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

Reportable/ Not Reportable

Case no: CA & R 40/2024

In the matter between:

ROAD ACCIDENT FUND Appellant

and

NICOLAAS CONLEY MIENIE Respondent

Coram: PHATSHOANE DJP, WILLIAMS and MAMOSEBO JJ.

Heard: 15 September 2025.

Delivered: 6 February 2026.

Summary: Delict – Appeal against quantum – Claim for loss of earnings – Compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 not delictual – Road Accident Fund's liability not to be adjusted in accordance with Compensation Fund's methods – Court to scrutinize expert evidence even in the absence of controverting evidence – Court *a quo* having failed to do so – Appeal succeeds.

ORDER

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:
   "a) The defendant is ordered to pay the plaintiff the sum of R502 862,06 and costs of suit, which shall exclude the costs already awarded by Sieberhagen AJ on 10 November 2022.
   b) Interest on the amount of R502 862,06 from 12 May 2023 to date of payment on the applicable scale."
3. The respondent is to pay the costs of the appeal.
4. The appellant is to pay the costs of the application for condonation.

JUDGMENT

Williams and Mamosebo JJ (Phatshoane DJP concurring)

Introduction

[1] This is an appeal, with leave from the Supreme Court of Appeal, against the whole of the judgment and the following order by Tlaletsi JP, made on 12 May 2023:

> "1. The defendant is ordered to pay the plaintiff the sum of R1 050 412,06 which shall exclude the costs already awarded by Sieberhagen AJ on 10 November 2022.
>
> 2. Interests on the amount of R1 050 412,06 from the date of the order until the date of payment on the applicable scale,"

[2] The distilled issues to be adjudicated upon by this Court are the following:

2.1. The failure by the appellant to seek condonation for the late filing of its Notice of Appeal;

2.2. The failure by the appellant to file its heads of argument timeously and its failure to apply for condonation thereof; and

2.3. The merits of the appeal should 2.1 and 2.2 above be decided in favour of the appellant.

Condonation

[3] As alluded to, the filing of the notice of appeal was out of time. In simple terms, the appeal has lapsed and for the appeal court to consider its re-instatement, a substantive application with cogent reasons advanced to revive it must be filed.

[4] Rule 49(2) of the Uniform Rules of Court stipulates that:

> 'If leave to appeal to the Full Court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.'

[5] Leave to appeal was refused by Tlaletsi JP on 08 September 2023. The appellant, the Road Accident Fund ("the RAF"), approached the Supreme Court of Appeal (SCA) on petition whereafter leave was granted to the Full Court of this Division on 26 April 2024. Whereas the RAF was supposed to deliver the Notice of Appeal by not later than 29 May 2024, it was only filed on 18 July 2024, almost eight weeks late.

[6] The RAF's explanation for the delay is the following. After the SCA granted it leave, there was correspondence between the local State Attorney, Mr Mogano, who had deposed to the affidavit explaining what had transpired and the efforts he took to enrol the appeal timeously and the

RAF's correspondent attorney in the State Attorney's office, Bloemfontein, Ms Cornelize Cronje, who noted the SCA order. She notified the Kimberley office thereof, but only emailed the order two months later. According to her, she struggled with servers and emails. The RAF's counsel was appointed on 04 September 2024 and consultation with him only took place on 11 September 2024. Ms Cronje was requested to draft an affidavit explaining cause of the delay, but she failed to even respond to the request. This explanation is flimsy and inadequate and does not meet the trite principle governing condonation. This Court is loath to penalize the RAF for Ms Cronje's lack of diligence.

[7] Condonation is not to be had merely for the asking. The Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*[1] held:

> "This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[8] Regard being had to the facts and circumstances of this case, it appears that the RAF has reasonable prospects of success on appeal. Additionally, there are important legal issues inclining this Court to grant the relief sought. It follows therefore that the appellant should not be non-suited because it would be in the interests of justice to grant it condonation. The appeal is consequently revived.

[1] 2008 (2) SA 472 (CC) para 20.

[9] The second aspect of the RAF's non-compliance pertains to the late filing of the heads of argument. The RAF's heads of argument reached us after the respondent, Mr Nicolaas Mienie, hereinafter referred to as "the plaintiff", had already filed his. The plaintiff made an issue of the late filing of the heads. The purpose and timeframes pertaining to the filing of heads are set out in these terms in Rule 49(15) of the Uniform Rules of Court:

> "Not later than fifteen days before the appeal is heard the appellant shall deliver a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not later than ten days before the appeal is heard the respondent shall deliver a similar statement. Three additional copies shall in each case be filed with the registrar."

