



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

WC Case No: **1169/2020**

Case No: **A186/2025**

In the matter between:

ROAD ACCIDENT FUND

Appellant

and

NICOLAAS JOHANNES VAN WYK

Respondent

Neutral citation: *Road Accident Fund v Nicolaas Van Wyk* (Case No: **A186/2025**)
[2026] ZAWCHC... (09 February 2026)

Coram: DOLAMO J, LEKHULENI J *et* NZIWENI J

Heard: 12 September 2025

Delivered: Electronically on 9 February 2026

Summary: Appeal against payment of past medical expenses – Court setting aside the RAF's first directive to reject claims for past medical expenses settled by medical aid scheme – The RAF issuing two subsequent directives – The RAF contending that two subsequent directives do not breach the court order setting aside the first directive – *res inter alios acta* principle discussed – Appeal Court finding that the two subsequent directives breached the court order setting aside the first directive – Appeal dismissed.

ORDER

1. The appeal is hereby dismissed.
2. The RAF is ordered to pay the costs of the appeal on a party and party scale including the costs of two counsels where so employed on scale C.

JUDGMENT

LEKHULENI J: (DOLAMO et NZIWENI JJ Concurring)

Introduction

[1] This is an appeal by the RAF against the judgment and order handed down by Mthimunye AJ in respect of a delictual claim in which the appellant was directed to pay the respondent's past medical expenses in the sum of R350 187,56 plus interest thereon at the prescribed rate of interest 14 days from the date of judgment to the date of final payment. On 18 December 2018, the respondent was involved in a motorcycle accident in which he collided with another vehicle driven by an insured driver as envisaged in the Road Accident Fund Act 56 of 1996 ('the RAF Act'). As a result of that collision, the respondent sustained bodily and multiple orthopaedic injuries to his body and was admitted for medical treatment at Milnerton Mediclinic.

[2] Pursuant thereto, on 3 June 2019, the respondent lodged a motor vehicle claim against the appellant ('the RAF') for compensation for the bodily injuries he sustained in the accident. The respondent sought to hold the RAF liable for his claim for past and future medical expenses, past and future loss of earnings, and general

damages. The RAF defended the action and disputed that the insured driver was the sole cause of the collision.

[3] In the alternative, the RAF pleaded that, if the court finds that the insured driver was negligent as alleged by the respondent, the RAF denied that such negligence contributed causally to the collision. In the further alternative, the RAF pleaded that in the event the trial court finds that the insured driver was causally negligent, then in that event, the RAF averred that the collision was caused partly through the negligence of the insured driver and partly as a result of the respondent's negligence; the respondent having been negligent in not keeping a proper look out and having driven at an excessive speed. In its Plea, the RAF did not impugn the payment of past medical expenses paid by the respondent's medical aid scheme in line with the directives issued by the Acting Chief Claims Officer to all regional managers.

[4] The matter was enrolled for trial on merits and quantum for 19 June 2024. At the hearing of the matter, merits and quantum were not separated. At the commencement of the trial, the court was informed that the RAF's witness, the insured driver, was not available and was in Zimbabwe. The RAF's attorney requested leave from the court to lead the evidence of the insured driver through the virtual platform. However, the court *a quo* refused the request. Subsequent thereto, the RAF applied for a postponement of the trial. The trial court also refused the application for a postponement and finalised the matter after hearing only the respondent's evidence.

[5] The court thereafter granted an order on the merits and found that the RAF was liable for 100 per cent of the respondent's proven damages. The court also ordered that the RAF must provide an undertaking in terms of s 17(4)(a) of the RAF Act in which it undertakes to compensate 100 per cent of the respondent's future medical expenses and costs arising from the said motor vehicle accident-related injuries. In addition, the court ordered the RAF to pay R350 187,56 in respect of the respondent's past medical expenses, plus interest thereon at the prescribed rate of interest. The trial court also ordered the RAF to pay the respondent's agreed or taxed costs on scale C for counsel's fees.

[6] Thereafter, on 25 July 2024, the RAF applied for leave to appeal against the judgment and orders made by the trial court. In terms of the application for leave to appeal, the RAF submitted that the trial court erred in its finding, specifically in not allowing the RAF to present the evidence of the insured driver virtually and further that the court erred in finding that the RAF was 100 per cent liable to pay the respondent's proven damages. On 3 September 2024, the application for leave to appeal was heard. The trial court dismissed the RAF's application for leave to appeal on 9 September 2024, on the grounds that there were no prospects of success on appeal.

[7] The RAF thereafter considered the decision handed down on 27 October 2022, by Mbongwe J in *Discovery Health (Pty) Ltd v Road Accident Fund and Another*,¹ in which the RAF issued its directive on 12 August 2022 (the first directive), which instructed the RAF employees to reject road accident victims' claims for the disputed past medical expenses. This directive was to the effect that all claims for past medical expenses lodged by claimants whose medical aid schemes had already settled them should be rejected on that basis alone. The reasoning underpinning this directive was that those claimants did not suffer any loss, and that the RAF therefore had no duty to reimburse them. Mbongwe J reviewed and set this directive and, amongst others, interdicted the RAF from relying on the directive to reject claims for past medical expenses.

[8] The RAF also considered the subsequent decision of the majority in *Discovery Health (Pty) Ltd v Road Accident Fund and Another*,² in which the full court of the Gauteng Division found that two subsequent directives, issued by the RAF on 13 April 2023 (the second directive) and on 2 November 2023 (the third directive) respectively, were not unlawful and not in breach of the order issued by Mbongwe J on 27 October 2022. For completeness, the second directive required the RAF's employees to first ascertain whether a claim fell within the prescribed minimum benefits (PMBs) or emergency medical conditions (EMCs), and only where it was neither would a claim be processed and honoured if successful. The third directive

¹ 2023 (2) SA 212 (GP) (*'Discovery Health 1'*).

² 2025 (3) SA 225 (GP) (*'Discovery Health 2'*).

was based on s 19(d)(i) of the RAF Act, which provides that: ‘the Fund or an agent shall not be obliged to compensate any person in terms of s 17 for any loss or damage –

‘...

(d) where the third party has entered into an agreement with any person other than the one referred to in paragraph (c)(i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim –

(i) a portion of the compensation in respect of the claim.’

[9] After considering these two cases and other decisions in these division dealing with the RAF’s stance on the payment of past medical expenses, on 5 December 2024, the RAF applied for leave to appeal for the second time before the trial court seeking to impugn the Court a quo’s order directing the RAF to pay the respondent the sum of R350 187, 56 as his past medical expenses and interest. The trial court summarily dismissed the RAF’s second application for leave to appeal, holding that the RAF’s application was an abuse of power and abuse of the Court’s time. The Court subsequently ordered the RAF to pay the costs of the second application for leave to appeal on an attorney-and-client scale.

[10] Aggrieved by this decision, on 25 January 2025, the RAF petitioned the Supreme Court of Appeal in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013 (‘the Superior Courts Act’). The RAF sought leave from the Supreme Court of Appeal (‘the SCA’) to appeal against paragraphs 3 and 4 of the trial court’s orders, which directed the RAF to pay the respondent past medical expenses in the sum of R R350 187, 56 and interest. On 04 April 2025, the SCA granted the RAF leave to appeal to the full Court of this division against paragraphs 3 and 4 of the orders of the Court a quo, namely the payment of past medical expenses plus interest thereon at the prescribed rate of interest.

Factual Background

[11] Before I can consider the matter on the merits, it is instructive to set out the background facts that led to the respondent’s claim against the RAF. As foreshadowed above, the respondent was involved in a motor vehicle accident on 16

December 2018 on the N1 National Road. At the trial, the respondent testified that on Sunday, 16 December 2018, he rode his motorbike from Mossel Bay, where he had visited his ex-wife and son, to his home in Lagoon Beach, Cape Town. He is well experienced in riding motorbikes. While travelling, just after passing Paarl, it was around 20h00 and the sun had just set. He was riding his motorbike in the fast lane because the left-hand lane was quite congested.

[12] According to the respondent, there were no cars in front of him for about 300 meters. While riding between 110 and 120 kilometres per hour, he noticed a bakkie driven by the insured driver moving from the left-hand lane into the right-hand lane, directly in his path. The said vehicle did not have its lights on. The respondent tried to brake and swerved to avoid the accident, but it was too late. His motorbike's front wheel collided with the right side of the bakkie's rear bumper. He lost control of the motorbike, fell to the ground and lost consciousness. He stated that he suffered serious bodily and orthopaedic injuries and was admitted to Milnerton Mediclinic for medical attention. The respondent further gave evidence of a schedule of medical expenses amounting to R350 187,59 incurred in respect of this motor vehicle accident. During cross examination, he denied that he did not keep a proper lookout.

