



OF INTEREST

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Case No. EL 1493/2018

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

ANDILE GAVIN MABHESHWANA N.O.

(EXECUTOR ESTATE LATE

CHANTEL LIEZEL LEWIS)

Respondent

JUDGMENT

HARTLE J

[1] The applicant, represented in these proceedings by a senior claims officer of the Road Accident Fund in Pretoria, seeks an order in the following terms:

“1. That, in terms of Section 173 of the Constitution of the Republic of South Africa of 1996, the Honourable Court exercise its inherent power to develop the common law, taking into account the interests of justice, in the following respects-

1.1 the common law be developed by recognizing as a separate or further ground of rescission, the Road Accident Fund’s right to rescind or vary an order of a court of law, granted in its presence, in circumstances where payment has been agreed to and/or ordered for future loss of income, payment had not been made, and the claimant or judgment creditor has passed away before any or partial future loss have set in;

1.2 *alternatively* that the doctrine of *functus officio* be revised or extended so that a court of law that would ordinarily become *functus officio* by granting an order in terms of which future loss of income has to be paid, may reconsider, vary or rescind its order in circumstances where payment has been agreed to and/or ordered for future loss of income, payment had not been made, and the claimant or judgment creditor has passed away before any or partial future loss have set in;

2. That it be declared that the Applicant shall not be liable to pay to the Respondent any loss of income, in terms of the Order of the Honourable Court granted on 31st January 2023 under case number 493/2018 by his Lordship Acting Justice Nqumse, insofar as such loss constituted loss after 27th May 2023 and had not been paid;

3. That paragraph 1 of the Order of the Honourable Court granted on 31st January 2023 under case number 1493/2018 by his Lordship Acting Justice Nqumse, be varied by substituting the existing numbers and words,

“R4 839 100.00 (Four Million Eight Hundred and Thirty-Nine Thousand One Hundred Rand”

for the following,

“R192 231.00 (One Hundred and Nine-Two Hundred and Thirty-One Rand”).”

[2] To put the relief sought into context, the applicant seeks a pass from this court to be able to rescind and to in fact vary a final order made by this court on 31 January 2023 (“*the Order*”) at the conclusion of a trial in an action instituted against it by the late Ms. Lewis who was injured in a motor vehicle accident. The Order directs the payment of compensation to her for her past and future loss of income suffered as a result of such injury arising from the negligent driving of a motor vehicle in circumstances where the applicant was statutorily obliged to pay compensation to her (and by necessary implication to her estate because she has since died) pursuant to the provisions of section 17 (1) of the Road Accident Fund Act, No. 56 of 1996 (“*RAFA*”).

[3] The respondent in the present application is Ms. Lewis’ attorney in the motor vehicle action who represents her deceased estate *nomine officio*.

[4] Ms. Lewis was a passenger in a vehicle involved in a collision on 17 February 2018 in East London. She duly lodged a claim with the applicant for statutory compensation. The claim ought ideally to have settled administratively soon after its lodgment, but she was evidently obliged to enforce her right to claim compensation by way of legal proceedings issued out of this court under the abovementioned case number.¹

¹ See *Maqhutyana and Another v Road Accident Fund* (CA 17/2020) [2021] ZAECHMHC 30 (17 August 2021), especially the court’s comment at footnote 32, together with the general tenor of the judgment that the scheme under the RAFA was intended to result in the expeditious administrative settlement of claims. Litigation was intended to be a fall-back option in the rare cases where the Fund repudiates liability for the claim (section 24 (6)), or in order to beat prescription (section 23). Unfortunately, due to the length of time the Fund takes to assess claims (beyond the 120 day period mandated), plaintiffs necessarily have to ensure by the legal enforcement of their claims that they do not prescribe.

[5] It appears that the issues of liability and general damages were settled in her favour by agreement with the applicant. This is borne out by a separate order of this court dated 29 July 2021 reflecting such a milestone.

[6] The remaining aspect of her claim for future loss of income was determined by way of a trial on 10 October 2022, culminating in the Order.

[7] Despite the Order directing the Fund to pay the assessed compensation for this head of damage to Ms. Lewis within 14 days of the order, this did not happen.

[8] She died on 27 May 2023, four months after judgment in her favour had been granted. The applicant says that the fact of her death came to its attention in the process of conducting a routine mortality inquiry on the Home Affairs database to establish if she was still alive before making payment to her of the capital amount due in terms of the Order. Since she did not survive, the applicant withheld the payment.