The Court has not been considerably inconvenienced by the late filing of the heads. The plaintiff has also not been prejudiced. Accordingly, such non-compliance with court rules should not detain us, it is accordingly condoned. Afterall, the heads are for the benefit of the Court.

Merits

[10] The grounds of appeal can be summarised as follows:

9.1 That the court *a quo* erred in accepting the evidence of Mr W H Boshoff, that the same principles applied by the Compensation Commissioner in calculating the pension payable to the plaintiff should be applied in determining the award for loss of earnings.

9.2 The court *a quo* erred in rejecting the RAF's argument based on the judgment in *Road Accident Fund v Maphiri*[2].

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[2] 2004 (2) SA 258. (SCA).

[11] The plaintiff was involved in a work-related motor vehicle accident whilst on duty on 27 October 2017. He instituted an action for damages against the RAF as a result of his injuries sustained.

[12] The RAF conceded liability for the plaintiff's proven damages and on 10 November 2022, Sieberhagen AJ made an order *inter alia* that the RAF pay the plaintiff general damages in the amount of R1.5 million and provide him with the statutory undertaking in respect of future and related medical expenses. The RAF also made an interim payment of R 474 705.00 to the plaintiff.

[13] The claim relating to the loss of earnings was postponed for future determination. At the hearing to determine this head only the plaintiff's actuary, Mr W H Boshoff from Munro Actuaries, testified. He had first been instructed by the plaintiff's attorneys to compile an actuarial report during 2020. Based on the generally accepted actuarial methodology employed and assumptions made, his first report dated 3 March 2020, which took into account a contingency deduction of 5% for past and a 10% deduction for future loss of earnings, provided for an mounted of R3 161 930,00.

[14] Due to the effluxion of time and the impact it has had on past and future loss of earnings, Mr Boshoff was instructed during 2022 to provide an updated actuarial report. This report dated 4 July 2022, reflects the value of the plaintiff's loss of earnings as R3 761 500,00.

[15] Mr Boshoff testified that at the time of compiling the July 2022 report, he had in his possession a letter from the Compensation Fund placing a value on the plaintiff's pension. He however did not have the underlying actuarial

basis used by the Compensation Fund to determine their capitalisation factor, but immediately realised that the actuarial basis used by the Compensation Fund was different from that used by Munro Actuaries and other actuaries working in the damages arena.

[16] Mr Boshoff explained that up until 2021, when using his usual actuarial basis to calculate a loss of earnings capitalisation, he would arrive at more or less the same figure as that used by the Compensation Fund, which for a male aged 42, as was the age of the plaintiff, would be approximately 15. The capitalisation factor used by the Compensation Fund would be more or less the same as the one used by Munro Actuaries. In those circumstances, he would be content to calculate the loss of earnings on his usual actuarial basis, since there would be no discrepancy or prejudice to any party.

[17] It is common cause that the capitalisation factor adopted by the Compensation Fund increased to 25.68. After many attempts at determining why the capitalization factor used by the Compensation Fund differed so vastly to what was used in the past, the actuaries for the Compensation Fund were subpoenaed to provide the actuarial basis for the increase.

[18] Mr Boshoff testified that they (Munro Actuaries) discovered that the actuarial basis for the new capitalisation factor used by the Compensation Fund's actuaries differed from theirs in that *inter alia,* different mortality and interests assumptions were used. According to Mr Boshoff, the actuarial basis used by the Compensation Fund was incompatible with that which is normally used by the damages actuaries. The incompatibility is in the sense that one must calculate the difference (subtracting one figure

from another) between two differently calculated figures. He stated that you would then not be comparing apples with apples, but apples and pears, which could be prejudicial to either the plaintiff or the RAF.

[19] Mr Boshoff testified as follows in this regard:

"MR BOSHOFF: The problem being you use incompatible actuarial bases. The only way actuarially you can arrive at the correct answer is either you calculate both [mechanical interruption – audio distorted #27:27] that the bases used by the compensation fund must be used by law. Even if I may as an actuary say well, I think the bases is too light or to heavy it does not matter. By law that bases is prescribed. I do not have a choice. We have to use it to calculate the capital value of the... [indistinct] pension.

The only reasonable action that remains for me as an actuary is then to adjust my basis in determining the capitalised value of the uninjured or premorbid earnings and use the same bases as the bases used by the commissioner." (*Sic*)

[20] Mr Boshoff then applied the same actuarial factors used by the Compensation Fund in order to determine the compensation due to the plaintiff/ to quantify the damages (loss of earnings) claimed by the plaintiff from the RAF. The capital total loss of earnings as reflected in his latest report of 11 December 2022 amounted to R4 309 050,00.