[13] At the conclusion of his testimony, the respondent formally closed his case on the merits. Thereafter, the RAF's legal representative informed the Court that their witness, the insured driver, was available to provide his evidence via Microsoft Teams, as he was based in Zimbabwe. The respondent's legal representative opposed the application and submitted that a substantive application on notice should have been made timeously. The respondent's counsel asserted that the RAF's application from the bar was prejudicial to the respondent and a waste of the Court's time. In addition, the respondent's counsel implored the Court to dismiss the RAF's request to lead evidence through the virtual platform.

[14] After considering the arguments presented, the Court dismissed the RAF's application to lead evidence through the virtual platform.

[15] Subsequently, the RAF applied for a postponement of the matter to secure the attendance of its witness at Court. The trial court refused the application and found

that it would not be in the interest of justice to postpone the matter. The Court also found that the respondent had ample time to make the necessary arrangements to secure the attendance of its witness at Court. Without giving the parties an opportunity to address it on the merits as envisaged in Rule 39(10) of the Uniform Rules, the Court a quo subsequently endorsed a draft order prepared by the respondent's counsel in which the RAF was, inter alia, held to be 100 percent liable for the respondent's still to be proven damages arising from the motor vehicle accident that occurred on 16 December 2018 and that the RAF must pay the respondent past medical expenses of R350 187, 56 plus interest thereon at the prescribed rate of interest 14 days from date of judgment to date of final payment.

[16] Subsequent thereto, the parties reached a settlement in respect of general damages and in respect of past and future loss of earnings. The agreement between the parties in this regard was reduced to writing and made an order of the Court. The RAF only disputed the trial court's ruling regarding the payment of past medical expenses and interest thereon. As foreshadowed above, the application for leave to appeal this head of damages was dismissed. On 12 December 2024, the respondent issued a warrant of execution against the RAF's property for the payment of R350 187,56 in respect of past medical expenses, together with interest thereon at the rate of 11,25 per annum from 9 July 2024 to the date of final payment.

[17] On 20 December 2024, the RAF brought an urgent application for the suspension of the writ of execution pending the hearing in part B, in which the RAF sought to suspend the operation of the court order granted by the Court a quo on 19 June 2024, insofar as it related to the payment of past medical expenses. The RAF's application to stay the warrant of execution was premised on the judgment the delivered on 17 December 2024 by the full court of the Gauteng High Court (*Discovery Health 2*) on the lawfulness of the subsequent directives issued by RAF on 13 April 2023 and 2 November 2023 which excluded payment of past medical expenses in instances where a medical aid scheme has paid the claimants' past medical expenses.

[18] The RAF's first urgent application was removed from the roll on 20 December 2024. The RAF thereafter brought a second urgent application on exactly the same

papers on 20 January 2025, which was set down for hearing on 23 January 2025. This urgent application was dismissed by Holderness J on 24 January 2024. The RAF thereafter brought a third urgent application to suspend the execution of the warrant, which was a duplication of its previous urgent applications in which urgent relief was sought. The application was enrolled for hearing on 28 January 2025. The third urgent application to suspend the warrant was argued before Mangcu-Lockwood J on 28 January 2025 and was dismissed with costs on an attorney and client scale. The RAF subsequently petitioned the SCA for leave to appeal against the trial court's order relating to past medical expenses.

[19] In the interim, on 30 January 2025, the RAF paid the respondent's past medical expenses, together with interest. Notwithstanding, the RAF contends that it is not liable for the respondent's hospital and past medical expenses due to those expenses having been paid by the respondent's medical aid scheme. As discussed in paragraph 10 above, the SCA granted the RAF leave to appeal against the past medical expense in the sum of R350 187, 56 and the order relating to the payment of interest on this amount. Before I can consider the appeal concerning the payment of past medical expenses and interest, it is essential that I clearly set out the grounds for appeal raised by the RAF in this matter.

Grounds of Appeal

[20] The RAF raised various grounds of appeal against the court a quo's findings. The grounds of appeal as discernible from the notice of appeal may, concisely, be summarised as follows:

[21] The RAF submitted that the court a quo erred in its application of the law relating to postponements and, in doing so, infringed on the RAF's right to a fair trial. The RAF contended that its request to have its witness testify virtually, was not uncommon. It has been employed during the COVID-19 years and is now provided for in the directives of the various divisions of the High Court throughout South Africa. The RAF further submitted that its application for a postponement was brought as an alternative to its request for leave to have its witness testify virtually. When such a request was refused, fundamental fairness and the interests of justice

favoured granting a postponement. Accordingly, the RAF submitted that the trial court erred in not allowing its witness to testify through the virtual platform, alternatively in refusing its application to postpone the matter.

[22] The RAF further contended that, by denying its request to allow its witness to testify virtually and by refusing to postpone the matter, the trial court essentially decided the matter in default. Concerning the payment of past medical expenses, the RAF submitted that, at the time this matter was heard, it was involved in litigation in the Gauteng Division in *Discovery Health II*. Judgment in that matter was delivered on 17 December 24. The crux of the judgment, on RAF's understanding, is that the two directives on which the RAF relies for its refusal to pay past medical expenses in circumstances where medical aid scheme has covered them are not misplaced or unlawful. Based on the full court's views in *Discovery Health II*, the RAF submitted that the trial court could not make the order it did in respect of the past medical expenses.

Issues for determination

[23] From the discussion above, this court is enjoined to determine three critical questions. The *first* question is whether the court a quo was correct in refusing the RAF leave to present the evidence of its witness through Microsoft Teams. *Secondly*, and incidental to the first question, is whether the court a quo was correct in finding that on a conspectus of all the facts placed before it, it was not in the interest of justice to postpone the matter after refusing the RAF's application to have its witness testify through the virtual platform. *Thirdly*, whether the court a quo was correct in making an order directing the RAF to pay the respondent R350 178,56 as past medical expenses, notwithstanding the decision of the full court in *Discovery Health II*. Incidental to this question is whether the application of the RAF's two subsequent directives was *res judicata* and whether these directives applied retrospectively.

Applicable legal principles and discussion

[24] It is settled law that in a matter such as the present, this court's powers to interfere on appeal with the findings of fact of the trial court are limited in the

absence of demonstrable and material misdirection. Where there is no misdirection on fact, the presumption is that its findings are correct, and the appellate court will only interfere with them if it is convinced that they are wrong. This principle was restated in *S v Jochems*,³ as follows:

‘It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless is convinced on a conspectus of the evidence that the trial court was clearly wrong. ***R v Dhlumayo and Another 1948(2) SA 677 (A)*** at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para12. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.’

[25] However, in *Minister of Safety and Security & others v Craig & others NNO*,⁴ Navsa JA, stated that although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness’ demeanour, but predominantly upon inferences and other facts and upon probabilities. In such a case, a court of appeal with the benefit of a full record may often be in a better position to draw inferences.

[26] Against this backdrop, I turn to evaluate the merits of this appeal. However, for completeness, I will address the issues for determination discussed above, sequentially. The first two contested issues are inextricably intertwined, and for brevity’s sake, I will address them jointly.

Was the court a quo correct in refusing the RAF’s request to present evidence virtually and its application for a postponement?

[27] I am mindful that the RAF limited its application for leave to appeal against the payment of past medical expenses and the payment of interest thereon when it

³ 1991(1) SACR (A) at 211 E-G.

⁴ 2011 (1) SACR 469 (SCA) para 58.

applied for leave to appeal in the SCA. The SCA granted the RAF leave to appeal in accordance with its request in the Notice of Motion. However, I must state that in its founding affidavit in support of its application for leave to appeal in terms of s 17(2)(b) of the Superior Courts Act, the RAF raised the issue of being denied the right to a fair trial when the Court a quo refused it leave to present the evidence of its witness through the Microsoft Teams platform.

