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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-117206

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

17 December 2024
DATE

SIGNATURE

In the matter between:

DISCOVERY HEALTH (PTY) LTD Applicant

and

ROAD ACCIDENT FUND First Respondent

CHIEF EXECUTIVE OFFICER OF THE ROAD ACCIDENT FUND: COLLINS PHUTJANE LETSOALO Second Respondent

Coram: Mlambo JP, Opperman J and Bam J

Heard: 21 June 2024

Delivered: This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 17 December 2024.

Summary: Standing – enforcement of court order – own interest – litigant with judgment in its favour has sufficient own interest to seek enforcement of that judgment and to allege a breach without having to show exceptional circumstances

***Res judicata* – application – what constitutes same issues – issues will not be *res judicata* if the previous judgment did not contemplate them**

***Res inter alios acta* – applicability to medical schemes – medical schemes are not indemnity insurers – deductibility of collateral benefits – no rigid rule –**

deductibility of collateral benefits is determined by considerations of fairness, equity, and policy

Subrogation – application to medical schemes – principle of subrogation is specific to law of insurance and has no automatic application to medical schemes which are not insurers

Medical Schemes Act 131 of 1998 – nature of medical scheme – difference between medical schemes and insurers – insurance law principles not to be automatically transplanted to medical schemes

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ORDER

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1. The application is dismissed with costs, such costs to include the costs of two counsel, on scale C.
2. The costs are to include the costs related to the strike-out application.

JUDGMENT

MLAMBO, JP and BAM, J

Introduction

[1] This is an application for a declarator, amongst others, that the first respondent is in breach of the order handed down on 27 October 2022, by this Court (Mbongwe J) in *Discovery Health (Pty) Ltd v Road Accident Fund and Another*.[1] At the heart of the matter is the first respondent's liability for the payment of past medical expenses of road accident victims, who are members of medical schemes, in circumstances where such expenses have been settled by a medical scheme (the disputed medical expenses).

The parties

[2] The applicant (Discovery Health or Discovery) is a company and medical schemes administrator managing some 18 medical schemes including Discovery Health Medical Scheme. It brings this application in its own interest, to vindicate the rights of medical schemes which it administers and their members' rights to have their claims assessed and processed, by the first respondent, in line with the Road Accident

[1] [2022] ZAGPPHC 768; 2023 (2) SA 212 ("Mbongwe J or Discovery Health Judgment").

Fund Act[2] (the RAF Act). Discovery Health also asserts that it brings this application in the public interest and to vindicate section 165 of the Constitution.

[3] The first respondent (the RAF or the Fund) is a juristic person established in terms of the RAF Act. It operates what it refers to as a social benefit scheme to compensate persons who have suffered loss, by way of injuries or death, arising from the negligent driving of a motor vehicle within South African borders. The second respondent is self-evidently the Chief Executive Officer (CEO) of the RAF.

[4] The main relief initially sought by Discovery Health was a declarator that the respondents are in contempt of the order granted by the learned Mbongwe J as well as consequential orders linked thereto. Discovery Health did not however, persist with the contempt relief and moved for a simple declarator that the respondents are in breach of the Mbongwe J order, as well as costs of suit.

[5] In essence, Discovery Health seeks to compel the RAF to comply with the Mbongwe J order. It asserts that the RAF has failed to comply with the order, in that it continues to refuse to pay the disputed medical expenses. Discovery Health further seeks a pronouncement by this Court that the RAF's reliance on the two directives it had issued subsequent to the Mbongwe J order, perpetuates its breach of that order.

[6] The respondents assert that Discovery Health, a medical schemes administrator, has no standing to bring this application. They further assert that Discovery Health has not made out a case for the RAF to be interdicted from relying on its subsequent directives. They submit that the legal premise on which the two directives stand has yet to be scrutinised and determined by a Court; that until reviewed and set aside, the directives stand and remain binding. The respondents' stance is, to a certain extent, reliant on the reasoning of a judgment of this Court,[3] per the learned Khumalo J, as well as on the fact that the subsequent directives are beyond the reach of the Mbongwe J order. Their bases are totally different to that set aside by Mbongwe J and consequently, they are perfectly entitled to implement and rely on them.

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[2] 56 of 1996, as amended.
[3] *Discovery Health (Pty) Ltd v Road Accident Fund and Another* [2023] ZAGPPHC 523 ("Khumalo J Judgment").

