services of a professional practising litigation attorney and exercised the necessary degree of skill, care, expertise and judgment in relation to the plaintiff's claim. He maintained the highest standard of honesty towards the plaintiff and his family, and had not acted negligently.

17. The defendant denied that there was any under-settlement of the plaintiff's claim. There was no settlement offer or other proposals from the RAF.

18. The defendant denied that he acted in breach of the parties' agreement or in breach of his legal duties, and pleaded that he had appointed qualified experts for medico-legal reports.

19. As I have indicated, the case was ultimately presented on the basis that the only questions for determination were whether the RAF claim had, in fact, been settled for a section 17(1)(a) undertaking and, if so, whether such settlement constituted an under-settlement. A secondary question was whether the plaintiff's claim against the RAF had since prescribed. It is common cause that the defendant never issued summons against the RAF.

The evidence

20. The plaintiff called the following witnesses to give evidence:

- 20.1. The plaintiff;
- 20.2. The plaintiff's mother, Mrs L[...] J[...];
- 20.3. Dr Piet Olivier, orthopaedic surgeon;
- 20.4. Mr Andre Geldenhuys, the plaintiff's attorney;
- 20.5. Mr Leonard Kelder, an attorney with experience in RAF matter;

- 20.6. Mr Colin Verwey, acting manager of the RAF claims adjudication department, Cape Town;
- 20.7. Mr P.C. Crous, industrial psychologist; and
- 20.8. Dr Wilhelm Gericke, orthopaedic surgeon.

21. The defendant called Ms Natasha Coetzer, acting manager of the RAF claims adjudication department, Pretoria.

22. I refer briefly to the salient evidence.

The plaintiff, Mr S[...] JI...]

23. The plaintiff testified that he is 33 years old. He was 17 years old at the time of the accident in September 2008. Due to the accident, he sustained injuries to his ankle resulting in two operations to his ankle, one immediately after the accident and the other one about six years later. After the accident, he walked with the assistance of crutches for about 6 months. He also failed his matric examination in 2009.

24. In October 2008, he met the defendant, who came to his home and agreed to prosecute his claim against the RAF. He was a minor and at school at the time of the accident and his mother mainly dealt with the defendant whilst he only spoke directly with the defendant on one or two occasions. The defendant explained that he was going to assist him with his claim against the RAF.

25. The plaintiff and his mother subsequently went to the defendant's office where she signed the power of attorney authorising the defendant to act on their behalf. After meeting the defendant at his home in 2008, the only other time when he can remember seeing the defendant was when he went to his office on one occasion.

26. The defendant referred him to an orthopaedic surgeon, Dr Gericke, and to Dr Adams at the local hospital.

27. On one occasion, and on a date that he could not recall, the plaintiff and his

mother attended the defendant's offices to enquire whether he was going to receive monetary compensation because his friend, who had also been in the collision, had received a cash payment. At that stage the defendant informed the plaintiff that his injuries were not serious. The defendant then gave them a letter dated 21 October 2011 and the section 17(1)(a) undertaking. The letter was from the RAF, addressed to the defendant, stating: "*Attached please find the undertaking certificate as part of settlement for your attention*". It was signed by Ms M. Joubert, senior claims handler for the RAF in Menlyn.

28. At this meeting, the defendant explained to the plaintiff that he only had a "13% injury" (with reference to the RAF's Whole Person Impairment regulations) and indicated that "*die saak is klaar*". The plaintiff was unhappy because one of his friends who was with him in the vehicle when the accident occurred had received a cash payment and "*opened a security company*". The defendant always hastily explained "*everything*" to him and when he left, he could not remember or even understand what was explained.

29. The defendant did not communicate with them about the progress of the matter. The plaintiff testified that the defendant did not explain the contents of the undertaking or the settlement of the matter to him. When he took the undertaking to the hospital, they informed him that it was not viable. The accounts from Paarl Hospital were posted directly to him. He could at first not remember whether they had been paid, but stated later that the accounts were not paid.