[28] The RAF also impugned the trial court's decision to refuse it a remand of the matter after its application to present evidence virtually was denied. To this end, the RAF contended that its right in terms of s 34 of the Constitution was infringed. These two aspects also form part of the RAF's grounds of appeal in this matter. Whilst this appeal mainly relates to the payment of past medical expenses and interest pursuant to the two directives issued by the RAF, I am of the view that the issues raised by the RAF are pertinent and must be considered by this Court before I can deal with the appeal on the past medical expenses and the payment of interest, for which the SCA granted the RAF leave to appeal.

[29] Accordingly, it is common cause that at the hearing of the matter on 19 June 2024, the RAF witness was not physically present in court. The witness was in Zimbabwe. However, he was available to testify on that day virtually. During the proceedings, the Court sought certainty regarding the witness's availability to testify, and the Court was informed that the witness was available and ready to testify. As foreshadowed above, after considering the submissions from both parties, the Court a quo held that the RAF should have made a substantive application and thereafter dismissed the application to present evidence virtually and found that it would not be in the interest of justice to postpone the matter. Accordingly, the application for a remand was also dismissed.

[30] The Court a quo's decision not to permit the RAF's witness to present his evidence through the virtual platform in these circumstances was fundamentally flawed. Significantly, it was known that the witness was not available in South Africa and was in Zimbabwe. The witness was available and consented to testify virtually. The Court was made aware of this fact. From the record, the witness was waiting to be called to connect virtually so that his evidence could be heard. While I

acknowledge that the RAF did not meticulously follow the Uniform Rules and Practice Directives of this Division in arranging for the presentation of its witnesses' evidence virtually, I firmly believe that the pursuit of justice and the cumulative factors placed before the Court a quo weighed heavily in favour of granting the order sought by the RAF as envisaged in Practice Directive 56 of this Division.

[31] Granting permission for the insured driver's evidence to be presented virtually would have ensured that all the relevant facts are placed before the court a quo to enable it to make an informed decision on the question of liability after hearing from both parties. Such an approach, in my view, was crucial to fostering a setting where fairness and justice prevail. Notably, it is now trite that video conferencing is an efficient and effective way of providing oral evidence both in chief and in cross-examination and that this is simply another tool for securing effective access to justice.⁵

[32] I am cognisant that the general rule is that all witnesses should be examined in the presence of the court, viva voce. However, it is apposite to remind ourselves that the Superior Courts Act was amended by the Criminal and Related Matters Amendment Act 12 of 2021, which introduced s 37C to the Act. This section allowed the leading of evidence through an audiovisual link in civil proceedings. In terms of this section, a court may, on application by any party to proceedings before that court or of its own accord, order that a witness, irrespective of whether the witness is within or outside the Republic, if the witness consents thereto, give evidence by means of audiovisual link. The relevant parts of s 37C (2) of the Superior Courts Act provide as follows:

‘(2) A court may make an order contemplated in subsection (1) only if —

(a) it appears to the court that to do so would —

(i) (aa) prevent unreasonable delay;

(bb) save costs;

(cc) be convenient; or

(dd) prevent the likelihood that any person might be prejudiced or harmed if he or she testifies or is present at such proceedings; and

⁵ *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ) para 35.

- (ii) otherwise be in the interests of justice;
- (b) facilities therefor are readily available or obtainable at the court; and
- (c) the audiovisual facilities that are used by the witness or at the court enable —
 - (i) persons at the courtroom to see, hear and interact with the witness giving evidence; and
 - (ii) the witness who gives evidence to see, hear and interact with the persons at the courtroom.
- (3) The court may make the giving of evidence in terms of subsection (1) subject to such conditions as it may deem necessary in the interests of justice.
- (4)
- (5) For purposes of this Act, a witness who gives evidence by means of audiovisual link, is regarded as a witness who was subpoenaed to give evidence in the court in question.
- (6) For purposes of this section 'audiovisual link' means facilities that enable both audio and visual communications between a witness and persons at a courtroom in real-time as they take place.

[33] Section 37C must be read together with Rule 38(9) of the Uniform Rules of Court, which was introduced with effect from 1 February 2022. Rule 38(9) primarily provides that a court may, on application on notice by any party and where it appears convenient or in the interests of justice, make an order for evidence to be taken through an audiovisual link. Both s 37C and Rule 38(9) give effect to the right of access to courts as contemplated in s 34 of the Constitution. Both provisions envisage that where it appears convenient or in the interests of justice, the court may make an order for evidence to be taken through an audiovisual link. In my view, the overriding considerations in deciding whether to grant a request for an audiovisual link are convenience and the interests of justice.

[34] It is incontestable that the insured driver's evidence was critical to the RAF's defence. According to the RAF's Plea, the respondent was the sole cause of the collision, in that, inter alia, he did not keep a proper lookout and turned into the insured driver's path of travel when it was dangerous and inopportune to do so. In the alternative, the RAF pleaded contributory negligence against the respondent. In these circumstances, in determining whether to grant or to refuse the request for a virtual hearing, s 34 of the Constitution was of fundamental importance.

[35] In other words, the court a quo had to be satisfied that in making the order, effect would be given to the parties' right to have the dispute between them decided in a fair public hearing before the court. The corollary thereto is that in refusing the order, in circumstances where the witness was available to testify through the virtual platform and was outside the borders of South Africa, was an apparent infringement of the RAF's constitutional right in terms of s 34 of the Constitution to have the dispute between the RAF and the respondent decided in a fair public hearing before the court.

[36] There is no doubt that the evidence of the insured driver was vital to the RAF in response to the respondent's claim. Importantly, considering the accident report, the insured driver disputed that he was the cause of the accident. According to the report, the insured driver stated he was driving straight when he saw a motorcycle approaching at high speed. Later, he heard a loud knock at the back of his vehicle and saw the motorcycle spin on the side of the road. Without that evidence under oath, the respondent's evidence remained unrebutted. Accordingly, for the court to decide the question of liability fairly and in an objective manner, the court had a duty to consider and evaluate the evidence of the insured driver and the respondent whose vehicles were involved in the collision. The negligence, if any, on the part of the respondent or any contributory negligence that could be imputed on the respondent could have been determined from the evidence in its totality.

[37] Importantly, the court a quo held that the RAF was 100 per cent liable to pay the respondent his still-to-be-proven damages. Pursuant thereto, the respondent received 100 per cent of his proven damages. The respondent found himself in a fortunate position, as his evidence was not countered by the insured driver's evidence. It is my firm view that a fair and objective assessment of the matter required a conspectus of all the evidence to enable the court to make a dispassionate and informed decision. Undoubtedly, without the evidence of the insured driver who was readily available to testify virtually, the RAF was prejudiced and gravely handicapped in the conduct of its defence. In my view, the court a quo erred in failing to consider the requirements of justice broadly.

[38] The main reason advanced by the trial court in refusing the RAF's application to lead evidence of the insured driver virtually was that there was no substantive application made and that there was no compliance with the Practice Directives of this division. It must be stressed that court procedures and the rules that govern them are designed to administer justice, and not to hamper it.⁶ Fairness and justice are ensured by allowing proper participation by the parties and the full ventilation of issues.⁷ The Rules of Court facilitate the litigation process that invariably underpins the expression of the right of access. Erasmus II explains this as follows:⁸

'The object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves. Consequently, the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Thus, it has been held that the rules exist for the court, not the court for the rules. Formalism in the application of the rules is not encouraged by the courts.'⁹

[39] Significantly, Rule 39(20) of the Rules of Court establishes that if it appears convenient to do so, the Court may at any time make any order regarding the conduct of the trial as it seems meet, and thereby vary any procedure laid down by the rule. The subrule contemplates an order regarding the conduct of the trial which will vary any procedure laid down by this rule. The paramount test laid down by this subrule is convenience to the parties, the witnesses, and the Court. The convenience envisaged in this rule also involves the hearing of the matter through an audiovisual link.

[40] In summary, the Court a quo, in my view, erred in rejecting the RAF's application to lead the evidence of the insured driver virtually. Furthermore, it could not be said that the subsequent application by the RAF for a postponement to secure the attendance of its witness was mala fide. It was for the first time that the RAF sought a remand. The insured driver was in Zimbabwe. Undoubtedly, the RAF was

⁶ *Republikeinse Publikasie (Edms) Bpk v Afrikaanse Pers Publikasie (Edms)* 1972 (1) SA 773 (A) at 783A.

⁷ *Social Justice Coalition and Others v Minister of Police and Others* [2022] ZACC 27 para 54.

⁸ Erasmus Superior Court Practice 2 ed (Juta & Co Ltd, Cape Town 2018) vol 2 (Erasmus II).