[9] In the present application the applicant seeks a declarator that its liability to Ms. Lewis should in effect be limited to the date of her death for this head of damage, and that the Order be varied to give effect to such limitation on the supposed basis that her future losses assessed and determined by the trial court have not yet “*set in*.” The substituted amount referred to in paragraph 3 of the notice of motion evidently represents the limited amount of her damages for loss of income that, in the applicant’s own judgment must, conversely, have “*set in*” before her death.²

² It is explained for the first time in the applicant’s heads of argument that it is of the view that the deceased estate should only be entitled to payment of Ms. Lewis’ past loss of income (R192 231.00) calculated by the Fund’s actuary in August 2023.

[10] The prospect that the applicant can discount Ms. Lewis' damages by the simple stratagem of a rescission application (assuming the introduction into the common law of the proposed further ground of rescission) that claws back the prospective portion of her claim for loss of income because of her earlier than expected death is not made provision for in the RAFA, and runs counter to several well-established common law principles. The applicant recognizes the challenge in the fact that it asks this court to develop the common law, considering the interests of justice, at least in the respects indicated in its notice of motion.

[11] Since Ms. Lewis' damages arose as part of a unitary claim for statutory compensation, it is necessary to consider the social security scheme under the provisions of the RAFA³ together with the related principles of the common law that have natural application in the realm of the legal enforcement of personal injury claims by litigants and/or their estates as well as the general, well-established, rule *of functus officio*.

[12] Section 17 (4)(b) read with section 17 (1), of the RAFA obliged the applicant to compensate Ms. Lewis as a claimant under the circumstances referred to in sub- section (1) (the jurisdictional facts), for loss or damage suffered by her as a result of the accident, *inter alia* for her future loss of income by way of a lumpsum or in instalments as agreed upon, subject only to the cap on damages in respect of the annual loss provided for in section 17 (4)(c)(i), read with section 17 (4A) of the RAFA. Once the Fund accepted liability for the claim, it was inevitable under the scheme that such category of

³ See *Law Society of Africa & Ten Others v Minister of Transport* 2011 (1) SA 400 (CC) at paras [17] – [28]; *Road Accident Fund v Lebeko* (802/11) [2012] ZASCA 159 (15 November 2012) at paras [3] – [4]; *Road Accident Fund v Duma*, *Road Accident Fund v Kubeka*, *Road Accident Fund v Meyer*, *Road Accident Fund v Mokoena* 2013 (6) SA 9 (SCA) at para [3] – [10] ("*Duma and three similar cases*"); and *Maqhutyana and Another v Road Accident, Supra*, for an understanding of the current scheme with its unique nuances. Of particular relevance is the statutory abolition of the common law claim of an accident victim against the owner or driver of a motor vehicle or against the employer of the driver (Section 21 (1)(a) and (b) of the RAFA) in the place of whom the Fund has been substituted.

loss would be paid to her as compensation in terms of the RAFA. As indicated above this marker was reached in July 2021 when other heads of damage were tendered, leaving only the loss of income claim to be finally and separately determined by the court.

[13] It is accepted that in legal proceedings to enforce road accident claims, where a court is called upon to assess a claimant's loss of income, it does so according to the conventional method of determining the estimated present value of the loss, based on the use of accrual calculations premised on whatever evidence is available,⁴ but subject to the cap on a claimant's full damages that was introduced by way of the amendment to the RAFA in 2005 (by Act 19 of 2005), effective since 1 August 2008.⁵

[14] This method has found universal application within the common law once- and-for-all-Rule that requires a party with a single cause of action to claim in a single action whatever remedies the law accords him upon such cause. The Rule has two components: the first is that all damages, present and prospective, must be claimed in a single action and, the second, that damages are claimed as a lump sum. Under the RAFA such loss of income claims are permitted to be paid by way of instalments, but only by agreement with the claimant.⁶ The Rule aforesaid is part of the very foundation of our law.⁷ The applicant itself recognizes that its purpose is to promote finality.

[15] Although speaking in the context of a claim for future medical expenses, the Supreme Court of Appeal in *T N obo B N v Member of the Executive*

⁴ *Southern Insurance Association Ltd v Bailey N.O.* 1984 (1) SCA 98 (A) at 113 F – 114 A. The common law recognizes the speculative, but necessary and acceptable basis, for the calculation of future losses in personal injury claims.