30. The plaintiff testified that he did not give the defendant instructions to request an actuarial report from Mr Robert Koch. He expected the defendant to handle his case and expected to get enough money to purchase a house when the matter was finalised.

31. He testified that he is currently employed as a temporary caretaker at Groendal primary school, having been so employed for the past 6 years. The defendant telephoned the school about four years prior to the hearing enquiring about the plaintiff's salary, which was R4 200 per month at the time. However, the plaintiff was offered a position to replace the caretaker at the school who retired, and his

salary increased to R17 000 per month. The principal at the school indicated to him that he would be appointed permanently in due course. Prior to working at Groendal primary school, the plaintiff was employed as a maintenance worker at a guest house where he earned R4 000 per month, and was also working as a panel beater where he earned R600 per week.

32. The plaintiff's plan was to become a diesel mechanic after finishing school. The defendant did not discuss the issue of future loss of earnings with him and did not send him to an industrial psychologist.
33. In cross-examination, the plaintiff testified that he could not remember the details surrounding the undertaking, but that his mother would remember such. He could not remember whether the discussion in relation to the undertaking took place at the defendant's offices, when the discussion took place, or what the content of the discussion was in relation to the undertaking. He could only remember the defendant mentioning "13%" and advising them that the matter was finalised.
34. The plaintiff then testified that the undertaking was not discussed with him at all. It was put to him that his counsel referred him to the undertaking in his evidence in chief, and it was in relation to the undertaking that he had testified about the "13%" issue, to which he replied that he could not remember because the incident occurred long ago. He then stated that the defendant informed him that the matter had been settled according to the undertaking. It was put to him that he had earlier testified that the undertaking was not discussed with him at all and later thereafter stated that he could not remember the discussion in relation to the undertaking. He stated that the defendant told him that the matter was settled, that he would not receive monetary compensation, and that he "*must move on*". At a later stage during cross-examination, the plaintiff said that he saw the undertaking for the first time after the file had been handed to his new attorney. When asked if he provided any proof to his new attorney that the undertaking was accepted by the defendant, the plaintiff said that he could not recall.
35. The cross-examination proceeded in this fashion, with the plaintiff clearly unsure as to when and where exactly he had been presented with the undertaking for the

first time.

36. In re-examination, too, the plaintiff remained unsure as to whether he had the undertaking when he went to the hospital, or whether he took the defendant's file to the hospital. He said the first time he saw the undertaking was when they fetched the file. He and his mother went to the hospital, where they were told the undertaking could not be used. They then took the file to Mr Geldenhuys, who explained its meaning.

37. The defendant's counsel criticised the plaintiff for these contradictions. The plaintiff was, however, clearly ignorant as regards the timeline of events and the import of the undertaking. He was sincere in giving his evidence, and the contradictions did not undermine the salient aspects thereof. What is clear from the plaintiff's evidence, whichever way one looks at it, is that he had at some stage been placed in possession of the undertaking. It was not seriously disputed that the defendant had told him and his mother that the case was at an end ("*die saak is nou klaar*").

Ms L[...] J[...] (the plaintiff's mother)

38. Ms J[...] testified that, following the incident, the defendant visited their residence, presenting himself as an attorney. He stated that he could help with the case due to his ongoing work related to road accidents.

39. She accordingly signed a power of attorney authorising the defendant to undertake the case on their behalf. She frequently had telephonic contact with the defendant who did not explain the exact process to her. The defendant contacted them from time to time for consultations, updates, and signing forms. She trusted him because he had promised to help.

40. She and the plaintiff were concerned about the fact that no monetary award was forthcoming, and she decided to contact her new attorney, and sought to retrieve her file from the defendant. Both the plaintiff and his mother repeated that the defendant had explained to them that the plaintiff had suffered 13% Whole

Person Impairment, and thus did not qualify for any monetary compensation from the RAF. They both found this to be odd as the other claimants who were involved in the same accident, and whose claims the defendant had also handled, received some sort of monetary compensation.

