**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

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| (1) | REPORTABLE: |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED. |

DATE _____ SIGNATURE _____

**CASE NO: 2022/016179**

In the matter between:

**DISCOVERY HEALTH (PTY) LIMITED** Applicant

and

**ROAD ACCIDENT FUND** First Respondent

**MINISTER OF TRANSPORT** Second Respondent

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**JUDGMENT**

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**MBONGWE J:**

**INTRODUCTION**

[1] The Applicant has brought this application on urgency in terms or rule 6(12) of the Uniform Rules of Court seeking an order in terms of which a directive issued by the first respondent on 12 August 2022 (''the directive'') is reviewed and set aside. The directive communicates to managers of the first respondent the immediate introduction of the rejection of all claims for past medical expenses made by claimants of damages arising out of motor vehicle accidents in instances where such expenses were paid by medical schemes. The rationale behind the directive is that a claimant in such circumstances has not suffered any loss or incurred those expenses.

[2] The applicant is a company duly registered under the company laws of South Africa. It describes itself as:

> "t*he leading medical scheme administrator in South Africa, providing administration and managed care services to over 3.3 million beneficiaries, accounting for over 40% of the medical scheme market*.'' (It) "administers *18 restricted medical schemes and Discovery Health Medical Scheme (''DHMS''), the largest open medical scheme in South Africa with an open market share of 57.1 % (according to the Council for Medical Schemes (''CMS'') Annual Report for the period ended 31 December 2020, covering a combined 3, 461,328 beneficiaries at 31 December 2020.''*

[3] The first respondent is the Road Accident Fund, a juristic person established in terms of the Road Accident Fund Act 56 of 1996 (as amended),''RAF Act'').

[4] The second respondent is the Minister of Transport cited herein in his capacity as the National Political representative responsible for the administration of the RAF Act.

**THE APPLICANT'S CASE**

[5] This application has been brought following an 'Internal Communique' dated 12 August 2022 distributed by the Acting Chief Claims Officer of the first respondent to all regional managers of the RAF and reads thus:

> "*Dear colleagues*
>
> ***All Regional Managers*** *must ensure that their teams implement the* ***attached process to assess claims for past medical expenses.*** *All RAF offices are required to assess claims for past medical expenses and* ***reject*** *the medical expenses claimed if the* ***Medical Aid has already paid*** *for the* ***medical expenses****. The regions must use the prepared* ***template rejection letter*** *(****see attached****) to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred any expenses relating to the past medical expenses claimed. Therefore, there is no duty on the RAF to reimburse the claimant. Also* ***attached*** *is a* ***list of Medical Schemes****.* ***Required outcome: immediate implementation of the process and 100% compliance to the process****."* (the RAF's own emphasis)

[6] The applicant is the administrator of several medical aid schemes which have and continue 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 in motor vehicle accident claims 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.

[7] The applicant has brought this application in terms of the provisions of section 38 of the Constitution of the Republic of South Africa, 1996:

7.1 in its own interest in terms of section 38(a);

7.2 in the interest of its clients as a class of persons in terms of section 38(c), and;

7.3 in the public interest in terms of section 38(d).

[8] The applicant opposes the directive by the first respondent contending that same is unlawful and inconsistent with the provisions of section 17 of the Road Accident Fund Act 56 of 1996 which impose an obligation on the first respondent to pay a claimant proven damages, of which past medical expenses are a part.

**INFRINGEMENTS**

[9] Asserting the rights the directive will infringe, the applicant states at para 46 of the founding affidavit;

> *"Discovery Health, its client medical schemes and their clients have a right to have members' claims assessed and processed lawfully and in accordance with the RAF Act. The RAF Act read together with the common law make it quite clear that the schemes' members who meet*

*the requirements in section 17 have a right to full compensation from the RAF for past medical expenses regardless of whether their medical aid has already paid for those expenses.*''

[10] The applicant lists the consequences that will visit it, its members and their clients if the directive is implemented as follows;

10.1 the rejection to pay past medical expenses to claimants means that medical aid schemes will no longer be receiving reimbursement for past medical expenses incurred for medical treatment of their clients whose rights to recover same from the RAF stand to be unlawfully taken away from them;

10.2 medical aid schemes will suffer a significant, unplanned loss of income that will;

10.3 require that they re-assess and increase monthly premiums payable by their clients to ensure the sustainability of the schemes;

10.4 members will be prejudiced in that they contribute to the RAF fuel levy, but will not receive full compensation from the RAF in the event of sustaining injuries caused by the wrong-doing of a negligent driver;

10.5 medical aid schemes may find it viable to exclude claims for medical expenses arising from motor vehicle accidents. This will entitle RAF claimants to claim for past medical expenses. This undermines the very purpose of the schemes as members will be forced to incur the costs upfront and claim later.