⁵ See *RAF v Sweatman* 2015 (6) SA 186 (SCA) in which the court discusses the impact of the cap and confirms that it does not alter the “conventional method” of calculating a plaintiff's claim for loss of income, or support, as the case may be.

⁶ Section 17 (4)(b) of the RAFA. By necessary implication the common law expectation of a litigant being paid in a lumpsum for her prospective loss of income is the default position.

⁷ *Evins v Shield Insurance* 1980 (2) SA 814 (A) at 835 H. ...

*Council for Health of the Eastern Cape Government and Others (“TN”)*⁸ had reason to reiterate the utility of and rationale for the retention of the common law once-and-for-all Rule in relation to assessing prospective losses in personal injury claims. The court in that instance clarified why there existed no call for the development of the Rule to accommodate payment in kind damages rather than conventionally estimated losses suffered by the plaintiff in that scenario, in the form of a lumpsum:

“Since it is unreasonable, indeed impossible, to predict with accuracy the nature and extent of losses that may arise in the future, damages awarded will sometimes exceed actual future medical expenses; and at other times be less than those expenses. In other words, the rule frequently results in over- or under-compensation, particularly where the claimant survives beyond the life expectancy estimated at the time of trial; or alternatively, dies earlier. But this is not new. In retaining the rule as part of the common law, the courts have confronted the difficulties and reasoned that the benefits of the rule outweigh its shortcomings. In essence, the rationale for the rule is closure for the parties and judicial efficiency. The principle is that ‘immediate certainty and finality are to be preferred above deferred precision’.⁹ And damages are awarded in a lump sum ‘to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions’.¹⁰

[16] The court in *TN* reflected on the wider consequences of the proposed development of the once-and-for-all Rule contended for, in that scenario to substitute the conventional lumpsum payment model with structured public hospital services, and explained why there was good reason to maintain the Rule with all its idiosyncrasies:

⁸ (383/23) [2026] ZASCA 14 (11 February 2026) at [50].

⁹ *Reyneke NO v Mutual & Federal Insurance Co Ltd* 1992 (2) SA 417 (T) at 420F.

¹⁰ *MEC for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (*DZ*), at [16].

“The rule ...ensures finality and protects parties against multiple, piecemeal actions for damages, thereby ensuring fairness to both parties. Defendants are not subject to potentially endless, intermittent and indeterminate claims, which are difficult to plan for. And plaintiffs are not required to bring claims every time they wish to obtain part of the relief, which a court has already granted them...”¹¹

And because

“... (O)pen-ended remedies undermine finality, and repeated disputes increase legal costs. The result is continuous litigation, and an increased burden on the parties and the court system. And courts could become long-term administrators of public healthcare, rather than adjudicators.”¹²

[17] The court concluded with the following observations regarding the Rule, which holds good for the application at hand as well:

“The rule is designed precisely to prevent these issues (that is continuous litigation, and an increased burden on the parties and the court system) from ever arising. It does so at the cost of perfect accuracy in calculating damages, but for important reasons related to the administration of justice. Little wonder, then, aware of future uncertainty in assessing damages, this Court stated that ‘[n]o better system has yet been devised for assessing general damages for future loss’.”¹³

[18] The applicant has entirely overlooked the accepted model of assessing damages in personal injury cases in the present matter. It does not pertinently ask the court to develop that Rule at the same time or to consider how it falls to be implicated by the particular development of the common law it prays for. Indeed, the applicant focuses only on the doctrine of finality, through the principle of *functus officio* which stands in the way of it being able to rescind

¹¹ *Supra* at [51]

¹² *Supra* at [55]

¹³ *Supra* at [56].

and or vary the Order, without observing how the Order implicating prospective losses according to the well-established once-and-for-all Rule came to be granted in the first place.

[19] The applicant appropriately recognizes that the basis upon which it applies for the relief under consideration does not fit neatly into any of the existing grounds of rescission especially given the fact that the Order was granted “*in the presence of the applicant*”, so to speak, upon the culmination of a full blown trial in which the expected date of Ms. Lewis’ death in the future was given express recognition as a factor in the calculation of her damages under this head, this according to the conventional damages assessment method referred to above.