[21] During cross-examination, Mr Boshoff explained as follows:

"MR BOSHOFF: I just stated it is not just my personal preference. I would expect any actuary to do the same. M 'Lord, if I may, the fact that the actuarial basis for the compensation is prescribed by law even though I am not prescribed by law as to which actuarial basis I should use as an actuary, as a professional in this area I will immediately use the same actuarial basis if I can obtain it, because that is the correct way to do the calculation. The law does not prescribe what mortality I should use in any case and the law does not prescribe what interest or inflation assumption I should use in any case. That is completely within the ambit of my expertise as an actuary who is also accountable to my professional body, for professionalism and to my colleagues that we as many actuaries will have the same conclusions to maintain the integrity of the profession. Within that ambit, M 'Lord, I see it as the only position I have that if the compensation basis is prescribed and I have to adopt that same basis and there is no law that says I must, but there is also no law that says I must not in my ambit as an actuary and as an expert that I make that decision to do to maintain actuarial integrity." (*Sic*)

[22] The court *a quo* accepted the evidence of Mr Boshoff that the only way to mitigate against any prejudice would be to use the same actuarial basis used by the Compensation Commissioner. The court *a quo*, in the absence of any controverting evidence, ordered that the compensation awarded by the Compensation Fund, plus the part-payment already made to the plaintiff by the RAF, be deducted from the amount of R4 309 050,00, as determined by Mr Boshoff in his December 2022 report. This then determined the amount the RAF was liable to pay the plaintiff (R1 050 412,06) for loss of earnings.

[23] It bears to have another look at s 36 of the Compensation for Occupational Injuries and Diseases Act[3] (COIDA), which reads as follows:

"Recovery of damages and compensation paid from trial parties.

(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease-

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

[3] 130 of 1993.

(b) the Commissioner or the employer by whom compensating is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection (1)(a) the court shall have regard to the compensation paid in terms of this Act.

(3) In an action referred to in subsection (1)(b) the amount recoverable shall not exceed the amount of damage, if any, which in the opinion of the court would have been warded to the employee but for the Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension the capitalized value as determined by the commissioner of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be."

[24] It is no coincidence that s 36 distinguishes between compensation and damages. Compensation in terms of COIDA is paid to the employee by the Commissioner or employer by reason of his/her statutory obligation and not because he/she is liable in delict[4].

[25] In the court *a quo* and again during argument of the appeal, counsel for the RAF referred the court to *Road Accident Fund v Maphiri*[5]. In *Maphiri* the SCA rejected the *"like for like"* principle where the respondent in that case contended that compensation must be deducted against certain heads of damages and not against general damages. The court *a quo* held that *Maphiri* did not deal with the question whether the plaintiff could use the same capitalization factors used by the Compensation Commissioner.

[4] See *South African Railways and Harbours v South African Stevedores Services Co Ltd* 1983 (1) SA 1066 (A) at 1088F-H.

[5] 2004 (2) SA 258 (SCA).

[26] The *Maphiri* case is however instructive in that it restates the distinction between compensation and damages. Mthiyane JA stated the following:

"In my view, the whole amount of the compensation (R38 346,17) is to be deducted from the plaintiff's total award irrespective of the fact that it exceeded what the plaintiff has been held to be entitled to in respect of the heads of damage to which the compensation related (if it can be related!). It is true that the plaintiff's general damages are being reduced by the amount of the excess. But does the Compensation Act prevent the court from deducting the excess merely because it exceeds the amount to which the plaintiff would be entitled under the particular head of damage to which the Commissioner's payment relates? That would only be so, if one interprets the 'like from like' dictum in the *Klaas* case as requiring a *qualitative* correlation between the particular amounts being considered. There is nothing in the Act or in the *Klaas* judgment itself to suggest that the Act was to be interpreted in that way. The Judge *a quo* in a detailed judgment has not pointed to such correlation. As a matter of law the contrary is true. **The form in which compensation is awarded does not mirror the heads of damage to be found at common law. It has been said that compensation paid under the Act is not the same as damages. Nor is there room to compare 'compensation' received under the Compensation Act to a benefit under a policy of insurance. An attempt to do so was rejected by Schreiner J in the *Maasberg* case *supra*, where the learned judge said 'compensation received by the workman should [not] be approximated to, and treated on the same basis as, insurance moneys, sick-fund benefits and the like'.**

It does not matter under which head of damage the Commissioner has paid or will be liable to pay compensation, nor that the amount exceeds the amount to which the plaintiff has been found entitled under that head by the court. It is sufficient that it is an amount which the Commissioner was obliged to pay and that the notional *total sum of damages* to which the plaintiff would be entitled is equivalent to or exceeds that sum. **In short, if it means that the award for general damages is reduced or wiped out, that simply is the consequence of the application of the Compensation Act or as**

Viljoen J put it in the *Botha* case *supra* 'the impact of the provisions of an Act of Parliament upon the common law'."[6] (Emphasis added.)