⁹ At D1-7 to D1-8.

prejudiced by the Court a quo's order. Consistent with the principles of natural justice, fundamental fairness and justice demanded that the RAF be afforded the opportunity to present its evidence to counter the evidence of the respondent. On the other hand, any prejudice that the respondent could have suffered if the matter was postponed could have been compensated by an appropriate order of costs.

[41] Notwithstanding these findings, in my view, to set aside the proceedings before the Court a quo based on the above will be tantamount to unscrambling a scrambled egg, which, in my view, will have far-reaching consequences. The parties reached an agreement on various heads of damages even before the matter was finalised. I must also mention that from the record of proceedings of the Court a quo, at the beginning of the trial, the RAF's legal representative indicated to the trial Court that the RAF would soon make an offer on general damages and loss of earnings. The parties eventually reached an agreement on these heads of damages, which was subsequently made an order of the Court by agreement. What remained in dispute between the parties was the past medical expenses, which the RAF disputed, basing its refusal to pay on the full Court's decision in *Discovery Health II*.

[42] Furthermore, the RAF limited its application for leave to appeal at the SCA to the payment of past medical expenses and interest thereon only. The RAF did not raise the refusal for a remand and the dismissal of its application to present evidence virtually as a ground of appeal. The SCA granted the RAF leave to appeal on the grounds requested by the RAF. To go beyond what leave to appeal was granted for would be prejudicial to the respondent and, above all, against the interest of justice. Moreover, the heads of argument for the respondent dealt only with the issue of past medical expenses and interest, for which the SCA granted leave to appeal.

[43] In summary, the findings above aim to guide courts in avoiding a rigid or inflexible approach when considering applications for virtual hearings; instead, they should consider these applications with a thoughtful mind, always prioritising the pursuit of justice as their guiding principle. As the maxim goes, many things are

forbidden in law to be done, which yet, when done, hold good.¹⁰ With that framework, I turn to consider the third issue in dispute.

Was the Court a quo correct in ordering the RAF to pay the respondent's past medical expenses?

[44] The issue relating to the RAF paying past medical expenses for claimants whose claims have been satisfied by their medical aid schemes has been the subject of debate and an avalanche of court decisions in recent times. There is a difference of opinion on whether the RAF should be held liable to pay past medical expenses that have been paid by the medical aid pursuant to injuries sustained in motor vehicle accidents.

[45] To give context to the order I propose hereunder, it is necessary to briefly summarise the litigation that arose from the RAF's attitude towards the payment of past medical expenses since 2022. It is common cause that on 12 August 2022, the RAF issued a directive instructing its employees to reject road accident victims' claims for the disputed medical expenses. The directive was that all claims for past medical expenses lodged by claimants whose medical schemes had already settled them should be rejected on that basis alone. The reasoning underpinning this was that those claimants did not suffer any loss, and that the RAF therefore had no duty to reimburse them.

[46] On 19 August 2022, Discovery Health (Pty) Ltd initiated urgent proceedings to review and set aside the said directive, on the basis that it was unlawful (*Discovery Health I*).¹¹ On 26 October 2022, Mbongwe J ruled in favour of Discovery Health and found that it was unlawful for the RAF to refuse to pay past medical expenses on the grounds that those expenses had already been paid by the victim's medical aid scheme and interdicted the RAF from implementing the internal directive.¹² In

¹⁰ See *NW Civil Contractors CC v Anton Ramaano Inc & Another* 2020 (3) SA 241 (SCA) para 19.

¹¹ See *Discovery Health (Pty) Ltd v Road Accident Fund and Another* 2023 (2) SA 212 (GP).

¹² At paras 31, 32 and 42.

upholding the Discovery Health's application, Mbongwe J relied on various authorities, inter alia, *D'Ambrosini v Bane* 2006 (5) SA 121 (C); *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C); and stated as follows:

'The applicant is the administrator of several medical aid schemes which have and continues to settle medical bills on behalf of their clients for the services referred to above with a clear understanding or agreement that the expenses incurred are refundable by the claimant to its medical aid scheme. It is on this basis that past medical expenses are included as part of the claim for damages and are payable to the medical aid scheme by the claimant upon settlement of its claim.'

[47] The learned justice concluded that the RAF Act does not provide for the exclusion of benefits received by the victim of a motor vehicle accident from a private medical scheme for past medical expenses. The court concluded that the medical aid scheme benefits which the plaintiff has received or will receive are not deductible in determining his claim for past and future hospital and medical expenses.¹³ It is common cause that the RAF's application for leave to appeal failed before Mbongwe J, the SCA and the Constitutional Court.

[48] Notwithstanding, the RAF subsequently issued the second and the third directives. The second directive required the RAF's employees to first ascertain whether a claim fell within the prescribed minimum benefits (PMBs) or emergency medical conditions (EMCs), and only if it did not would a claim be processed and honoured, if successful. The third directive was based on s 19(d)(i) of the RAF Act which in short provides that the Fund or an agent shall not be obliged to compensate any person in terms of s 17 for any loss or damage where the third party has entered into an agreement with any person other than an attorney practicing as such in the Republic or a representative of the state in accordance with which the third party has undertaken to pay such person after settlement of the claim a portion of the compensation in respect of the claim.

[49] Discovery Health viewed the issuance of these subsequent two directives as a refusal to comply with and a circumvention of the Mbongwe J order in *Discovery*

¹³ At para 27.

Health I. It demanded that the RAF desist from this conduct. The RAF refused, insisting that it had the right to issue and implement them. Faced with this stance, Discovery Health launched an application for a declarator, amongst others, that the RAF was in breach of the order handed down on 27 October 2022, by Mbongwe J. The matter was heard by the full court of the Gauteng Division presided over by Mlambo JP.¹⁴ The full court was divided on the reasoning and outcome of Discovery Health's application.

[50] The judgment of the full court in *Discovery Health II* can roughly be divided into two schools of thought, both in terms of reasoning and outcome. The first school of thought articulated by the majority decision posits that, despite Judge Mbongwe's ruling on 27 October 2022, which reviewed and set aside the initial directive of the RAF issued in August 2022, in which RAF instructed its employees to reject past medical claims that a medical scheme had paid, the two subsequent directives the RAF issued regarding the rejection of similar claims do not fall foul of Mbongwe J's order or interdict. The first school of thought further posits that the issues decided in the Mbongwe J order are not the same as those dealt with in the second and third directives.

[51] Put differently, the first school of thought holds that the subject matters addressed in the two subsequent directives do not fall within the scope of the Mbongwe J order. Furthermore, this school of thought opines that medical schemes cannot be compensated through their members for what they have paid in discharge of their contractual and statutory obligations. To this end, the court stated:

'paragraphs 30-34 of Mbongwe Judgment are no authority for the proposition that medical schemes have a right of recovery from the RAF, through their members, what they have paid in discharge of their statutory obligation to pay PMBs and EMC in full as required by the MSA and its regulations 7 and 8. If anything, these paragraphs demonstrate that the MSA and its regulations carrying the statutory duty placed on schemes to pay PMBs and EMCs in full was not drawn to the attention of

¹⁴ *Discovery Health (Pty) Ltd v Road Accident Fund and Another* 2025 (3) SA 225 (GP) “(*Discovery Health II*)”

Mbongwe J. To suggest otherwise would simply mean that the Court, in dereliction of its duty, failed to uphold the law.¹⁵

[52] The views of this school of thought were also quoted with approval in *Machi v the Road Accident Fund*,¹⁶ in which the court found that it was not persuaded that such benefits (payment of medical expenses) would accrue to the member of the medical scheme for the simple reason that once the RAF has settled the claim relating to past medical expenses already paid by the medical scheme, the plaintiff is bound in terms of the agreement entered into by her and the medical scheme to pay the settled claim to the medical scheme. For that reason, the court found that the benefit accrues to the medical scheme and not the plaintiff.¹⁷

[53] On the other hand, the second school of thought is expressed by the minority judgment in *Discovery Health II*. It believes that the issues raised in the second and third directives fall within the reach of Mbongwe J's order and are thus *res judicata*. The second school of thought believes that there is a single primary ratio which underpinned the entirety of Mbongwe J's judgment and determines the meaning of its orders, including the interdict, namely that it is unlawful for the RAF to reject a claim for past medical expenses on the ground that a medical aid scheme has already paid for those expenses. The minority stated:

'In my view, this Court should not condone the RAF's stratagem of using subsequent directives on the same subject matter to subvert the judgment of Mbongwe J, upheld as it was by the Highest Court. A public body cannot insulate itself from the law by adopting a policy not to comply with a court order. It is not open to an organ of state whose conduct has been found to be unlawful by the courts to repeat that conduct in smaller parts if it can conjure up a new justification for doing so. If this were possible, it would enable organs of state to perpetually evade compliance with judgments of our courts by repeating their unlawful decisions and generating new justifications...'¹⁸

[54] The minority concluded as follows:

¹⁵ At para 45.