41. Ms J[...] testified that the defendant had explained to them that the undertaking could be used to obtain medical services. When they attempted to do so at the local Medi-clinic, they were informed there was no active file or undertaking in existence. They then returned the undertaking to the defendant as they were of the view it was of no assistance to them.

42. Ms J[...] used the same wording to describe the manner in which the defendant had explained the undertaking to them, namely, "*Die saak is klaar*".

Dr Wim Gericke, orthopaedic surgeon

43. Dr Gericke was the orthopaedic surgeon who assessed the plaintiff after the accident in April 2009. Dr Gericke indicated that he had not been asked to consider the RAF's narrative test, and that he in any event did not regard himself as having the necessary training to do so. He stated that the RAF4 had probably been completed by Dr Adams at the Hawequa clinic. Dr Gericke's function was merely to assess the plaintiff and provide a report. He explained that the effects of the plaintiff's injuries were permanent in nature, and limited his employment prospects.

Dr Piet Olivier, specialist orthopaedic surgeon

44. Dr Olivier testified regarding the proper procedure to fill in the RAF4 medical form from his over 30 years of experience. He stated that the lack of markings on the RAF4 form in the present matter meant that the form was incomplete, in that the narrative test has either not been performed or the results thereof were not noted down. In those circumstances the attorney in question normally refers the form back to the doctor, with instructions for the narrative test to be performed and the findings recorded.

45. In his view, the only way for a claim to be properly individualised is to conduct the narrative test and investigate the personal circumstances of the plaintiff to ascertain the extent of the injury's effect on him. He explained the importance of the narrative test in terms of assessing what may be considered a minor injury in theory, but the particular circumstances of the plaintiff may render the injury and the effects thereof serious. He also differentiated between the Whole Person Impairment and the actual application of the narrative test to further investigate the effects of the injury particularly where Whole Person Impairment is less than 30%.

46. Dr Olivier stated that, in his estimation and assessment, the plaintiff was rendered unemployable by the injury and, if he were to be employed, he would be restricted to general labour. This was particularly so as the plaintiff had been unable to complete his schooling as a result of the accident and the impact it had on him. At the time of seeing Dr Olivier, the plaintiff had already reached what is referred to as Maximum Medical Improvement. He had already been through various operations and his ankle was permanently stiff. Dr Olivier explained that the blood flow to the foot would never be normal, and that the plaintiff will never walk normally. He would remain in constant pain, and unable to perform weight-bearing exercises or activities.

Mr Piet Crous, industrial psychologist

47. Mr Crous testified that he had assessed the plaintiff's pre-morbid and post-morbid position, in particular in relation to a loss of earning capacity. He indicated that, in the case of a scholar, loss of income or earning capacity is a certainty. It was clear to him from Dr Gericke's report that an industrial psychologist should have been appointed.

48. The plaintiff was unemployed for several years which indicates a loss of income. He did not pass his matriculation exams and therefore is categorised as unskilled as opposed to a semi-skilled worker which requires physical strength. He would have had a better standing in the job market with matric. The fact that the plaintiff

is currently employed only impacts his post morbid earning potential, which is in any event a scenario where one cannot cater for everything.

Mr Leonard Kelder

49. Mr Leonard Kelder was initially called as an expert witness. He purported to be a practising attorney and an expert in dealing with RAF matters. The defendant objected to Mr Kelder being called as an expert on the grounds, *inter alia*, that his expert summary was defective and that he could in any event not provide an opinion on the reasonableness of the defendant's conduct. The court upheld the objection but allowed Mr Kelder to be called as a lay witness.

50. It transpired, however, that Mr Kelder could not furnish relevant evidence in any event. He had no personal knowledge of the facts of the matter, and his evidence reverted time and again to his opinion on how the defendant should have acted, which is a matter for the court to decide. The court does not admit opinion evidence unless it is tendered as expert evidence in terms of the relevant rules of court.⁶ Any opinion, whether from a layperson or expert, which is expressed on an issue that the court can decide without receiving such opinion is in principle inadmissible because of its irrelevance. Only when an opinion has probative force can it be considered admissible.⁷

51. In the circumstances, I disregarded Mr Kelder's evidence.

Mr Andre Geldenhuys, attorney

52. Mr Andre Geldenhuys, the plaintiff's legal representative then testified. He explained how the plaintiff had come to instruct him to deal with the RAF claim and the claim against the defendant.