[7] The legal utility of the subsequent directives is the overarching point of divergence between this Judgment and the second, which takes the view that these directives are *res judicata* on the basis that the *ratio* of the Mbongwe J Judgment covers the subject matters of those directives. In the fulness of time it will be demonstrated, in this Judgment, that this view is erroneous.

Background

[8] Necessity dictates that the background that led to the Mbongwe J order be set out in some detail, and what has transpired since then. On 12 August 2022, the RAF issued a directive that instructed its employees to reject road accident victims claims for the disputed medical expenses.[4] In summary, the directive was to the effect that all claims for past medical expenses lodged by claimants whose medical schemes had already settled them, should be rejected on that basis alone. The reasoning underpinning this was that those claimants did not suffer any loss, and that the RAF therefore had no duty to reimburse them.

[9] Having become aware of the directive, Discovery Health initiated urgent proceedings to review and set it aside, on the basis that it was unlawful. The matter was heard by Mbongwe J, who reviewed and set it aside and, amongst others, interdicted the RAF from relying on the directive to reject claims for the disputed medical expenses. The RAF launched an application for leave to appeal the judgment. Simultaneously, Discovery Health applied, in terms of section 18 of the Superior Courts Act,[5] for the immediate enforcement of the order.

[10] Mbongwe J refused leave and also declined to entertain Discovery Health's section 18 application, on the basis that it was no longer necessary i.e. after having refused the RAF's application for leave to appeal. On 23 February 2023, the RAF petitioned the Supreme Court of Appeal (SCA) for leave, and while the RAF's application was pending, Discovery Health brought a new section 18 application which was heard by this Court (Khumalo J) on 3 March 2023. On 31 March 2023, the SCA refused the RAF's application for leave to appeal, on the basis that it had no reasonable prospects of success. At that time, judgment in Discovery Health's section 18 application was still reserved before Khumalo J. On 24 April 2023, the RAF

[4] The first or 12 August directive.
[5] 10 of 2013.

approached the Constitutional Court seeking leave to appeal Mbongwe J's Judgment. On 26 June 2023, Khumalo J handed down judgment refusing Discovery Health's section 18 application. She subsequently refused Discovery Health's application for leave to appeal her ruling. Discovery Health did not pursue the matter any further. On 18 October 2023 the Constitutional Court refused the RAF's application for leave to appeal the Mbongwe J order, finding that the matter did not engage its jurisdiction.

[11] It then transpired that the RAF had issued a directive on 13 April 2023 (the second directive). This directive required the RAF's employees to first ascertain whether a claim fell within prescribed minimum benefits (PMB's) or emergency medical conditions (EMC's), and only where it was neither, would a claim be processed and honoured if successful. It appears that this directive is premised, *inter alia*, on the medical schemes' statutory obligation to honour claims for PMB's and EMC's as provided for in the Medical Schemes Act (MSA)[6] and its regulations; that the RAF is not an insurer, as understood in insurance law; that its operational model and regulatory classification by bodies such as the South African Reserve Bank (SARB) and the Financial Service Conduct Authority (FSCA), confirms this. In this regard the RAF's stance is that the MSA [7] and its regulations [8] confer no reimbursement right to any medical scheme and further that no medical scheme's rules can coerce members to recover same from the RAF.

[12] The RAF issued a further directive on 2 November 2023 (the third directive). This directive is based on section 19(d)(i) of the RAF Act which provides–

> "19. The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage –
>
> ...
>
> (d) where the third party has entered into an agreement with any person other than the one referred to in paragraph (c)(i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim –
>
> (i) a portion of the compensation in respect of the claim."

[13] Discovery Health viewed the issuance of these directives as a refusal to comply with and a circumvention of the Mbongwe J order. It demanded that the RAF desist from this conduct. The RAF refused, insisting that it was within its rights to issue and

[6] 131 of 1998.
[7] Section 29 of the MSA.
[8] Regulation 7 and 8 of the MSA.

implement them. Faced with this stance, Discovery Health launched the present application.