¹⁶ See *Machi v RAF* (2020-12687) [2025] ZAGPJHC 78 (3 February 2025).

¹⁷ At para 96.

¹⁸ At para 137

'I find that the phantom and third directives, created as they were to be kept away from public scrutiny, have no legal consequence in these proceedings other than evidencing breaches of the Mbongwe J order and judgment.'¹⁹

[55] The views of the second school of thought have been quoted with approval in various decisions of this division.²⁰

[56] I will return to the views of the two schools of thought later in this judgment when I consider the question of *res judicata*. However, I must highlight that the disagreement between the two schools of thought is currently pending resolution before the SCA. On 9 April 2025, the full court in *Discovery Health II* granted Discovery granted leave to appeal to the SCA against the majority judgment and orders, handed down on 17 December 2024. At the hearing of this appeal, Mr Filton, counsel for the RAF, submitted that, considering the views expressed by the full court in the *Discovery Health II* and other matters decided in this court, it is instructive that the appropriate course would be to leave the decision in respect of payment of past medical expenses to the SCA for decision.

[57] I respectfully disagree with this proposition. As stated in *Franko Maphosa v RAF*,²¹ the core function of the judiciary is to interpret and apply the law impartially, regardless of the prospects of review by higher courts. While appellate review is integral to the legal system, it should not compromise the lower court's obligation to deliver timely and well-founded judgments based on the evidence and relevant legal principles. It is not in the interest of justice that this court delay judgment or defer a finding in this matter solely because a higher court, in this case the SCA, might reach a different conclusion on the same issues.

[58] The RAF impugns the decision of the Court a quo, predicated its grounds on the majority decision of the court in *Discovery Health II*. It must be stressed that throughout, the RAF had always paid the hospital and medical expenses incurred by the medical aid scheme of a claimant. It was not until recently, in April 2022, when

¹⁹ At para 139.

²⁰ *Basson v Road Accident Fund* (5213/2021) [2025] ZAWCHC 229 (30 May 2025); *Jaffer v Road Accident Fund* 2025 JDR 1436 (WCC); *Esack Road Accident Fund* 2025 (4) SA 201 (WCC).

²¹ (1093/2022) [2024] ZAGPJHC 263 (7 March 2024) para 55.

the RAF decided that it would no longer pay claims lodged by the victims of road accidents for past medical expenses where those expenses had already been paid by the victim's medical aid scheme, by issuing the three directives discussed above. As foreshadowed above, the stance that the RAF adopted is that the claimant sustained no loss relating to past medical expenses, as the medical aid scheme had paid for them and that there is therefore no duty on the RAF to reimburse the claimant.

[59] Clearly, as pointed out by the respondent, the RAF's implementation of the directives resulted in a radical departure from over 100 years of legal precedent and practice and also altered the approach to compensation that the RAF had followed and applied since 1942, when the compulsory motor vehicle insurance was introduced in South Africa through the Motor Vehicle Insurance Act 29 of 1942. Mr Eia, counsel for the respondent, who appeared with Mr Coughlan, argued that the principle that medical aid scheme benefits are a form of indemnity insurance and accordingly are disregarded in an award of damages against the wrongdoer as being *res inter alios acta*, has been recognised by our courts for over a century. Counsel submitted that in *McKenzie v S.A Taxi-Cab Co*,²² the principle of *res inter alios acta* was first applied by the court regarding hospital charges and doctors' fees which had been paid by an insurance society to which the plaintiff had contributed. Following the leading case of *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1, the court held that the sum which the plaintiff was entitled to recover as damages for bodily injury was not subject to deduction in respect of the amounts paid by the insurance society.

[60] This principle was succinctly articulated in this court by Scott J in *Zysset and Others v Santam Ltd*,²³ where the learned justice stated:

'The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. See *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904

²² 1910 WLD 232.

²³ 1996(1) SA 273 (C).

(A) at 917B. Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action.

Notwithstanding the foregoing, it is well established in our law that certain benefits which a plaintiff *may receive are to be left out of account as being completely collateral*. The classic examples are (a) *benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums* and (b) *moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy*. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff. Nor, it would seem, are these the only benefits which are to be treated as *res inter alios actae*.²⁴ (emphasis added)

[61] The rationale for the collateral source rule is that the defendant should not benefit from the plaintiff's foresight in acquiring insurance. Expressed differently, the plaintiff should reap the benefit of the bargain he or she has made for insurance. This collateral source rule requires the party responsible for causing the injury to compensate the victim for all the harm caused, not merely the net loss suffered by the victim. In other words, a wrongdoer can have no concern with the transaction between a plaintiff and his insurer, and there is no equitable ground to grant the wrongdoer a windfall by allowing him a credit for the payments that the insurer made.

[62] In terms of the common law doctrine of *res inter alios acta*, articulated above, the RAF is not entitled to claim for itself the benefit of a road accident victim's medical scheme insurance. The doctrine of *res inter alios acta* does not permit the RAF to deduct the amount paid by the medical scheme from the quantum payable to claimants in respect of past medical expenses. In other words, the relationship

²⁴ At 277H – 278D.

between a claimant and the medical aid scheme is contractual and of no concern to the RAF.²⁵

[63] I find the view expressed by Zondi J, as he then was, in *Rayi NO v Road Accident Fund*,²⁶ very pertinent and apposite in this matter. The court had to determine whether the RAF was liable to the plaintiff for the payment of past medical expenses in the amount of R58 736-94. The relevance of this question arose because Bonitas had already paid the plaintiff's medical expenses. The plaintiff asserted that the RAF was liable to pay her the amount of R58 736.94 in terms of the doctrine of subrogation. While the RAF, on the other hand, contended that it was not liable to pay the plaintiff the amount of R58 736.94 as this would amount to enrichment, and that Bonitas must claim the amount from the defendant, whose claim had prescribed. The court rejected the RAF's argument that the plaintiff cannot claim for the past medical expenses after payment of such expenses by Bonitas. The court stated:

[15] In my view, settlement by Bonitas of the plaintiffs past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for the past medical expenses he incurred. Payment by Bonitas was made in terms of the undertaking made by the plaintiff to Bonitas in terms of which Bonitas agreed to settle the plaintiffs past medical expenses on the understanding that upon a successful recovery from the defendant, the plaintiff would reimburse Bonitas for all the costs it incurred on plaintiffs behalf in connection with the claim against the defendant.

[16] The obligation which the undertaking imposes on the plaintiff towards Bonitas does not arise until such time that there is a successful recovery of the past medical expenses by the plaintiff from the defendant. The defendant primarily remains liable to the plaintiff for the payment of the past medical expenses and the liability of Bonitas to the plaintiff for the past medical expenses is secondary to that of the defendant. The defendant should pay the past medical expenses to the plaintiff who should upon receipt of payment account to Bonitas in terms of the undertaking,

²⁵ *Gunther v Road Accident Fund* (24228/16) [2024] ZAWCHC 153 (6 June 2024) para 31.

²⁶ (343/2000) [2010] ZAWCHC 30 (22 February 2010).

[17] The undertaking given by the plaintiff to Bonitas creates a contingent liability which is enforceable on the happening of some future event. Bonitas' right of recourse against the plaintiff for reimbursement does not arise until the plaintiff has received payment from the defendant. The defendant's liability to the plaintiff for the payment of the past medical expenses is not affected by Bonita's payment on behalf of the plaintiff.

[64] Similar sentiments were echoed by Davis J in *Mooideen v Road Accident Fund*,²⁷ where he observed that the settlement by Discovery of the deceased's past medical expenses did not relieve the RAF of any of its legal obligation to compensate the plaintiff in a represented capacity for the past medical expenses which the deceased in that matter incurred. David J stated further that the RAF is not entitled to raise Discovery's medical aid scheme indemnification as a defence and therefore benefit from the payment.