53. Mr Geldenhuys testified that he regarded the defendant's conduct of the claim as

⁶ *KGA Life Ltd v Multisure Corporation (Pty) Ltd and others* 2024 (3) SA 51 (SCA) para 9.

⁷ *Helen Suzman Foundation v President of the Republic of South Africa and others* 2015 (2) SA 1 (CC) para 30.

negligent, given the latter's failure to follow up on the incomplete RAF4. I do not regard this evidence as admissible because whether the defendant was negligent was an issue for the court to decide.

54. Nevertheless, in cross examination Mr Geldenhuys was asked whether, in his view, the defendant had settled the plaintiff's RAF claim. It was put to Mr Geldenhuys that settlement presupposes an agreement between the parties to settle the matter. Mr Geldenhuys' response was that only the issue of future medical expenses had been put before the RAF, and thus they could only decide on what was before them. In Mr Geldenhuys's view, the defendant did not reject the undertaking and as such the offer of the undertaking was accepted; it was, after all, the only offer made. He explained that the file contents had been subpoenaed by him and what he gleaned from the contents of the file was the matter had been settled for an undertaking.

Mr Colin Verwey

55. Mr Colin Verwey is employed by the RAF in Cape Town. He testified regarding the process and procedure for undertakings to be issued, and the acceptance thereof. As part of the process, the merits of the claim must be assessed and signed off by two people and once it is considered that an offer must be made an undertaking must be issued. The procedure has not changed since 2011. He regarded the undertaking as valid and enforceable, and was of the view that the RAF's system reflects that the matter has been settled.

Ms Natasha Coetzer

56. The defendant did not testify, but called Ms Coetzer as his sole witness.

57. Ms Coetzer effectively holds the same position in the RAF in Johannesburg as Mr Verwey does in Cape Town. According to her, an undertaking is issued once the merits of a claim become settled. The undertaking is only issued once an assessment of the claim is done by at least two separate officials in the RAF, namely a claims handler and the adjudication department. Once a merits

assessment has been completed, the undertaking is issued immediately so that the claimant can have access to medical treatment.

58. Ms Coetzer specifically drew the court's attention to the portion of the undertaking that reads "...*Claimant is entitled 100% of her proven damages...*" as impetus for the above statements, in particular that the merits were not in dispute, only the *quantum* had not been settled. She also pointed out there had been no summons issued in the matter. She explained that no cash offer was made. The claims handler accepted the undertaking on the system on the day it was issued.

59. Ms Coetzer conceded that the defendant had an opportunity either to amend the lodgement documents in respect of the heads of damages (the RAF1 form) or to issue summons. When questioned about the undertaking being considered a partial or under-settlement of the matter, she indicated that it could be considered a partial settlement. She also stated that in order for the RAF to consider a matter settled there must be one of three documents viz a discharge form signed by the attorney on presentation of the offer, a court order or a default judgment for payment, or there must be an offer saying "*in full or final settlement of the matter*". In the absence of such documents she was of the view that the file remained open and unsettled, and it would in 2017 still been capable of settling. When it was put to her that the defendant had not attempted to prove any other heads of damages, she said that there was no summons on file, and the RAF was therefore not liable for any such other damages. She was unable to dispute that the matter had become settled or partly settled, and specifically stated that she did not know what else to say to the question.

60. I turn to discuss this evidence in light of the issues for determination.

Did the defendant settle the plaintiff's RAF claim?

61. The plaintiff bears the *onus* to prove, on a balance of probabilities, that the defendant settled his claim against the RAF, and that such settlement constituted a negligent under-settlement.