The strike out application

[14] Before turning to the main issues, we must consider a strike out application raised by the respondents against Discovery Health. They claim that paragraphs 58 to 61 of Discovery Health's replying affidavit along with certain annexures, should be struck out because they introduce new material that was not available when the answering affidavit was filed. These paragraphs refer to 10 annexures containing the RAF's responses to letters of demand from claimants that took place before the Constitutional Court's order of 18 October 2023. Discovery Health had sought to rely on these to show contempt on the part of the respondents. As Discovery Health is not persisting with the contempt relief, we don't think it is still necessary to consider the strike out application in these proceedings. Its relevance remains in so far as costs are concerned. The respondents were driven to initiate the application to strike out due to the inclusion of new material in Discovery Health's replying affidavit. Accordingly, we find that they are entitled to their costs in this regard.

The Mbongwe J Judgment

[15] The determination of this matter turns on the proper interpretation of the Mbongwe J Judgment. It is thus necessary to set out its essential parts, as well as those of the Khumalo J Judgment. The issue before Mbongwe J was, whether the RAF's 12 August 2022 directive, on which it based its refusal to pay the disputed medical expenses, was unlawful and therefore liable to be reviewed and set aside. Mbongwe J granted the declaratory order of unlawfulness and set the directive aside while also interdicting the RAF from implementing it.

[16] Mbongwe J reasoned that the directive was unlawful because it was contrary to the RAF's statutory obligations contained in section 17 of the RAF Act. In his view, the social purpose of the RAF was for it to step into the shoes of the driver whose negligent driving had caused the motor vehicle accident, resulting in injuries and/or death to the accident victim. The learned Judge said, at common law, the victim had a claim against the negligent driver, which, under the Act is transferred to the RAF. He further said, in terms of the law of delict, there are certain amounts which are excluded from the damages claim, and in terms of the RAF Act, the statute explicitly

states what is excluded. He found that none of these exclusions include benefits received by victims from a private medical scheme for past medical expenses.

[17] Relying on *Zysset and Others v Sanlam Ltd*,[9] Mbongwe J emphasised that there was established authority that payments from an insurance company to its insured are collateral benefits that are not excluded from calculating loss in delict because the negligent wrongdoer cannot benefit from a private contract entered into between the victim and their insurance company. Mbongwe J found that medical schemes, through the principle of subrogation, were entitled to claim from those who occasioned loss to their members, which they, as insurers, had settled. Mbongwe J found that victims of road accidents were entitled to be placed in the position they would have been had the negligent conduct not caused the accident resulting in loss.

[18] For this reason, Mbongwe J found that the directive, which sanctioned the rejection of claims for the disputed medical expenses, was contrary to the provisions of the RAF Act. He found that the RAF Act's social security protections were clear in that they did not oblige medical schemes to carry the costs of victims of motor vehicle accidents and that this was to be funded by the fuel levy imposed on motorists, being the funding base of the RAF. The lack of consultation when implementing the directive – which was accepted as being administrative action – was also found by Mbongwe J to be a contravention of the Promotion of Administrative Justice Act.[10]

The Khumalo J Judgment

[19] We must also briefly touch on the Khumalo J Judgment, in view of the respondents' reliance on it in resisting this application. That Judgment focused on three issues in the context of a section 18 application, namely, whether Discovery Health had established exceptional circumstances, whether Discovery Health had showed that it would suffer irreparable harm, and whether it had standing. As to exceptional circumstances, Khumalo J found that there were no exceptional circumstances, and that Discovery Health's argument about medical schemes losing millions of rand each time a settlement is entered into between the RAF and a member of a medical scheme, was unsustainable. Khumalo J found that the interdicted

[9] 1996 (1) SA 273 (C).
[10] Act 3 of 2000.

directive had no impact on medical scheme members concluding settlements with the RAF.

[20] Disposing of the irreparable harm element, Khumalo J reasoned that nothing in the directive stopped the parties to an action from voluntarily negotiating an amicable outcome that may or may not include the disputed medical expenses. She further found that the allegations by Discovery Health that medical schemes are deprived of the potential to recover the disputed medical expenses whenever the alleged unlawful tender by the RAF is accepted, cannot be factually substantiated. In this regard, Khumalo J pointed out that the agreement between the medical scheme and its members is not based on the fact that the scheme will be reimbursed for the claims they settle, but rather on the monthly premiums that the schemes receive from their members. She further noted that the claimants' right to claim the disputed medical expenses from the RAF was never extinguished nor threatened by the directive. In her view, the claimants were legally represented, and thus, could easily lodge claims against the RAF for past medical expenses. As a result, claimants were responsible for their own interests.