**URGENCY**

[11] Harm to claimants and medical aid schemes is imminent and will soon be felt if the contents of the directive are anything to go by. To prove the urgency of this matter, the applicant has attached a copies of a letters, annexures FA2, FA3 addressed by senior claims officials of the RAF to attorneys of some claimants' attorneys and which read;

11.1 On 12 August 2022 RAF officials forwarded the above directive to certain firms of attorneys representing claimants and adding:

> "*Please don't kill the messenger as I am only obligated to follow our directives. Please advise if there are any specific expenses that the claimant paid himself/herself that was not covered by the medical aid?*'' (sic)

11.2 On 15 August 2022:

> *''Your claim for past medical expenses for the block settlement files refer. Please provide me with the agreement between claimant and medical aid that confirms that the medical expenses need to be paid to the medical aid. If the is no agreement between the claimant and medical aid the RAF will reject the claim for past medical expenses as the claimant did not suffer any lost,''* (sic).

11.3 On 15 August 2022 an litigation official of the first respondent addressed a letter to a firm of attorneys which reads;

> *"Dear Sir / Madam*

*RE: REJECTION OF CLAIM FOR PAST MEDICAL EXPENSES*

*The above matter refers. The RAF has assessed the claim for past medical expenses. The RAF takes note of the fact that the past medical expenses claimed were paid by Discovery medical scheme. As a consequence, the claimant has not sustained any loss or incurred any expense in respect of the past medical expenses claimed and there is therefore no duty on the RAF to reimburse the claimant and the RAF hereby repudiate the claim for past medical expenses.''*

**THE RELIEF SOUGHT**

[12] As a result of the above repudiations of the claimants' claims for past medical expenses, the applicant has approached the court on urgency seeking the following orders:

12.1 The ordinary times, forms and service prescribed in Rule 6 of the Uniform Rules be dispensed with, and this application be considered urgently in accordance with the provisions of Rule 6(12).

12.2 The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is declared unlawful.

12.3 The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is reviewed and set aside.

12.4 The first respondent is interdicted and restrained from implementing the directive aforementioned.

12.5 That a rule nisi be issued calling upon the first respondent to show cause. on a date to be arranged with the Registrar, why a final order should not be granted in the following terms;

[13] In the alternative;

13.1 The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is declared unlawful.

13.2 The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is reviewed and set aside.

13.3 The first respondent is interdicted and restrained from implementing the directive aforementioned.

13.4 Pending the return date of the rule nisi, the first respondent is interdicted and restrained from implementing the directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022.

**THE LAW - LIABILITY OF THE RAF: - SECTION 17)6**

[14] It is apposite at this stage, in the light of the dispute between the parties as set out above, to traverse the law and, in particular, the applicable provisions of section 17 of the Road Accident Fund Act 56 of 1996, as amended.

[15] In terms of the common law a victim of a motor vehicle accident would have a claim for loss or damages sustained against the negligent driver of the motor vehicle or its owner. This situation has since been altered by the enactment of the Road Accident Fund Act 56 of 1996 (‘’the Act’’). In particular, section 21 of

the Act abolishes the common law delictual claim against the negligent driver: - *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC). In *Road Accident Fund v Abrahams* 2018 (5) SA 169 (SCA para 13, the court explained the position as follows:

> "*Section 21(1) 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*."

[16] The purpose of the Act and similar legislation preceding it was aptly described in *Engelbrecht v Road Accident Fund & Another* [2007] (6) SA 96 (CC) as primarily to give the maximum protection to persons who suffer loss or damage as a result of the negligent driving or unlawful conduct in the driving of a motor vehicle by the driver thereof.

[17] In line with the said purpose, the provisions of section 17(1) of the Act impose the liability to compensate victims of motor vehicle accident on the RAF where bodily injuries have been sustained or death has occurred as a result of the negligent driving of a motor vehicle. Section 17(1) reads as follows:

*"The fund or its agent shall; Subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*

*(a) Subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor driver thereof has been established; be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or his or her employee in the performance of the employee's duties as employee …''*

[18] It is important to note the different periods within which claims for compensation arising from the circumstances described in section 17(1)(a) (''identified motor vehicle and/or driver and/ or owner'' and those described in section 17(1)(b) (''unidentified motor vehicle, driver and/or owner'') are to be lodged with the RAF. Claims in the circumstances of section 17(1)(a) are to lodged within a period of three years from the date of the occurrence of the accident and two years in respect of those falling under the circumstances described in section 17(1)(b).