[20] The principle of *functus officio* flows from the general, well-established rule, that once a court has duly pronounced a final judgment or order, it itself has no authority to correct, alter, or supplement it. Allied thereto is the accepted principle that the inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in circumstances especially provided for in the Uniform Rules of Court, or the common law.¹⁴ The applicant is aware that no basis currently exists to rescind the final order for the reason postulated, hence its request to develop the common law as prayed for in the notice of motion.

[21] A further rule that the applicant appears to have overlooked is that which promotes the transmissibility of claims for or against the heir of a deceased litigant after the stage of *litis contestatio* has been reached in litigation and the obvious sequitur to that under our law of succession, which is that a judgment or order granted under such circumstances will favour/burden the estate of that

¹⁴ *Erasmus, Superior Court Practice* under the discussion of Rule 42 at D1 – 561.

litigant and ultimately its heirs.¹⁵ In this instance Ms. Lewis' death followed the granting of the capital award for loss of income. The award is thus an asset that vests in her estate for the benefit of her heirs however unpalpable that is for the applicant who took years to process her claim under the RAFA.

[22] In summary the applicant seeks, retrospectively at that, to develop the common law in the following respects relative to a category of matters concerned that can be likened to Ms. Lewis' circumstances.¹⁶

[23] Firstly it claims that it is necessary that the common law should be developed by holding that the applicant should not be compelled to pay, be it under a settlement or court order,¹⁷ for future loss when the claimant or beneficiary has passed away before actual payment was made.

[24] Secondly it asserts a need for the court to recognize and develop as a common law ground of rescission, the need to permit the applicant to rescind or vary a court order granted in its presence, and in the circumstances where before payment has been made for future loss, the claimant or judgement creditor passes away with no or partial future loss having "*set in*".¹⁸

[25] Finally, it asserts the need for this court to extend or develop the doctrine of *functus officio* so that court, which has ordinarily become *functus officio* by granting an order in terms of which future loss has to be paid, may reconsider its order.¹⁹

¹⁵ *Minister of Justice v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) at [19].

¹⁶ The applicant contends that it should be permitted to recover future losses assessed in the past "*only in deserving cases with refined facts similar to the present*".

¹⁷ Both compromised claims and court orders attract finality in legal proceedings.

¹⁸ The applicant does not explain why it means by the concept of "*set in*". One has to infer it means that a deceased person will not suffer any loss of future income once he or she dies, by obvious implication because of their death. The applicant however simply glosses over the common law Rule that permits prospective losses to be awarded in personal injury claims. It also ignores the fact of the vested interests of the deceased estate or that the order is final in effect.

¹⁹ The main and alternative prayers seem to propose one and the same thing.

[26] Vaguely contended in the applicant's founding papers is the assertion that unless the order is rescinded Ms. Lewis' heirs will be unjustifiably enriched, over other (live) deserving claimants, whereas *they* never sustained any form of loss.

[27] Its leading motivation for the relief sought is the applicant's view that the proposed development of the common law would aid it to give social security to more claimants than not because it would by the development sought be able to claw back prospective losses it agreed to pay to claimants after their death who in the Fund's perception no longer have a need for such damages.

[28] It further puts forward the dire financial predicament that it finds itself in by virtue of the fact that it is presently unable to meet its statutory mandate to compensate victims of road accidents who have been injured as a result of wrongful driving because of a lack of adequate funding. The applicant's release from an obligation to compensate a claimant who has no apparent need for a projected future income stream because that person has met their death would, so the simple argument goes, put money back into the kitty where it can serve a real need to compensate victims who are alive. The applicant, for good measure, adds the raft of constitutional rights of those victims that are under threat both because of its perceived inability to meet the claims of road accident victims, as well as the so called unjust enrichment of heirs of deceased estates.

[29] I dare point out that this is the core obligation of the Road Accident Fund which the applicant acknowledges. It expressly exists to compensate victims of motor vehicle accidents caused by wrongful driving that are deserving of compensation. In this respect the applicant has stepped into the shoes of the common law delictual wrongdoer. What the applicant apparently glosses over, however, is that such a wrongdoer that causes personal injury to another will be

liable to compensate that person or his/her estate in damages, including prospective losses conventionally calculated. It is in my view a misconception for the applicant to contend therefore that “*the RAF does not exist to benefit heirs in an estate*”. To the contrary it has taken on the risk of the wrongdoer. Whilst it is so that the Fund is borne from social legislation that endeavors to compensate victims suffering the consequences of serious injuries sustained in motor vehicle accidents, it is a distortion to reflect that a wrongdoer would not have any obligation to successful claimants or plaintiffs who happen to die before that compensation is paid to them.