[21] Unlike Mbongwe J, Khumalo J found it necessary to consider the issue of Discovery Health's standing. She accepted that as an administrator of medical schemes, it had a direct and substantial interest in acting on behalf of medical schemes. However, in her view, Discovery Health lacked standing to act on behalf of claimants because they were legally represented and could freely conclude settlements with the RAF that exclude past medical expenses, if they were so inclined. As a result, she found that Discovery Health could not directly sue the RAF for those expenses because that was a matter between the accident victim and the RAF.

[22] Khumalo J's reasoning in refusing Discovery Health's section 18 application was primarily that Discovery Health, not being a medical scheme, had no standing to insist on the payment of the disputed medical expenses. She further found that because Discovery Health is not a medical scheme, it has no members, and it consequently suffers no prejudice where the RAF does not compensate claimants for the disputed medical expenses.

[23] The reasoning by Khumalo J has given impetus to the respondents' insistence that the RAF is entitled to reject claims for the disputed medical expenses where the legal basis justifies this. They rely on the Khumalo J Judgment, predominantly, for their stance that, firstly, Discovery Health has no standing and, secondly, that based on the subsequent directives, the RAF is entitled to reject claims for disputed medical expenses where the legal grounds justify this.

[24] Discovery Health argues that the issues decided by Mbongwe J are *res judicata*, have been decided by higher Courts and therefore neither Khumalo J nor this Court can reconsider them.

Discovery Health's standing

[25] In these proceedings, the respondents challenge Discovery Health's standing to bring this application. They argue that Discovery Health has not shown any own interest beyond merely stating that it brings this application in its own interest. They go on to rely on the Khumalo J Judgment and argue that Discovery Health or the medical schemes it administers cannot claim directly from the RAF; that there is no nexus between Discovery Health and the RAF; and that the liability of the RAF for the losses suffered by road accident victims obliges it to compensate said victims not Discovery Health. It follows, so the argument goes, that because the victim is the person who suffers the loss, he or she has the requisite standing to claim from the RAF. The respondents further argue that Discovery Health is excluded from the list of those who can claim directly from the RAF, because in terms of sections 17(5) and 19(1)(c) of the RAF Act, it is only a victim of a motor vehicle accident or a service provider or supplier, who provides actual accommodation, treatment, service, or goods related to medical care to whom the RAF may be liable.

[26] The respondents deny that Discovery Health has standing in terms of section 38 of the Constitution because it has not identified the constitutional right that is threatened or infringed, and if it is acting in terms of section 38(c), it has not obtained prior approval for a class action lawsuit.[11] Furthermore, the respondents, relying on

[11] *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA).

Areva NP Incorporated in France v Eskom Holdings Soc Limited and Others,[12] argue that there are no exceptional circumstances nor public interest considerations for Discovery Health to have the merits of this matter considered. They further place reliance on *Goldrush Group (Pty) Ltd v North West Gambling Board and Others*[13] arguing that, as found by the SCA in that matter, Discovery Health has, *in casu*, similarly not made out a case that it is in the interests of justice for this matter to be entertained by this Court, on the merits.

[27] Discovery Health argues that the respondents' reliance on the Khumalo J Judgment is misplaced as the proceedings before her were aimed at resolving an interlocutory issue based on section 18. According to Discovery Health, the Khumalo J Judgment could not and did not overturn the findings of the Mbongwe J Judgment on the merits. In any event, Discovery Health also disputes the correctness of the Khumalo J Judgment to the extent that it purports to contradict the Mbongwe J Judgment, which, it contends, was upheld by the SCA and the Constitutional Court when refusing the RAF's applications for leave to appeal.

[28] Discovery Health also placed reliance on the SCA's judgment in *Fakie NO v CCII Systems (Pty) Ltd*[14] where it was found that in terms of our law, a private litigant with a judgment in its favour has standing to launch contempt proceedings if the order has not been complied with.[15] It further argues that if this Court is not with it on this point, then standing can be found in the other broader grounds which it pleaded in its founding affidavit.