[65] In addition to the above, it bears emphasis that the object of the RAF Act is to establish the Fund to pay compensation for loss or damage to an injured claimants wrongfully caused by the negligent driving of motor vehicles. The Act constitutes social-security legislation whose primary object has been described as 'to give the greatest possible protection to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle'.²⁸ The Act can be employed by anyone who is injured in consequence of the negligent driving of a vehicle to claim compensation for any loss sustained. To this end, s 17(1) of the RAF provides for compensation to third parties, for any damages or losses incurred due to the negligent or unlawful actions of the driver of the motor vehicle. The Act regulates the tripartite relationship of a negligent driver, the victim, and the RAF by designating the RAF as a substitute for the wrongdoing driver. The protection afforded is against the possibility that the victim will be unable to recover his damages due to the original wrongdoer being unable to financially meet the victim's claim for compensation of his damages.

²⁷ (17737/2015) (11 December 2020) At page 10.

²⁸ *Mvumvu and others v Minister for transport and another* 2011 (2) SA 473 (CC) para 20; *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) para 23

[66] In *Road Accident Fund v Abrahams*,²⁹ Makgoka AJA, as he then was, writing for a unanimous court, provided an admirable exposition on the statutory obligations and liability of the RAF to compensate third parties injured in the negligent driving of motor vehicles. The learned justice stated:

A useful starting point is to consider the effect of s 17(1), read with s 21(1). As stated already, the latter section abolishes the right of an injured claimant to sue the wrongdoer at common law. Section 17(1), in turn, substitutes the appellant 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.³⁰

[67] Considering the substitutionary obligation entrusted upon the RAF to compensate injured claimants, in my opinion, the RAF is not entitled to claim for itself the benefits of a road accident victim's medical scheme insurance. If the RAF is allowed to set off any payments made by a claimant's medical aid scheme on the plaintiff's behalf, notwithstanding that the plaintiff has paid for the insurance, the RAF would be shirking its substitutionary obligation and instead appropriating that benefit to itself. In *Standard General Insurance CO Ltd v Dugmore NO*,³¹ the SCA held that the object of awarding Aquilian damages is to place the plaintiff in the position in which he would have been had the delict not been committed, thereby redressing the diminution of his patrimony caused by the defendant's delict.³²

[68] Our courts have recognised that there exists no reason to make any distinction between an ordinary insurance contract, and the contract which exists between a medical scheme and its members. A medical aid is simply another form of insurance.³³ In *D'Ambrosi v Bane and Others*,³⁴ the court rejected the argument that

²⁹ 2018 (5) SA 169 (SCA).

³⁰ At para 13.

³¹ 1997 (1) SA 33 (A) 48.

³² At 41C-D.

³³ *Malgas v Road Accident Fund* (126/2020) [2022] ZAEQBHC 50 (1 December 2022) para 10.

³⁴ 2006 (5) SA 121 (C) at para 45.

payments received from a medical aid scheme should be treated as a benefit that must be deducted from the plaintiff's claim for compensation for future medical expenses. It found that a medical aid scheme, like the one the plaintiff in that case was a member of, was in substance a form of insurance.

[69] The SCA confirmed the High Court's finding on appeal in *Bane and Others v D' Ambrosi*.³⁵ The SCA rejected the argument that medical scheme benefits are a form of social insurance that could reduce delictual damages and confirmed the principle that payments which the medical aid was and is obliged to make to the respondent constitute the discharge by the medical aid of contractual obligations flowing from the contract concluded between it and the respondent. As such, they constitute *res inter alios acta* and the appellants cannot claim the benefit of them.

[70] In the present matter, the RAF relies on the decision of the majority in *Discovery Health II* that the two subsequent directives issued by RAF on 13 April 2023 and 2 November 2023 respectively, by the RAF instructing its officials to repudiate claims for past medical expenses where the claimant's medical aid scheme has paid those expenses do not fall foul of the Mbongwe J's judgment. I will shortly deal with these directives individually hereunder. However, I must mention that the RAF did not plead or raise the contents of those directives in its plea.

[71] Concernedly, at the trial, when the matter was heard, the RAF did not place those directives before the trial court during the hearing of evidence. In the RAF's cross-examination of the respondent, the past medical expenses as testified to and confirmed by the respondent went completely unchallenged. The RAF failed to cross-examine the respondent and failed to dispute the respondent's version in respect of the past medical expenses. The RAF raised the issue of past medical expenses only when a second application for leave to appeal was filed.

[72] It is fitting to remind ourselves that the object of pleading is to define the issues, and that the parties are to be kept strictly to their pleas, where any departure would cause prejudice or prevent full enquiry. But within those limits, the Court has a

³⁵ 2010 (2) SA 539 (SCA).

wide discretion.³⁶ Pleadings need to clearly articulate, set out and substantiate the claim and the defence thereto. The RAF failed to do so. This, in my view, is fatal to the RAF's appeal. Simply put, the RAF cannot be allowed to appeal on an issue that was not raised before the trial court nor borne out by its pleadings.

[73] Notwithstanding, I turn to consider the two directives and the subsequent decisions addressing them.

The RAF's second directive

[74] The second directive of the RAF required the RAF's employees to first ascertain whether a claim fell within prescribed minimum benefits (PMBs) or Emergency Medical Conditions (EMCs), and only where it was neither would a claim be processed and honoured if successful. In *Discovery Health (Pty) Ltd I*, Mbongwe J found and correctly so, in my view, that it was unlawful for the RAF to refuse to pay past medical expenses on the grounds that those expenses had already been paid by the victim's medical aid scheme and interdicted the RAF from implementing the internal directive.

[75] The ratio underpinning Mbongwe J's judgment is that s 17 of the RAF Act obliges the RAF to compensate road accident victims for all proven damages arising from the accident, including medical expenses paid by their medical scheme. Furthermore, the ratio in *Discovery Health (Pty) Ltd I* is that medical scheme benefits received are not deductible from their claim against the RAF for past and future hospital and medical expenses. This is because the benefit originates from a contract between the claimant and the medical aid scheme for the explicit benefit of the claimant.

[76] Considering the discussion raised above, I am of the view that the second directive contradicted the findings of Mbongwe J. Mbongwe J found that the RAF Act read together with the common law, gives medical scheme members the right to full compensation from the RAF for past medical expenses regardless of whether their

³⁶ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

medical scheme has already paid for those expenses. In my view, that applies irrespective of whether they constitute a prescribed minimum benefit under the Medical Schemes Act.

[77] Importantly, the second directive offended the *res inter alios acta* principles, which were clearly articulated in Mbongwe J's judgment as articulated by the SCA in the *Bane and Others v D'Ambrosi* decision. The medical scheme's liability to pay its members' medical expenses remains a contractual liability. Consequently, a claimant's right to compensation from the RAF for past medical expenses is unaffected by the fact that a medical aid scheme paid those expenses. When a medical aid scheme pays the plaintiff compensation, it is of no concern to the RAF.³⁷

[78] In summary, a settlement by a medical scheme of past medical expenses of a claimant does not relieve the RAF of any of its legal obligations to compensate the claimant for past medical expenses which it has incurred.

[79] In any event, the RAF cannot rely on this directive in this appeal because to sustain its defence based on PMB and EMC, the RAF would of necessity need to lead evidence of an expert at the trial to establish that the actual medical expenses in question constituted the payment in whole or in part of the PMB and/or EMC. The RAF failed to lead any such evidence at the trial. Consequently, the RAF cannot rely on the directive in this matter. I now turn to consider the third directive.

The RAF's Third Directive

[80] The RAF's third directive is based on s 19(d)(i) of the RAF Act. Section 19 of the RAF Act provides that the RAF is not obliged to compensate a claimant if they have entered into an agreement with any person [other than an attorney or a state representative] in accordance with which the claimant has undertaken to pay such person after settlement of the claim a portion of the compensation in respect of the claim. Section 19(d)(i) of the RAF Act would render a plaintiff's claim unenforceable against the RAF if the plaintiff entered into an agreement with someone other than

³⁷ *Gunther v Road Accident Fund* (24228/16) [2024] ZAWCHC 153 (6 June 2024) para 31.

an attorney or a state representative as defined in s 19(c)(ii) of the RAF Act. In *Road Accident Fund v Abdool Carrim and Others*,³⁸ the SCA held that s19(d) protects claimants, many of whom are indigent, from entering into champertous agreements and does not target arrangements that protect claimants (in that matter arrangement with medical service providers).