[30] Ironically in *Law Society of Africa & Ten Others v Minister of Transport*,²⁰ the Constitutional Court found that amended Section 21 of the RAFA, that abolished the common law right, passed constitutional muster because the Fund would be absorbing the risk of the negligent driver or his/her employer entirely under the replaced scheme.²¹ The Court also defended as justifiable the limitation of the Constitutional rights of victims of road accident to physical integrity or freedom from violence by eliminating their common law entitlement to fully recover damages from wrongdoers in order to secure their bodily integrity.²² The court held that the scheme puts in the place of the common law delictual right a compensation regime that is (and was) directed at ensuring that the Fund is inclusive, sustainable and capable of meeting its constitutional obligations towards victims of motor vehicle accidents. Of further importance, in relation to a victim’s property rights under section 25 (1) of the Constitution, the Court maintained that the scheme does not deprive a victim of income or support, but simply regulates the extent to which the Fund

²⁰ *Supra*.

²¹ *Supra* at [40] – [44].

²² *Supra* at [76] – [80].

would be liable. It does so by providing a legislative underpin by the right to compensation for an innocent victim.²³

[31] The courts are bound to apply the common law unless it requires development to align it with the spirit, purport, and objects of the Bill of Rights pursuant to the provisions of Rule 39 (2) of the Constitution; or under circumstances where it is in the interests of justice to do so, as contemplated by the provisions of section 173 of the Constitution.

[32] The applicant relies on the latter provision, which clothes the Constitutional Court, the Supreme Court of Appeal and the high courts with inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[33] In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* (“*Mighty Solutions*”),²⁴ the Constitutional Court urged that before a court proceeds to develop the common law it should do the following:

“...it must (a) determine exactly what the common-law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.”²⁵

[34] *DZ*²⁶ repeated the process for the enquiry as follows:

“[27] To start the enquiry one must be clear on (1) what development of the common law means; (2) what the general approach to such development is; (3) what

²³ *Supra* at [81] – [86].

²⁴ [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC).

²⁵ *Supra* at para [39].

²⁶ *Supra*.

material must be available to a court to enable the development; and (4) the limits of curial, rather than legislative, development of the common law.”²⁷

[35] The Constitutional Court further reminded us in *Mighty Solutions* of the significant injunction expressed in *Carmichele v Minister of Safety and Security*²⁸ that, before embarking on any trail blazing approach in changing the common law:

‘. . . “[j]udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary”. The principle of separation of powers should thus be respected.’²⁹

[36] If one begins with the latter qualification, the applicant has not taken the court into its confidence regarding the anticipated reform of the current compensation system currently administered by it. Ironically in the controversial Road Accident Benefit Scheme Bill, 2014 (“RABS”), which was not enacted but may again be on the table for discussion,³⁰ it provides in section 40 for the termination, suspension, and revision of benefits. It does not mince its words in stating that any benefit granted under a newly envisaged social security scheme that seeks to evolve away from a common law damages type of compensation award, shall terminate upon the death of the beneficiary. In the Bill’s preamble, the motivation for the replacement scheme finds common with the applicant’s in the present application, namely to provide for an effective benefit system that is *inter alia* affordable and sustainable in the long-term, optimizes the limited resources of the government, and provides, in lieu of common law damages as is the present model, for appropriate in-kind care and rehabilitation to person affected by injury or death from road accidents to lessen

²⁷ *Supra* at para [27]

²⁸ (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) (16 August 2001).

²⁹ *Carmichele Supra* at [36]. See also “DZ” at para 34 and “TN” at paras 46, 59 – 62 and 76.

³⁰ *De Rebus* Article - <https://www.derebus.org.za/aprav-rejects-the-tabled-rabs-bill-to-parliament/>.

the impact of such injuries, as well financial support to such beneficiaries (whilst alive) to reduce their income vulnerability as a result.

[37] In no way do I intend to examine or criticize the reforms under discussion. I merely highlight that the applicant has brought the present application quite perfunctorily, represented by a mere claims officer, as if it is the norm to ask to reverse final orders of court granted under the RAFA compensation scheme apart from integrated law reform under discussion in which several stakeholders have quite significant interests. None of those parties have been joined here.