[29] Discovery Health buttresses its argument that it has standing by relying on *Rand Mutual Assurance Company Ltd v Road Accident Fund*[16] to make the point that the SCA affirmed the decades long principle that the doctrine of subrogation allows an insurer to claim the loss it covered for its indemnified member from the person who caused it. It follows, so argues Discovery Health, that because the RAF steps into the shoes of the wrongdoer it cannot rely on a member's indemnity provided by its medical scheme to avoid liability. It will be recalled that in the same case, the SCA had found

[12] [2016] ZACC 51; 2017 (6) BCLR 675 (CC); 2017 (6) SA 621 (CC) ("*Areva*").
[13] [2022] ZASCA 164; 2023 (3) SA 487 (SCA) ("*Goldrush*").
[14] [2006] ZASCA 52; 2006 (4) SA 326 (SCA) ("*Fakie*").
[15] Id at para 7.
[16] [2008] ZASCA 114; 2008 (6) SA 511 (SCA); [2009] 1 All SA 265 (SCA) ("*Rand Mutual*").

that, an insurer is allowed to sue in its own name under the doctrine if it will not cause prejudice to the defendant. The respondents argue that Discovery Health cannot place reliance on the *Rand Mutual* case because it involved an insurer under the Compensation for Occupational Injuries and Diseases Act[17] and because Discovery Health is not an insurer, the doctrine of subrogation finds no application.

Discussion – Discovery Health's standing

[30] In so far as the controversy on standing is concerned, it is instructive that in *Areva*,[18] the Constitutional Court, quoting its decision in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*,[19] affirmed as a general principle that where a litigant lacks standing, its matter should be dismissed without entertaining the merits, save where there are exceptional circumstances or "the public interest really cries out" for a Court to consider the merits.[20]

[31] Additionally, in *Goldrush*,[21] the SCA considered previous decisions by the Constitutional Court on standing, including *Areva* and *Giant Concerts* and concluded that because *Goldrush* made no submissions on why it was in the interests of justice to hear the matter, the bar on its standing to bring the application on behalf of licensee companies stood, making it unnecessary to consider the merits.

[32] An important consideration in this matter is that Discovery Health simply seeks compliance with the Mbongwe J Judgment. The declarator sought by Discovery Health is that the respondents have failed to comply with that judgment. Before this Court, Discovery Health is a party with a judgment in its favour. It is therefore acting in its own interest arising from that judgment and has the right to seek compliance with it. That being the case, it is eminently entitled to enforce compliance with that judgment. Based on these basic incontestable facts, and on the authority of *Fakie*,[22] we find that Discovery Health has standing to initiate these enforcement proceedings. This obviates the need to determine whether the interests of justice and the need to show exceptional circumstances are at issue. Furthermore, the respondents' reliance on the Khumalo J Judgment, regarding the standing issue is misplaced, as her

[17] 130 of 1993 ("COIDA").
[18] *Areva* above n 12.
[19] [2012] ZACC 28; 2013 (3) BCLR 251 (CC) ("*Giant Concerts*").
[20] Id at para 34; *Areva* above n 12 at paras 40-41.
[21] *Goldrush* above n 13.
[22] *Fakie* above n 14.

conclusions and reasoning related to the issues she was called upon to decide, which are very different to the issues before us. This brings into the spotlight, the question of *res judicata* and whether it applies to the circumstances of this case, as argued by Discovery Health, a matter to which we now turn.

Res judicata

[33] The doctrine of *res judicata* has its origins in Roman law, and for over a century,[23] its requirements and the circumstances in which it can be relaxed have become well settled in our law.[24] The doctrine entails that where there is a previous judgment involving the same parties which finally determined an issue based on certain grounds between them, then neither of those parties can approach a different Court on those same issues and grounds seeking a different outcome.[25] This applies even in circumstances where the previous judgment may be incorrect.[26] The purpose for this principle is to ensure finality of matters by preventing endless litigation and abuses of court processes which would arise from the re-litigation of issues between the same parties, which have already been finally decided by a court.[27]

[34] There can be no suggestion that the parties before Mbongwe J, the subsequent applications for leave to appeal, and now before us, are different. The first requirement of *res judicata* is thus met. Turning to the second requirement, the matter before Mbongwe J concerned the lawfulness of the 12 August directive. He found that it was unlawful. A further question was whether the RAF's liability was excluded solely by reason that the disputed medical expenses had been paid by a medical scheme, as asserted in the directive.