[27] The RAF is liable in delict for the proven damages suffered by the plaintiff, *in casu,* loss of earnings. Harmse JA in *Maphiri,* held that:

"The second point, which tends to be overlooked, is that the Act is not for the benefit of third parties, such as the RAF, who are liable in delict; it is for the benefit of the employee and the employer, and 'premiums' have to be paid for this 'insurance'. This means that the starting point of any litigation under s 36 is a determination of the third party's liability. Some cases have referred to it as 'common law liability', a concept that gave the Court below some trouble. All it means is 'delictual liability' and what the courts have attempted to do by using the phrase was to distinguish between 'compensation' and 'damages'. Once this is understood, an apportionment of damages under the Apportionment of Damages Act 34 of 1956 does not give rise to any problems or to another method of calculation. In this case the starting point is then the RAF's liability for 50% of the plaintiff's damages which is R51 166,33.

The converse point has often been made and that is that s 36 does not increase the liability of a third party. Consequently, the full amount of its liability (in this case 50% of the plaintiff's loss) has to be divided between the employee and the Commissioner."[7] (Emphasis added.)

[28] It is not for the plaintiff's actuary to adjust the RAF's liability in accordance with the methodology used by the Compensation Fund. There can be no basis for that. The capitalization factors used by the Compensation Fund are used to determine the value of the pension payable to a claimant and not for delictual damages due to the plaintiff. The plaintiff's damages should be determined separately and independently

[6] *Ibid* paras 37 and 38.
[7] *Ibid* paras 8 and 9.

from that of the Commissioner. It is also not an issue of fairness towards the parties that the Compensation Fund's capitalisation factors be used to determine the plaintiff's loss of earnings. Mr Nalane SC, who appeared for the RAF, is correct in his contention that such an application of the Compensation Fund's methodology would in fact be unfair and create inequity in the compensation of damages for those plaintiffs who are covered by COIDA and those who are not. On Mr Boshoff's reasoning, the damages of plaintiffs who have been compensated under COIDA would be calculated using the Compensation Fund's higher capitalization factor and those who are not compensated in terms of COIDA would be subjected to the normal lower damages capitalization factor.

[29] The normal and acceptable principles used in the computation of damages should be used whether or not compensation has been paid to the plaintiff under COIDA.

[30] The fact that the RAF had not presented controverting evidence should be neither here nor there. The court must be satisfied that the opinion of an expert has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached a defensible conclusion.[8] The approach of Mr Boshoff to the calculation of the plaintiff's loss of earnings is not logically supported.

[31] The appeal must therefore succeed. We have been provided with draft orders which have been presented after argument to the court *a quo*, reflecting the RAF's as well as the plaintiff's contentions. The draft order which was handed up by the RAF makes provision for a calculation of the

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[8] See *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) para 37. See also *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL (E)) at 241G - 242B.

RAF's liability to the plaintiff on the basis of Mr Boshoff's July 2022 actuarial report which was compiled without regard to the Compensation Fund's capitalization factors, and which we are of the view is the correct approach.

[32] Therefor the calculation of the plaintiff's loss of earnings should be as follows:

Total loss of earnings:	R3 761 500, 00
Less compensation awarded	R2 783 932, 94
	= R977 567, 06
Less interim payment by RAF	R474 705, 00
Balance due to plaintiff	= R502 862, 06

[33] With regard to the costs of the appeal, there is no reason why costs should not follow the result.

[34] In the result, the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:
   "a) The defendant is ordered to pay the plaintiff the sum of R502 862,06 and costs of suit, which shall exclude the costs already awarded by Sieberhagen AJ on 10 November 2022.
   b) Interest on the amount of R502 862,06 from 12 May 2023 to date of payment at the applicable scale."
3. The respondent is to pay the costs of the appeal.
4. The appellant is to pay the costs of the application for condonation.

[redacted]

C C WILLIAMS

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

Appearances

For the Appellant:	Adv. FJ Nalane SC
Instructed by:	Office of the State Attorney (Kimberley)
For the Respondent:	Adv. J H Roux SC
Instructed by:	DSC Attorneys
	c/o Engelsman & Magabane Inc.