62. The classic test for negligence was formulated in *Kruger v Coetzee*,⁸ where the Court stated that liability for negligence arises if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence and the defendant failed to take such steps. The reasonable person is not an actual person but is the personification of society's perception of the acceptable standard of conduct within society under certain circumstances. The reasonable person is the typical average member of society who is not exceptionally gifted, cautious or sophisticated but on the other hand, is not careless or injudicious when taking chances.^{9 10}

63. The liability of an attorney to his or her client for damages resulting from that attorney's negligence is based on a breach of the contract between the parties.¹¹

"[14] In order to succeed in a claim for damages the client must meet the following threshold requirements:

'The client must allege and prove:

(a) The mandate;

(b) Breach of the mandate;

(c) Negligence in the sense described above (VIZ failure to exercise the required skill knowledge and diligence expected of an average attorney);

(d) Damages, which may require proof of the likelihood of success in the aborted proceedings. See Dhooma v Mehta.

(e) That damages were within the contemplation of the parties when the contract was concluded. See Bruce NO v Berman."

64. In the present matter, it is common cause that the defendant was mandated to

⁸ 1966 (2) SA 428 (A) at 430E-G.

⁹ *Harrington NO and another v Transnet Ltd t/a Metrorail and others* [2010] 2 All SA 220 (SCA) paras 34-35.

¹⁰ Wrongfulness, which is distinct from negligence, is not constituted in all cases by the infringement of a legal interest. It is also present when a person who is under a legally recognised duty to act, fails to do so. This position is qualified by the principle that there is no general duty to prevent loss from occurring. Whether an omission is wrongful will depend on whether the particular omission offends against the legal convictions of society at large: see *Nelson Attorneys v Smit N.O and others* [2025] ZASCA 162 (24 October 2025) paras 43-48.

¹¹ *Frost v Gerhard Von Wielligh Attorneys* [2019] ZAGPPHC 971 (12 December 2019) paras 13-14.

assist in the lodging and prosecution of the plaintiff's claim against the RAF.

65. There was much evidence on how the RAF usually settles matters but, since none of the witnesses who could testify on that process had personal knowledge of the facts, the evidence retained an aura of speculation. Mr Verwey, for example, readily admitted that in the ordinary course, matters are only settled between a claimant and the RAF through written instruments, either by the claimant's attorney signing a discharge form, alternatively by written confirmation of email or post. He, however, relied exclusively upon the screenshot which was generated by the RAF which records the "*date accepted*" in relation to the undertaking as 18 October 2011 which in his view means that the plaintiff accepted the offer on 18 October 2011. Ms Coetzer, on the other hand, testified that the "*date accepted*" means that the date that the relevant RAF officer accepted the offer on the system.

66. When all is said and done, nothing much turns on this. It is not disputed that the defendant lodged no claim for future loss of earnings or earning capacity: the RAF1 claim form indicates that the compensation claimed related only to "*Emergency medical treatment*" and general damages. The only medico-legal experts appointed by the defendant at that stage was Dr Gericke and Robert Koch, an actuary. The RAF4 form was filled in by Dr Adams at the Hawequa clinic.

67. The regulations under the Act recognise a difference in the information required in the RAF4 form as part of the statutory documents required for the submission of a claim, and the medico-legal expert reports underlying such information. The RAF4 is the serious injury assessment and differs from the normal expert reports in that it involves the application of the narrative test. In *Daniels and others v Road Accident Fund and others*¹² the court held as follows:

"... The application of the AMA Guides and the narrative test were centrally under consideration in Law Society of South Africa and others v Minister of Transport and

¹² [2011] ZAWCHC 104 (28 April 2011) para 88. Emphasis supplied.

another 2010 (11) BCLR 1140 (GNP). In that matter, Fabricius AJ ... summarised the operation of regulation 3(1)(b)(ii) and (iii) at para 69-72 of the judgment. ... The first and second respondents before us were also the respondents in the matter before Fabricius AJ. What, for current purposes, is of particular relevance is the learned judge's observation (at para 71) that 'First Respondent [i.e. the Minister of Transport] also points out that it is not possible to predict with certainty the outcome of an assessment under the AMA 6 with reference to hypothetical examples as the Applicants have sought, to do. The AMA 6 allows for significant adjustment of the percentage WPI ['Whole Person Impairment'] in various ways with reference to the circumstances of the individual: The inherent unpredictability, arising out of the effect of the peculiar circumstances of the individual concerned, which affects the potential characterisation of an injury as serious is emphasised by the fact that the narrative test, with its focus on the consequences of an injury for a particular individual, affords an alternative means, by way of a 'safety net', of 'a gateway' to qualification for compensation for non-pecuniary loss.'