[81] A champertous agreement is any agreement in which an outsider provides finance to enable a party to litigate in return for a share of the proceeds of the action if that party was successful.³⁹ Such agreements were condemned at common law on the basis that they undermine the integrity of the judicial system and threaten to give rise to abuse such as the inflation of damages, the suppression of evidence, and the suborning of witnesses. However, the Courts acknowledged one exception: It was accepted that if anyone, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void.⁴⁰

[82] As discussed above, s 19(d)(i) must be interpreted as excluding liability only where the agreement in question truly resembles a champertous agreement and undermines the public policy interests the provision was designed to safeguard. Section 19(d)(i) of the RAF was never intended to encompass medical aid scheme reimbursement arrangements, which lack the defining features of a champertous bargain. Medical aid schemes neither financed their members' claims nor share in a portion of the compensation for the claim as required by s 19(d)(1) of the RAF Act. When a medical aid scheme covers medical expenses, it is fulfilling its contractual duties to the road accident victims. Claimants have a corresponding obligation to reimburse their medical scheme for the full amount of their claim, not just a portion.

[83] Section 19(d) of the RAF Act finds no application whatsoever to the agreement between the claimants and their medical aid scheme. To hold otherwise

³⁸ 2008 (3) SA 579 (SCA) paras 7, 8, 13 and 14.

³⁹ *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] 3 All SA 20 (SCA) para 30; *Ronald Bobroff & Partners Inc La Guerr*; *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC) at fn 8.

⁴⁰ *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] 3 All SA 20 (SCA) para 27.

would be contrary to the legal principle discussed above that the benefit which the claimant receives from an agreement with her insurance company does not exonerate the RAF from discharging its obligation to the claimant in terms of the RAF Act. The third directive is clearly legally incompetent and offends Mbongwe J's judgment.

[84] Finally, with respect to these directives, it is common cause that the RAF's liability is excluded or limited in certain instances. The provisions of s 18 of the RAF Act expressly exclude benefits received under Compensation for Occupational Injuries and Diseases Act 103 of 1993 ('COIDA') or the Defence Act 42 of 2002 from the calculation of the claimant's damages in terms of the RAF Act.⁴¹ This is in circumstances where the victim of a motor vehicle accident is also entitled to compensation under COIDA or the Defence Act.

[85] In *Coughlan NO v Road Accident Fund*,⁴² the Constitutional Court had to determine whether foster child grants paid to the foster parents of three children, on behalf of whom the applicant (the Curator ad litem) acts, after the death of their mother as a result of a motor vehicle accident, are deductible from compensation payable by the RAF for loss of support to those children. The Curator, on behalf of the children, contended that the foster child grants are not deductible. The RAF, on the other hand, contended that they are, for failure to do so would amount to double compensation. The Constitutional Court dismissed the argument raised by the RAF and stated as follows:

'The purpose of the RAF is to give the greatest possible protection to claimants. A deduction of either foster child or child support grants would undermine that purpose. A reading of the RAF Act suggests that those grants should not be deductible. The RAF Act expressly provides that double compensation for persons who are entitled to claim under the Compensation for Occupational Injuries and Diseases Act should be

⁴¹ See *Discovery Health I* at para 23.

⁴² 2015 (4) SA 1 (CC).

deducted from compensation by the RAF *but there is no equivalent reference to social grants*.⁴³ (emphasis added and footnotes omitted)

[86] By parity of reasoning, on a reading of s 18 of the RAF Act, it does not expressly, or by implication, provide for the exclusion of benefits a plaintiff for compensation in terms of the RAF Act had received from a Medical Aid Scheme for past medical and hospital expenses. There is no equivalent reference to any other form of benefit which may be considered to be double compensation, other than those set out in the Act.⁴⁴

Res Judicata

[87] In *Discovery Health II*, the majority noted and correctly so, in my view, that the doctrine of *res judicata* entails that where there is a previous judgment involving the same parties which finally determined an issue based on certain grounds between them, then neither of those parties can approach a different Court on those same issues and grounds seeking a different outcome.⁴⁵ This applies even in circumstances where the previous judgment may be incorrect.⁴⁶ The purpose of this principle is to ensure finality of matters by preventing endless litigation and abuses of court processes arising from the re-litigation of issues between the same parties that a court has finally decided.⁴⁷

[88] As foreshadowed above, the majority in *Discovery Health II* found that the RAF's subsequent two directives were not in breach of the Mbongwe J's judgment because Mbongwe J dealt with the first directive issued by the RAF, whereas the RAF was seeking to rely on the two subsequent directives of 13 April 2023 and 02 November 2023, which had not been set aside as unlawful. With respect, and for the reasons that follow, I do not agree with the finding of the majority. In my view, the

⁴³ At para 59.

⁴⁴ See also *Malgas v Road Accident Fund* (126/2020) [2022] ZAEQBHC 50 (1 December 2022) para 13.

⁴⁵ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* 2020 (1) SA 327 (CC); (CC) at paras 71 and 111.

⁴⁶ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-D.

⁴⁷ *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* 2019 (3) BCLR 360 (CC) para 36.

matter regarding the two directives issued by the RAF is *res judicata*. The RAF may issue subsequent directives provided they are not in conflict with a court order.

[89] The parties have litigated to finality the issue of whether it is lawful for the RAF to refuse claims for past medical expenses on the ground that the victim's medical scheme paid those expenses. The RAF's attempt to relitigate the same issues by issuing new directives is unlawful. It violates the interdict granted by Mbongwe J. This is incompatible with the doctrine of *res judicata*. That matter had become *res judicata* insofar as the SCA and the Constitutional Court refused the RAF leave to appeal.

[90] The primary finding in Mbongwe J's judgment was that it is unlawful for the RAF to reject a claim for past medical expenses on the ground that the claimant's medical aid has already paid those expenses. Consistent with the SCA's decision in *Bane and Others v D'Ambrosi*, a claimant's right to compensation from the RAF for past medical expenses is unaffected by the fact that those expenses were paid by medical aid scheme. In my view, the decision of the minority in *Discovery Health II* was correct in holding that there is a single primary ratio which underpins the entirety of the Mbongwe judgment and determines the meaning of its orders, including the interdict: it is unlawful for the RAF to reject a claim for past medical expenses on the ground that a medical scheme has already paid those expenses.

[91] In my view, the RAF's reliance on subsequent directives is of no moment. The issues raised in the second and third directives fall within the reach of the Mbongwe J's order and are thus *res judicata*. It is simply not open to the RAF to repeat, on a different basis, essentially the same decision, in circumstances where the decision has been finally found to be unlawful. When an issue has been litigated to finality between the parties, it is not permissible for a litigant to seek to obtain a reversal of the decision of the same question by advancing different reasons.

[92] The respondent's counsels submitted that the stratagem of issuing subsequent directives on the same subject matter to subvert the judgment of Mbongwe J and to evade compliance with it constitutes unlawful conduct by a public body, which cannot be condoned. I agree with this proposition. It should be borne in

mind that both the SCA and the Constitutional Court have refused the RAF's application for leave to appeal. Thus, the RAF's subsequent directives cannot be issued to overrule the Constitutional Court's decision. To do so would infringe the dignity and authority of the courts envisaged in s 165 of the Constitution and risk rendering our courts impotent and judicial authority a mere mockery.

[93] Significantly, and the final nail in the RAF's coffin is the fact that subsequent directives particularly the third directive was dealt with by Cloete J in *Van Tonder v Road Accident Fund*.⁴⁸ Cloete J noted that at the eleventh hour prior to the hearing before her, the RAF raised a new defence based on s 19(d)(i) of the RAF Act.⁴⁹ The defence was to the effect that due to an internal policy or instruction, the RAF had decided to reject all claims for past medical expenses paid by a medical aid scheme on the basis that such a claim are excluded by virtue of s 19(d)(i) of the RAF Act and/or regulations 7 and 8 of the Medical Schemes Act 131 of 1998.⁵⁰

[94] Cloete J considered the decision in *RAF v Abdool-Carrim* discussed above and held that, 'by parity of reasoning, this puts paid to the RAF's s 19(d)(i) argument'.⁵¹ Cloete J found that the RAF was unable to refer the court to a single authority holding that, despite the long line of decisions to the contrary on the doctrine of subrogation, regulations 7 and 8 of the Medical Schemes Act nevertheless override the well-established legal position. Cloete J concluded that the RAF's argument on this score is contrived and appears to be an attempt to avoid the consequences of the Constitutional Court's refusal of leave to appeal in the *Discovery Health I* matter dealt with by Mbongwe J.⁵²

[95] Cloete J also found that the RAF was clutching at straws and, in the process, depriving deserving claimants of their lawful claims, and that in doing so, it was shamefully wasting yet more public funds which should be directed at the settlement

⁴⁸ (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023).