[19] A claim for compensation against the RAF is a delictual claim and therefore subject to the general rules which require that the damages for personal injury claimed be quantified.

**EXCLUSIONS AND LIMITATIONS OF RAF LIABILITY**

[20] Compensation for delictual damages a clamant is entitled to comprise of the difference between his/her patrimonial station before and after the delict has been committed. In *Erasmus Ferreira & Ackermann v Francis* 2010 (2) SA 228 (SCA) para 16 the court expressed the nature of an injured person's claim thus:

> "*As a general rule the patrimonial delictual damages suffered by a plaintiff is the difference between his patrimony before and after the commission of the delict. In determining a plaintiff's patrimony after the commission of the delict advantageous consequences have to be taken into account. But it has been recognised that there are exceptions to this general rule.''*

[21] In terms of our law, benefits received by a claimant from the benevolence of a third party or a private insurance policy are not considered for purposes of determining the quantum of a claimant's damages against the first respondent. The reason for this is merely because a benefit that accrues or is received from a private insurance policy origin from a contract between the insured and the insurance company for the explicit benefit of the claimant and its receipt does not exonerate the first respondent from the liability to discharge its obligation in terms of the RAF Act. In *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) at 277H – 279C the set out the principle in the following words:

"*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…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 aforegoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of the account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contract of insurance for which he has paid the premiums and (b) money 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."*

[22] In *Ntlhabyane v Black Panther Trucking (Pty) Limited and Another* 2010 JDR 1011 (GSJ) the court expressed the principle in the following terms:

"*a plaintiff's insurance, her indemnification in terms of it, and the consequent subrogation of her insurer are all matters of no concern to the third party defendant.''*

[23] The liability of the RAF is excluded or limited in certain instances:

23.1 The provisions of section 18 expressly exclude benefits received under COIDA or the Defence Act from the calculation of the claimant's damages in terms of the RAF Act. This is in circumstances where the victim of a motor vehicle accident is also entitled to compensation under the Compensation for Occupational Injuries and Diseases Act 103 of 1993 (''COIDA''), or the Defence Act 42 of 2002 (''Defence Act'').

[24] Section 18(4) limits the liability of the RAF to payment for the necessary and actual costs of the burial or cremation of a deceased victim of a motor vehicle accident. Section 19(g) excludes claims for emotional shock caused by the witnessing or being informed of the death of a motor vehicle accident.

[25] The Act precludes a claim for payment of interest a *tempore morae* against the first respondent.

[26] Certain benefits are considered while others are not considered in the calculation of the claimant's claim for damages against the first respondent. It is trite that social security benefits a claimant receives from the State are deductible from compensation the first respondent is liable for. The reason for this is founded on the principle that delictual damages are meant to restore the claimant to the position he was in prior to the commission of the delict and that he should not unduly benefit by receiving double compensation for his/her loss. (see *Zysset and others v Santam Ltd* above)

[27] As can be noted from the above exclusions and limitations, the RAF Act does not provide for the exclusion of benefits the victim of a motor vehicle accident has received from a private medical scheme for past medical expenses. The principle was expressed by the court in the matter of *D'Ambrosini v Bane* 2006 (5] SA 121 (C) in the following words:

> *"medical aid scheme benefits which the plaintiff has received, or will receive are not deductible from in determining his claim for past and future hospital and medical expenses*.''

[28] In *Rayi NO v Road Accident Fund* (9343/2000) [2010] ZAWCHC 30 (22 February 2010) the court stated the principle thus:

> *"payment by Bonitas of the plaintiff's past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for past medical expenses.''*

[29] It is apparent from the above statements of the legal position that the first respondent is not entitled to seek to free itself of the obligation to pay full

compensation to victims of motor vehicle accidents. Thus the directive challenged in the present proceed is outside the authority given by the enabling statute. More specifically the directive is inconsistent with the express provisions of section 17 and is, consequently, unlawful.

[30] The social security protection the RAF Act provides is in no way intended to impoverish medical schemes who, were the directive to stand, would face a one direction downward business trajectory as a result of their members becoming victims of motor vehicle accidents. The levy paid on fuel provides the funds for payment of compensation to motor vehicle accident victims and nothing in the law obliges medical aid schemes to contribute towards such compensation by the payment, from the time of hospitalisation and treatment of a motor vehicle accident victim, of medical expenses without a reasonable expectation of reimbursement upon settlement of the claimants' claims in terms of the RAF Act.

[31] It is for that expectation that medical schemes enter into agreements with their members and provide relevant invoices of medical expenses incurred to be considered in the calculation of the claimants' claims. Settlements of victims' claim is in full and final settlement. This means that, unless the past medical expenses form part or are included in the settlement amount, medical aid schemes will not be reimbursed for the medical expenses they paid. Worst still, medical schemes would have no standing to recover those expenses due to the claimant's claims having been settled in full and final settlement.