68. It appears from the documents in the trial bundle, to which the witnesses were referred, that the defendant had in fact been asked by the RAF in March 2011 to submit an industrial psychologist's report. The defendant replied that "an industrial psychologist report is not necessary, because he is still a scholar and doesn't earn a salary".
69. Much evidence was led before this court but, on a holistic consideration, it offers little justification of the defendant's inaction in relation to the plaintiff's case. Even accepting the defendant's witness's evidence in relation to whether the undertaking had been done by the RAF unilaterally, there is no explanation from the defendant as to why he did not pursue the plaintiff's claim in relation to other possible heads of damages. He took no further action following receipt of the undertaking, however it came about. Ms Coetzer testified that where an offer is sent and there is silence in response thereto, the matter is not settled unless there is a signed acceptance or court order. She was of the view that the plaintiff's case had not been settled because there was no settlement offer made to the defendant or communication from the defendant stating that the undertaking had been accepted in full and final settlement. On the facts as they emerged from the evidence, however, it is indisputable that the defendant was

content with the undertaking. He gave it to the plaintiff and then did nothing thereafter, either in relation to the claim as lodged or the issuing of summons when no further settlement proposals were forthcoming. He did not make any settlement proposals to the RAF.

70. I tend to agree with the submission by the plaintiff's counsel that, had the defendant properly considered the plaintiff's claim and the possible bases upon which it could be lodged, and had he instructed the appropriate medical practitioners to quantify the claim, there is a likelihood that the plaintiff would have successfully been awarded compensation for a loss of earning capacity, and possibly general damages, should his injury have been considered serious. The RAF, in its undertaking, tendered to pay 100% of plaintiff's proven damages, indicating that the merits of the matter had been conceded. On the defendant's own witness' version, *"it doesn't get better than that, no attorney would decline that"*.

71. By way of analogy, in *Daniels* the patient's attorney had requested that a serious injury assessment be completed. The first respondent had refused the request for because of a lack of information. The patient in *Daniels* had also suffered a lower limb injury and it was unclear how serious the injury was, but there was information regarding the treatment received. The court held that as a result of the uncertainty and lack of information, the serious injury assessment ought to have been conducted and RAF ought to have paid for same as part of individualising the claimant.

72. In this matter, the defendant neglected to instruct the person completing the serious injury assessment (whether Dr Adams or Dr Gericke) to perform the narrative test. To put it differently, the plaintiff was not individualised and the defendant erred in not following up on the seriousness of the plaintiff's injury either for the purposes of a claim for general damages or for a loss of earning capacity.

73. In my view, a reasonable attorney would have acted pro-actively in relation to the plaintiff's claim by at least appointing the relevant expert (such as an

industrial psychologist) to investigate and address the aspect of loss of earnings after ascertaining the proper degree of impairment. Precisely because the plaintiff was a scholar, the first port of call should have been the quantification of a possible loss of earning capacity. This was of particular importance as the injury set the plaintiff back in terms of progression at school. The pain and recovery of the operations performed caused him to miss school and ultimately fail matric which he had previously been on track to pass. As a result, the loss of earning capacity and the plaintiff's possible future career path should have been assessed. Dr Gericke admitted that he had no formal training on the narrative test and how to apply it, and he had not been requested to do so. It would be incumbent on the defendant, as attorney, to raise the aspect and then, if necessary, to appoint another expert to conduct the assessment and revert regarding the seriousness thereof:

*"A normally prudent attorney would have felt it wise to lodge the claim on the strength of the available information, however inadequate she or he reckoned it to be. What she did, was to throw in the towel and surrendered. She made no constructive and vigorous efforts to resolve the perceived problem. She did not have to have absolutely accurate information about every component of the compensation the plaintiff was entitled to claim".*¹³

74. The defendant clearly did not take reasonable steps to further the plaintiff's claim in accordance with all the avenues available to him. No settlement proposals were put forward by him as requested by the RAF claims handler in 2011. All that was provided was an actuary's report. At that stage, the defendant could also have still issued the summons claiming a loss of earning capacity, at least to preserve the plaintiff's claim. Instead, he handed the undertaking to the plaintiff and said that "*die saak is nou klaar*". On the evidence of his own witness, Ms Coetzer, no further action was taken on the plaintiff's file, whether by the RAF or by the defendant.

75. The defendant's failure to follow up for all intents and purposes resulted in the settlement of the matter, and there are no other avenues open to the plaintiff to

pursue this save for this action. Any action against the RAF has long since prescribed.

76. The defendant places much emphasis on the fact that there are two irreconcilable versions before the court in relation to whether the plaintiff's claim was in fact settled.¹⁴ I do not think, however, that that is really the case. The defendant did not testify despite having had the opportunity to do so. No coherent version was put to the plaintiff's witnesses and, whilst the defendant denied under-settling the claim, he failed to set out the factual basis upon which his denial rested. His "version" consisted of an armchair investigation into how the undertaking could possibly have come about. It bore the hallmarks of a belated construction.

77. The defendant argues that his explanation of the true state of affairs is more probable than that of the plaintiff for the following reasons: Mr Geldenhuys testified that he has never settled a matter with the RAF without a written agreement being concluded. Mr Verwey concurred that a settlement usually necessitated a signed discharge or documented communication, such as an email or letter from the claimant, as evidence of acceptance. Ms Coetzer testified that a settlement requires a written agreement between the RAF and the claimant, which resolves the claimant's claim in full and final settlement. The fact that there is no supporting documentation, such as a signed discharge by the defendant or an email wherein the defendant accepted the undertaking, suggests that the RAF issued the undertakings unilaterally when the merits were conceded. This is not dependent upon any agreement or settlement with the attorney or defendant.

78. The defendant argues that the explanation tendered by Ms Coetzer that where merits are conceded (as in the present case), the RAF would unilaterally issue an undertaking to assist the claimant to obtain medical assistance was uncontested during her evidence and is a probable, reasonable and cogent explanation. It is more plausible that the undertaking is a unilateral act by the RAF given that the undertaking itself provides for 100% of the proven damages of the claimant and it

¹⁴ As to the evaluation of the evidence in such a case, see *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) para 5.

covers all conceivable future medically related expenses, and that, according to Ms Coetzer's evidence, no attorney would refuse such an offer.

79. All of this does not, however, explain the defendant's actions in handing the undertaking to the plaintiff in 2011 and indicating that the matter was at an end. It appears, further, that Ms Coetzer's involvement in the matter was precipitated by a query from Ms Gaylene Blankenberg of the RAF in 2017, recording that "*that the attorney is however eager to settle the matter*". This email was sent in 2017. The defendant argues that this question begs answering – why would the defendant be "*eager to settle the matter*" which was already settled? Put differently, the defendant contends that his six years' inaction in the matter absolves him from liability. In my view, however, the defendant's eagerness to settle in 2017 more probably resulted from the fact that the plaintiff had by then appointed an attorney who had threatened the defendant with legal action arising from his handling of the RAF claim.

80. In these circumstances, I am of the view that the plaintiff has proven on a balance of probabilities that the defendant had settled the matter.

Was the plaintiff's claim under-settled?