[38] On that score the applicant could not be bothered to even satisfy this court that it gave effective notice in terms of the provisions of Uniform Rule of Court 16A of its intention to bring this application so that such parties with a vested stake in a continuing reform process might have been joined in these proceedings.³¹ By the same token the applicant offered no reason when asked by the court why the Minister of Transport (at least), who ought to have a vital interest in such an application, had not been joined.

[39] I align myself with the sentiment expressed by the court in “*TN*”³² (although in a nuanced context) that it is a misconception of the principle of separation of powers and the role of the judiciary to imagine that the common law can be radically developed through the judiciary rather than by Parliament. That reality especially applies in this instance. Here weighty controversial

³¹ The notice that forms part of the record (unstamped) merely repeats what is stated in the notice of motion. There is further no indication that it was given in the form required by the rule or timeously at that. Mr. Cole (who appeared for the respondent) was keen to argue that I should find that the Registrar obliged in publishing the notice as she ought and further that whilst proper notice was given in the related matter to which I refer elsewhere (*Goosen*), I should take judicial notice so to speak that no interest was expressed in that matter by those who would likely have an interest in the present proceedings. He further suggested that this court should dispense with the requirements of the rule in any event because it was in the interests of justice to get on with the application in order for the respondent to seek its dismissal.

³² *Supra* at [59].

issues on resources and social policy are at stake and have been under consideration by the legislature since 2014. It is even more audacious to imagine that an application such as the present one can be pulled off parochially (and without joining key incumbents responsible for the administration of the RAF for that matter) whereas the envisaged relief would have an impact nationally and would be expected to have to be applied retrospectively. The applicant also brings to the fore only those claimants who have entered the judicial system to enforce their claims forgetting that the compensation scheme under RAFA envisages the speedy resolution of claims under its provisions on an administrative basis. Although rare, claims comprising loss of income may have settled administratively under the RAFA in circumstances where those claimants may have passed before being compensated.

[40] Leave aside the current law reform under debate, what the applicant hopes to achieve by the present relief sought obviously implies a radical restructuring of the law of damages. It further asks Ms. Lewis' heirs (who are entitled to benefit in her place) according to well-established principles of our law, to undo or forego her traditional right to prospective damages for loss of income that she would have been entitled to but for the accident and injuries sustained by her that caused her losses calculated conventionally and consonant with the common law Rule. It also asks this court to forget about the finality of the proceedings in which a court properly computed her entitlement to the award under circumstances where the applicant was "*present*" and fully engaged in the litigation.

[41] It is useful to consider the court's comments in *Swart v Absa Bank*³³ that it is not in the interests of justice to set aside a judgment on the basis of supposed prejudice especially where the cause relied upon for the rescission did

³³ 2009 (5) SA 219 CPD.

not exist at the time the final judgment was handed down³⁴ or in circumstances where the court was in effect being asked to participate in falsifying a true perspective of the past.³⁵ Here the true perspective was that Ms. Lewis was alive and expected to live according to the evidence and actuarial projections indicated at trial. Why must that reality be altered because the Fund is concerned for its financial collapse, especially in circumstances where the Fund can apply cost saving measures itself to meet the claims of live claimants so to speak?

[42] Not only is the applicant constrained by relevant longstanding principles of the common law, but also by the provisions of the RAFA that circumscribes its role as a litigant, standing in the place of the common law delictual wrongdoer.

[43] What the applicant hopes to achieve by clawing back a claimant's prospective loss of income because of that person's death after the claim has been assessed, is not made provision for in the RAFA. The Fund under the present scheme is indeed permitted in lieu of paying a prospective lumpsum for future medical expenses to furnish an undertaking in respect of these, which undertakings by necessary implication will serve no further purpose or fall away automatically upon the death of that claimant. No similar provision for now avails the applicant to put a clamp on traditionally assessed future loss of income. It makes logical sense however that an amendment to the RAFA is the sound way to proceed to effect the change desired to bring claims for income loss in line with section 17 (4)(a) undertakings given by the Fund for future medical expense.

³⁴ *Absa Bank Supra* at 221 H – I – 222 A.

³⁵ *Absa Bank Supra* at 222 E – G.