[32] The only way to prevent their loss of expenses incurred for the medical treatment of their client victims of motor vehicle accidents, would be for the medical schemes to institutes concurrent claims against the RAF and in due

course seek the consolidation of the hearing of the two matters. The costs of the proceedings will be astronomical and unnecessarily incurred by the RAF which, in terms of the Public Finance Management Act, will constitute wasteful expenditure.

[33] The applicant has attached as annexure FA 9 a copy of a press release by the Council for Medical Schemes (''the CMS'') dated 12 March 2012. In addition to advising members of medical schemes of their rights to claim from the RAF in the event of sustaining injuries in a motor vehicle accident caused by the negligence of the driver. The applicant refers to rule 14.5 of the Model Rules of the CMS which states, in relation to past medical expenses paid by the scheme, that:

> "*If a member becomes eligible for a third party claim, the member undertakes to submit same and refund the medical aid scheme,''*

[34] The applicant has made its own rule 15.6 (Annexure F10) in line with the Module Rule 14.5 of the CMS in terms of which members of the applicant who have claims for damages may claim against third party indemnifiers such as the RAF, and are required to reimburse the medical scheme for payments made in respect of their past medical expenses that the scheme has settled.

[35] The issuing of the directive is an exercise of statutory authority by an organ of State and is consequently reviewable in terms of the provisions of the Promotion of Administrative Justice Act 3 0f 2000. As indicated above, there can be no doubt that the issuing of the directive by the respondent amounts to an unlawful abrogation of its statutory obligations in terms of the RAF Act – the enabling

statutory instrument. Not only is the exercise of the statutory powers in this manner a flagrant disregard of the provisions of the enabling statute, but a hopeless undermining of provisions of the Constitution which seek lawfulness, justice and fairness in the exercise of administrative powers.

[36] The applicant's approach to the court in the manner it did could not be more justified and, in fact coerced by the respondent's directive. What is more concerning is that the respondent so it fit to not give notice of its intention to introduce the directive and invite the comments and impute of all interested parties or stake stakeholders. It chose to go rogue and arbitrary. Without any consideration of the social benefit the Act is intended to serve and the requisite consultative public engagement of all stakeholders such as the schemes which alleviate the plight of motor vehicle accident victims. The ill- conceived effort of the first respondent cannot stand in the face of the muster of PAJA.

[37] In addition to having been displaced from their normal lives as a result of their injuries, claimants will have the further burden of having to settle their past medical expenses first to be able to submit their complete claims. An inability to do so prior to prescription of the claims may force claimants to abandon claims for past medical expenses to avoid prescription and settle their hospital bills after receipt of their settlements for other heads of damages. This is an absurd outcome the respondent's directive would result in.

**URGENCY**

[38] In determining whether this matter should be considered on urgency or not, I particularly factor in the manner in which the decision to repudiate the claimants'

claims for past medical expenses. It is common cause that the respondent is an organ of State and whose decisions are subject to the provisions of the Promotion of Administrative Justice Act, 2003, and therefore reviewable. It is correct to state that a review process would ordinarily be the avenue open to the applicant as opposed to a direct approach to the urgent court.

[39] The sudden auctioning of an obviously adverse decision that affects the claimants and other stakeholders, such as the medical schemes triggers urgency by any standard. It is unfathomable how the first respondent, without consultation, saw it fit to impose its authority without consideration of the gravity and far reaching consequences to claimants and medical schemes.

[40] Not only is the impugned decision arbitrary, it is a transgression of the enabling statutory provisions and the dictates of PAJA. The action of the first respondent unfathomably points to an oblivion that the schemes do not cover only motor accident related matters of their clients, but their clients' other health related aspects necessitating hospitalisation and medical treatment for which the schemes are obliged to pay – an obligation that would be impossible to discharge were the decision of the first respondent to be left unchecked. Worst still, the decision is unlawful for its variance with the provisions of section 17 quoted above, which renders it irrational as well.

**CONCLUSION**

[41] The purported immediate implementation of the unlawful decision on its own necessitated the applicant's launching of this application and rightfully seeking urgent relief.

**ORDER**

[42] Resulting from the findings in this judgment, the following order is made;

42.1 The directive issues by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is declared unlawful.

42.2 The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is reviewed and set aside.

42.3 The first respondent is interdicted and restrained from implementing the directive aforementioned.

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**MPN MBONGWE, J**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

APPEARANCES

| | | |
|---|---|---|
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JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON _____ OCTOBER 2022.