[35] In so far as the Khumalo J Judgment is concerned, whilst involving the same parties, it dealt solely with the question whether Discovery Health had made out a case for the execution of the Mbongwe J order whilst the RAF's application for leave to appeal was winding its way through the appellate courts. In short, that Court dealt

[23] *Bertram v Wood* (1892-1893) 10 SC 177 at 180; *Hiddingh v Denyssen and Others* (1884-1885) 3 SC 424 at 450; *Mitford's Executor v Ebden's Executors and Others* 1917 AD 682 at 686.
[24] *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) ("*Mkhize*"); *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC); *Smith v Porritt and Others* [2007] ZASCA 19; [2007] SCA 19 (RSA); 2008 (6) SA 303 (SCA) ("*Porritt*"); *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) ("*African Farms*").
[25] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) ("*Ascendis*") at paras 71 and 111.
[26] *African Farms* above n 24 at 564C-D.
[27] *Mkhize* above n 24 at para 36.

with a different issue. The issues being different, it is inconceivable that Khumalo J could have overruled the Mbongwe J Judgment. Mbongwe J decided that the RAF is not entitled to reject liability for the disputed medical expenses solely because the scheme had paid for those expenses. The principle of *res judicata* is therefore not displaced by the Khumalo J Judgment. *Res judicata* remains in the spotlight in that it remains to be determined whether the directives amount to the conduct declared unlawful by the Mbongwe J Judgment.

The subsequent directives

[36] The question before this Court is whether the subsequent directives fall within the conduct interdicted by Mbongwe J. Dealing with the second directive, the deponent to Discovery's founding papers, Mr Katz, avers:

> "The RAF also unsuccessfully sought to invoke section 29(1) of the Medical Schemes Act before this Court when it sought to oppose Discovery Health's application that gave rise to the Discovery Health Judgment. As held by this Court in the Discovery Health Judgment, the RAF Act does not provide for the exclusion of benefits received by the victim of a motor vehicle accident from a private medical scheme for past medical expenses (paragraph 27), *regardless of whether they constitute a prescribed benefit under the MSA*. It follows that, as finally decided by this Court, the RAF remains liable for benefits received by the victim of a motor vehicle accident from a private medical scheme for past medical expenses." (Our emphasis.)

[37] As regards the third directive, Discovery Health suggests that the SCA in *Road Accident Fund* v *Abdool-Carim* considered the meaning of section 19(d)(i) of the RAF Act at paragraph 13 of its judgment where it held that:

> "It is understandable that the legislation would seek to protect third parties, many of whom are indigent, from entering into champertous agreements, which is probably what section 19(d)(i) intends to achieve."

[38] Discovery Health submits that the RAF has taken the same policy decision that was outlawed by Mbongwe J, only this time, the RAF advances new defences. It argues that the new defences place substance over form; and constitute an impermissible contrivance of the Mbongwe J Judgment. Discovery Health argues that there is a single *ratio* underpinning the Mbongwe J decision, and that is, it is unlawful for the RAF to reject a claim for past medical expenses on the grounds that a medical scheme has already paid for those expenses. It further submits that all that has

changed with the new directives is that the RAF has concocted new justifications, which are nothing more than a reiteration of the same decision.

[39] The RAF argues that the legal premise for the second directive is located within the MSA and its regulations, which it says, confers no right on medical schemes to seek reimbursement from its members upon meeting its statutory obligation to pay for PMB's and EMC's. In simple terms, the RAF argues that where a scheme pays for PMB's or EMC's their members cannot claim these from it, as the payment of such benefits would have been in discharge of the medical scheme's statutory obligation. As to the third directive, which is premised on section 19(d)(i) of the RAF Act, the RAF says the section excludes its liability where a third party (accident victim) has entered into an agreement with a party other than those referred to in section 19(c)(i) or (ii).

[40] The RAF further submits that neither Discovery Health nor the medical scheme is covered by section 19(c)(i) and (ii) of the RAF Act. It takes the view that the agreements entered into between medical schemes and their members, where the members claim past medical expenses from the RAF in order to reimburse the scheme, exclude the RAF's liability. The RAF further submits that since the directives were not before Mbongwe J, they are not *res judicata*, they remain valid and binding until reviewed and set aside by a court.