[44] In my view the fact that the Fund's interests would be better served through legal reform would be reason enough to dismiss the application without further ado. However if I am wrong in this respect, I am equally not satisfied that the applicant has made out a case that it is in the interests of justice to develop the common law on the bases contended for. This was the essential basis upon which the respondent opposed the application.

[45] I should point out that this run of the mill attempt by the applicant to persuade this court that it should by fiat of the proposed development of the common law be absolved from paying compensation for settled loss of income claims after the claimant/plaintiff has since died, is in no way novel. The applicant has attempted to achieve the same relief in similar applications and has come up short. Why it imagined it might presently achieve a different outcome by pressing ahead with the current application despite judgments of the court adverse to its objectives is anathematic to the foundational principles of our law.

[46] The applicant perfunctorily went through the motions of arguing the present matter although, to his credit, Mr. Mlinganiso who appeared on the its behalf, directed the attention of this court to adverse judgments of this and the Northern Cape divisions respectively on the subject.

[47] In *Road Accident Fund v Goosen* (“Goosen”)³⁶ a court of this division reasoned soundly why it is not in the interests of justice to develop the common law on the same bases³⁷ as presently proposed by the Fund, as follows:

“[48] What are the wider consequences of the proposed development, which must be considered? The consequences, to claimants who institute action against the

³⁶ Unreported judgment of the Gqeberha High Court, Case No. 1121/2020 delivered on 18 February 2025.

³⁷ The case is on all fours with the salient facts of the present matter, save that in that matter the order was obtained consensually.

Applicant in terms of the Act and who settle their claims for future loss of income, have no certainty or finality in their claims until payment has been made by the Applicant. Until payment has actually been made by the Applicant, claimants are in a position of perpetual uncertainty, even after having obtained a court order in their favour in which liability is agreed. This is made worse in circumstances in which the Applicant, on its own admission, cannot make timeous payment when debts become due and often faces writs of execution as a result thereof. The applicant would then benefit from its inability and failure to make payment timeously, if the claimant dies after payment is due in the normal course but before payment is made. The Applicant would then be in a position to approach court for the rescission and variation of a court order, for future loss of income, based on its own inability and failure to make payment timeously. As in the present case, the Deceased died prior to the expiry of the 180 days in which the Applicant was afforded to make the deferred payment in terms of the court order, but after the 14 day period in which payment should, in the normal course, have been effected.

[49] The consequences, should the common law be developed as sought by the Applicant, may well have the effect that claimants, knowing that if they die prior to the Applicant making payment of their award, insist on and enforce payment within 14 days after the court order or settlement, to reduce the risk of a rescission and variation. The 180 days period, a grace period and indulgence given by the claimants to the Applicant to make payment, may not be agreed to which would result in the Applicant having to make payment when debts are due in the normal course, after 14 days of a court order, which, on its own admission, it cannot do.

[50] One of the primary facts relied upon for the development sought is that payment must not yet have been made by the Applicant, payment being within the exclusive control and authority of the Applicant. To develop the common law based on this primary fact would, in my view, be arbitrary.

[51] It is not known, and the Applicant does not disclose, whether the facts of this particular matter, upon which the development of the common law is sought, are common place or whether this is an isolated matter upon which the development would only affect this particular case. If this is an isolated matter the development sought would then find no generalised application beyond the particular matrix of this

matter, as warned in *Beadica*,³⁸ and a prudent and disciplined approach is accordingly required.

[52] Although the Applicant contended that the development sought is incremental, on the particular facts of the matter, in my view it would be a substantial development so as to introduce a new ground for the rescission and variation of an order of court, which would only be available to the Applicant and no other litigant.

[53] The cornerstones of the rationale for the common law relating to the rescission of judgments and orders, being certainty and finality, and the rationale underpinning this, in particular *rei judicata* and *functus officio*, must be given due deference and respect. I cannot find that the facts of this matter are so exceptional so to warrant the development sought and to do so would compromise legal certainty.

[54] The interests of justice is a term not easily defined and is a general standard. I accept that the Deceased, as a fact, did not sustain the loss of income claim as envisaged in the order of 23 May 2022 and also accept that the Applicant's obligations are to compensate deserving claimants for loss sustained as envisaged in the Act. This however requires to be balanced against the certainty available to a claimant, once settlement has been reached with the Applicant and an order made, by agreement, by a court. The interests of finality and certainty in judgments and orders of court in my view outweigh the interests of the Applicant on the facts of this matter and in those circumstances it would not be in the interests of justice to develop the common law as sought by the Applicant."