81. In *Fourie v Ronald Bobroff & Partners Incorporated*¹⁵ the principles in relation to a claim based on an under-settlement were set out as follows:

*"The following principles appear from J.R. Midgley, **Lawyers' Professional Liability** Juta 1st edition 1992.*

- a. Where a Plaintiff alleges that he/she has suffered a loss because a settlement was too low, he/she needs to prove that the amount recovered is less than the amount which would have been determined by a properly negotiated settlement or that which a Court would have ordered. The award will be the difference between the two amounts. (p 172)*
- b. Every lawyer has a duty to establish the facts and evidence which can best assist his client. Where the settlement figure, as a result of his failure to*

¹⁵ [2015] 2 All SA 210 (GJ) para 16.

investigate properly was too low, an attorney will be held liable.

- c. *Damages suffered by a client as a result of breach of the mandate should be assessed at the time when the agreement was concluded containing the alleged under-settlement. It is then when the loss is crystallised. The Court dealing with a second action to claim the damages suffered as a result of the under-settlement will thus have to establish the amount which would have been recovered on a balance of probabilities at the time of the under-settlement and with the information then available....”*

82. The plaintiff's case is that his claim against the RAF was settled by the defendant for an undertaking pursuant to section 17(4)(a) of the Road Accident Fund Act which provided only for the plaintiff's future medical expenses.

83. The defendant argues that, whilst the plaintiff alleges that the defendant settled his case for a s17(4)(a) undertaking only, it is not his case, nor has he advanced any evidence that the defendant settled with the RAF on the other heads of damages. There was therefore no settlement on general damages and loss of earning capacity. It follows, so the defendant contends, that there could not have been an under-settlement in respect of the other heads of damages. If the plaintiff wanted to hold the defendant liable for an alleged failure to claim for general damages as well as a loss of earning capacity, then he should have proceeded on a cause of action against the defendant for a failure or omission to settle the plaintiff's case on such heads of damages, not for under-settling the plaintiff's case.

84. I do not agree with this argument. Whether the defendant under-settled the plaintiff's claim is in the present matter to be regarded in the context of the claim as a whole, not only on the single head of damage – future medical costs – on which the defendant was fortunate to achieve something. I did not read the parties' agreement on the issue for determination to be as narrow as the defendant contended in oral argument at the end of the trial.

85. The evidence furnished by the medical experts in this matter was not seriously disputed. It shows that the plaintiff would probably have been successful in a claim based on a loss of earning capacity, and possibly general damages. I

accordingly find that the acceptance of the RAF's undertaking in finalisation of the plaintiff's claim constituted an under-settlement of the claim in the sense that, had the defendant pursued the other heads of damages that were applicable to the plaintiff's case, he would probably have obtained an award from the RAF in a total sum far outweighing the value of the undertaking on its own.

86. It was not in dispute that a civil claim against the RAF has prescribed, even taking into account the fact that the plaintiff was a minor at the time of the collision. Section 23 of the Act provides in relevant part as follows:

“23 *Prescription of claim*

- (1) *Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.*
- (2) *Prescription of a claim for compensation referred to in subsection (1) shall not run against-*
 - (a) *a minor;*
 - (b) *any person detained as a patient in terms of any mental health legislation; or*
 - (c) *a person under curatorship.*
- (3) *Notwithstanding subsection (1), no claim which has been lodged in terms of section 17 (4) (a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.*¹⁶

87. The plaintiff's claim was lodged in 2009, which was the year in which he turned 18 years of age. The plaintiff accordingly has no further recourse against the RAF in relation to the consequences of his injuries.

Costs

88. There is no reason why the general rule as to costs should not be followed, that is, that costs should follow the result. In the exercise of my discretion, I am of the view that counsel's fees should be taxed on Scale B.

Order

89. In the circumstances, it is ordered that:

89.1. The defendant is liable for the plaintiff's yet to be proven damages;

89.2. The defendant is ordered to pay the plaintiff's costs, inclusive of counsel's fees taxed on Scale B; and

89.3. The matter is remitted to the Rule 37(8) pre-trial roll for determination of the *quantum* of the plaintiff's claim.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the plaintiff:

Instructed by:

Ms S. Naidoo

Michalowsky Geldenhuys & Humphries
Attorneys

For the defendant:

Instructed by:

Mr T. Booley

Ditsela Incorporated Attorneys