⁴⁹ At paras 6 and 7.

⁵⁰ At para 7.

⁵¹ At para 12.

⁵² At para 14.

of worthy claims.⁵³ Cloete J directed the RAF to pay the plaintiff for his past medical expenses, together with interest thereon at the prescribed legal rate.

[96] The RAF applied for leave to appeal against Cloete J's order. Cloete J subsequently refused the RAF's application for leave to appeal. The RAF afterwards approached the SCA for leave to appeal on the basis that the common law doctrine of *res inter alios acta* did not apply to the RAF where a medical aid scheme had paid a claimant's past medical expenses. On 13 June 2024, the SCA, per Makgoka JA and Masipa AJA, dismissed the application for leave to appeal on the basis that there was no reasonable prospect of success on appeal and that there were no other compelling reasons why an appeal should be heard.

[97] The RAF thereafter brought an application to the president of the SCA for a reconsideration, in terms of s 17(2)(f) of the Superior Courts Act. The President of the SCA did not agree with any of the RAF's arguments. The application for reconsideration was dismissed with costs on 30 August 2024 because no exceptional circumstances warranting a reconsideration or variation of the decision refusing the application for leave to appeal had been established.

[98] I must stress that the *Van Tonder* judgment was cited with approval in *Road Accident Fund v Sheriff of the High Court for the District of Centurion East and Another*,⁵⁴ and in *Road Accident Fund v Malgas*.⁵⁵ In *Fokwe v Road Accident Fund* Cloete J observed that following a refusal of leave to appeal in *Road Accident Fund v Sheriff of the High Court for the District of Centurion East and Another* a petition by the RAF to the SCA was unsuccessful. Simply put, the issues which were raised by the RAF before the full court in *Discovery Health II* were considered by the SCA in *Van Tonder* and *Road Accident Fund v Sheriff of the High Court for the District of Centurion East and Another* and were dismissed.

[99] The majority in *Discovery Health II* briefly references the *Van Tonder* judgment, noting that it was decided by a single judge. However, it is important to

⁵³ At para 15.

⁵⁴ [2024] ZAGPPHC 149 (19 February 2024) at paras 28 and 30.

⁵⁵ Unreported judgment of Van Zyl DJP in application for leave to appeal, case no 126/2020 Eastern Cape Local Division, Gqeberha, delivered on 5 March 2024 at para 18.

recognise that the arguments presented by the RAF before the full Court in *Discovery Health II* were thoroughly considered and subsequently dismissed by the SCA in the *Van Tonder and Road Accident Fund v Sheriff of the High Court for the District of Centurion East and Another judgment*. This aspect does not appear to have been adequately considered by the majority. Had it been, it is my firm view that, in accordance with the principle of stare decisis, the majority would have dismissed the RAF's proposition.

[100] In addition to the above, in *Esack v Road Accident Fund*,⁵⁶ Nuku J in this division, considered a similar question and found that the majority judgment in *Discovery Health II* the other difficulty with the majority judgment in *Discovery Health II* is that the court was not required and in fact did not decide the issue of deductibility of payments made by medical aid schemes from compensation to be paid to road accident victims.⁵⁷ In other words, the majority decision did not have the effect of reversing the Mbongwe J's order. Nuku J found that it must follow that *Discovery Health* lends no support to the RAF's argument that it is not liable to compensate claimants in respect of past hospital and medical expenses that have been paid by their medical-aid scheme as part of the PMB's or EMC's.

[101] Nuku J emphasised that the common law principle of *res inter alios acta* is firmly entrenched in our law in respect of medical aid scheme benefits which claimants have received or will receive, and which are not deductible from their claims against the RAF. Nuku J refused a subsequent application for leave to appeal. An application for leave to appeal before the SCA suffered the same fate. An application for reconsideration by the President of the SCA in terms of s 17(2)(f) of the Superior Courts Act was also dismissed with costs on 1 November 2025. The President of the SCA found that the applicant has not established that the decision to refuse leave to appeal is not reconsidered or varied, a grave failure of justice would result, or the administration of justice would be brought into disrepute.

[102] From the foregoing, the issues raised in the second and third directives have been decided and are thus *res judicata*.

⁵⁶ 2025 (4) SA 201 (WCC).

⁵⁷ At para 17.

Do the two directives apply retrospectively?

[103] It is common cause that the respondent was involved in the motor vehicle accident on 16 December 2018 and that summons was issued against the RAF on 25 August 2020. Both events occurred before any of the RAF's impugned directives were issued. Even if the RAF's defence is upheld by the SCA in the *Discovery Health //* matter, in my opinion, this will not affect the judgment in this case based on the principle of retrospectivity. The RAF's directives do not have a retrospective effect. The three directives issued by the RAF were issued long after the respondent's claim was lodged with the fund and the respondent's summons was issued and served.

[104] In *S v Mhlungu and Others*,⁵⁸ the Constitutional Court, per Kentridge AJ, observed that there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation that invalidates what was previously valid, or vice versa, i.e., legislation that affects transactions completed before the new statute came into operation. The court also noted that there is a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g., by invalidating current contracts or impairing existing property rights.

[105] The Constitutional Court also noted that there is another well-established rule of construction, namely that even if a new statute is intended to be retroactive insofar as it affects rights and obligations, it is nonetheless presumed not to affect matters that are the subject of pending legal proceedings. Therefore, the general rule is that a statute is as far as possible to be construed as operating only on facts that come into existence after its passing.⁵⁹ The directives issued by the RAF were issued long after the respondent's claim was lodged with the fund. Pursuant to the above considerations, it is my firm view that even if the RAF's appeal to the SCA should be successful, that outcome can have no bearing on the outcome of this matter for

⁵⁸ 1995 (3) SA 867 (CC) para 65 -67.

⁵⁹ *Kaknis v Absa Bank Ltd and Another* 2017 (4) SA 17 (SCA) para 10.

various reasons, one of which is that the impugned RAF directives cannot apply retrospectively.

Costs

[106] The respondent sought costs against the appellant for two counsels on an attorney and client scale. Mr Filton opposed the application and submitted that the complexity of the issues in this matter did not warrant the employment of two counsels. It is a trite principle of our law that a court considering an order of costs exercises a discretion.⁶⁰ The court's discretion must be exercised judicially.⁶¹ The decision a court takes is a matter of fairness to both sides.⁶² The court is expected to take into consideration the circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as would be fair in the discretion of the court.

[107] In the present matter, the RAF has sought to make a mockery of the courts by issuing directives in conflict with a court interdict to evade what its statute obliges it to do. Despite the argument raised relating to its directives having been dismissed by the apex court, the RAF is still soldiering on in its resolve. As Mr Coughlan noted that allowing the RAF, which is a government organ, to escape the delictual liability in such a situation would be manifestly inequitable. Counsel submitted that the RAF's directives cannot acquire the force of law and cannot impermissibly conflict with the provisions of the RAF Act. The RAF is not entitled to change the prevailing legal position to free itself of its statutory obligations under s 17 of the RAF Act to pay full compensation to victims of motor vehicle accidents.

[108] On a conspectus of all the facts discussed above, I am of the view that the RAF must pay the costs of appeal, including the costs of two counsels. The issues raised in this matter are complex and, in my view, deserve the employment of two

⁶⁰ *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC).

⁶¹ *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

⁶² *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F- G.

counsels. However, I am of the view that costs must be paid on a party and party scale.

Order

[109] In the result, I would propose the following order:

109.1 The appeal is hereby dismissed.

109.2 The RAF is ordered to pay the costs of the appeal on a party and party scale including the costs of two counsels where so employed on scale C.

**LEKHULENI JD
JUDGE OF THE HIGH
COURT**

I agree:

**NZIWENI
CN
JUDGE OF THE HIGH
COURT**

I agree and it is so ordered:

DOLAMO MJ

JUDGE OF THE HIGH
COURT

APPEARANCES

For the Appellant: Adv M Filton
Instructed by: The State Attorney

For the Respondent: Adv P Eia
Adv W Coughlan
Instructed by: A Batchelor & Associates