[48] I respectfully align myself with court's rationale in *Goosen*.

[49] Mr. Mlinganiso did not offer any reason why this court should not follow the judgment.

[50] Mr. Mlinganiso indeed pointed out additionally that the court in *Raf v Bakker N O* ("*Bakker*")³⁹ had rejected an application brought by the applicant

³⁸ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* CCT 109/19 [2020] ZACC.

³⁹ (519/2018) [2025] ZANHC 73 (15 August 2025).

to rescind a damages award in favour of a claimant for loss of income that had been made an order of court in terms of a settlement agreement in a similar action enforcing the claim under the provisions of the RAFA. The deceased in that instance died before the settled past and future loss of earnings was due to be paid 180 days after it was entered into the applicant's awaiting payment list. The rescission was sought in terms of Rule 42 of the Uniform Rules of Court but the court was not satisfied that a basis had been made out in the founding papers for such relief. Further and in any event it appears that neither did the papers engage any of the common law grounds for rescission.

[51] The court in *Bakker* had reason to compare the case before it with that of the scenario laid out in *Goosen*⁴⁰ in which it noted that at least an attempt had been made by the Fund in the latter application to establish a basis for an extension of the common law grounds of rescission pursuant to the provisions of section 173 of the Constitution. In its judgment, though, it was constrained to find that the constitutional issues had not been made relevant to the application neither had it been launched in the appropriate manner contemplated by Rule 16A. The applicant had also failed to make out a case for condonation. Further it was precluded in any event, even notionally, from seeking a rescission of the order recording the parties' settlement without first seeking an order to set aside or vary the underlying agreement in terms of which the plaintiff's future loss of income was settled upon. The parties having compromised the claim, the court found that the matter had become *res judicata*, entailing that the court had no authority to embark on an enquiry as to whether the claim was justified on the merits or to determine if the compromise had been validly concluded.

[52] The court noted that in the absence of the parties having provided for the unexpected demise of the plaintiff and set up a mechanism for re-evaluating the

⁴⁰ At this point judgment had been reserved by the court in *Goosen* and had not yet been delivered.

future loss of earnings in the compromise agreement, that the accepted award had become an asset in the deceased's estate even in the event that the plaintiff did not live as long as was assumed in settling upon the agreed compensation for loss of income. Further and more significantly, so the court reasoned, it would not be in the public interest or in the administration of justice to allow a court to vary or set aside a compromise agreement. The court observed as follows in this respect:

“Without an agreed mechanism in the compromise agreement itself to allow for a recalculation of future loss of income if the plaintiff does not live as long as assumed in reaching the compromised agreement, allowing a court to vary or set aside such agreement would not be in the public interest or in the interests of the administration of justice. This is so because it offends two fundamental legal concepts that would apply in the circumstances. The first of these concepts is the ‘*once and for all rule*’, and the second is the rule that regards a compromise in litigation as tantamount to *res iudicata*. To undermine one or both concepts would reduce the motivation for litigants to compromise their respective positions in litigation. That would clearly be against the public interest and not be in the interests of the administration of justice. Accordingly, this court cannot assist the applicant/defendant under the catch all prayer for ‘further and/or alternative relief’”.⁴¹

[53] I am in respectful agreement that it would not be in the interests of justice to develop the common law on the facts of the present matter, or for a class of persons in the position of Ms. Lewis' deceased estate.

[54] No such case has been made out and in my view the application falls to be dismissed with costs.

[55] I was surprised that the applicant persisted in arguing the matter notwithstanding the applicant's lack of success in the similar applications of

⁴¹ *Supra*, at paragraph 30.

Goosen and Bakker. The respondent did not however ask for punitive costs to be awarded so I will make the usual order in this regard.

[56] I issue the following order:

1. The application is dismissed with costs, on Scale C.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF APPLICATION: 5 September 2025

DATE OF JUDGMENT: 5 March 2026

APPEARANCES:

For the applicant: Mr. B Mlinganiso of the State Attorney, East London (ref. Lewis, CL/Z03/BPM/uf).

For the respondent: Mr. S Cole instructed by Mabheshwana & Associates, East London (ref. AGM/MVA/LEWIS/L0007).