[41] To demonstrate that the issues in the second directive are *res judicata*, Discovery Health, by way of examples, isolates certain statements from the second directive and references them back to various paragraphs of the Mbongwe J Judgment. We set out two such statements: (i) the second directive states that the MSA and its regulations confer no reimbursement right to schemes to recover from the RAF what they have paid in discharge of their statutory obligation. This is a reference to the requirement placed by the law on schemes to pay PMBs and EMCs in full, regardless of the option to which a member belongs. Discovery Health suggests that Mbongwe J found the opposite, that is, schemes are entitled to such reimbursement and cites paragraphs 30-34 of the Discovery Health Judgment; (ii) where a scheme requires of a member to reimburse it for past medical expenses after the member has been paid by the RAF, this indicates that the member has not suffered any loss or damage. Discovery Health argues that Mbongwe J found the opposite. It proceeds with reference to paragraphs 27-29 of the Discovery Health Judgment.

[42] On the basis of its submissions that the matters in the second and third directives have already been considered by the Mbongwe J Judgment, Discovery Health calls upon this Court to put an end to what it terms the RAF's reckless and contemptuous conduct. It argues that the common law principle of *res judicata* looks at substance and not form. It further submits that, were this Court to uphold the two directives, it would amount to aiding an organ of state to abjure its constitutional obligation to uphold the rule of law and comply with court orders, in that it would be permissible for any organ of state to evade complying with a judgment it does not like by merely generating different means to achieve the same conduct that had been outlawed while forcing the litigant to re-litigate the same issue again and again.

[43] Discovery Health's submissions that the subject matters dealt with in the two directives are struck by Mbongwe J's order and are *res judicata* have found favour in the second judgment. The second judgment proceeds from the premise that the policy considerations underpinning *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[28] preventing state organs from disregarding what they subsequently consider to be unlawful administrative decisions do not apply in this case; that to find that the *Oudekraal* principles apply, is to allow abuse of power and evasion of the Court's role as the sole arbiter of the lawfulness of administrative action. It further argues that the *Oudekraal* principles are not immutable.

[44] In its Heads of Argument, Discovery Health starts off by reiterating that the subject matters in the subsequent directives were decided by Mbongwe J. It adds that even if these issues were not finally decided by Mbongwe J, the defences raised are utterly unsustainable. It confronts the legal premises of the directives, starting with the second, and suggests that there is more than 100 years of jurisprudence which establishes that the RAF is not entitled to claim for itself the benefit of a victim's medical aid scheme insurance. It submits that medical aid scheme benefits are a form of indemnity insurance that entail the payment of premiums by a member, accordingly payment by medical schemes in line with their obligation to indemnify their members are disregarded in an award of damages in line with the *res inter alios acta* principle.

[28] [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) ("*Oudekraal*").

[45] We have serious reservations regarding the persuasiveness of Discovery Health's examples of the statements in the second directive, which it says are supported by the Mbongwe J Judgment. Paragraphs 27-29 discuss the *res inter alios acta* principle, which is dealt with immediately here below. Paragraphs 30-34 of the Mbongwe J Judgment[29] are no authority for the proposition that medical schemes have a right of recovery from the RAF, through their members, what they have paid in discharge of their statutory obligation to pay PMBs and EMC in full as required by the MSA and its regulations 7 and 8. If anything, these paragraphs demonstrate that the MSA and its regulations carrying the statutory duty placed on schemes to pay PMBs and EMCs in full was not drawn to the attention of Mbongwe J. To suggest otherwise would simply mean that the Court, in dereliction of its duty, failed to uphold the law. The Constitutional Court made the point in *Buffalo City Metropolitan Municipality* v *Asla Construction (Pty) Limited* that:

> "[a] court can only make an order that is "competent and proper" and in accordance with the Constitution and the law."[30]

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[29] Paragraphs 30-34 of the Judgment read:

"[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."

[30] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) at para 23.

[46] For now, we deal with Discovery Health's submissions which rely heavily on the century's worth of jurisprudence regarding the principles of *res inter alios acta* and subrogation. Discovery Health has never claimed to be an insurer, much less an indemnity insurer, nor is it its case that it represents insurers. The RAF makes this submission in its answering affidavit, including the fact that the Fund itself is not an insurer. While it may be permissible in everyday exchanges to refer to medical scheme benefits as health insurance, they are in fact a distinct entity from insurance; the nature of the contract between an insured and insurer is different from that between a scheme member and a medical scheme; the institutions that offer these two are governed by separate and distinct legislation. In fact, to equate a medical scheme and its benefits to an indemnity insurer is to cause all over again the very mischief that the Demarcation regulations were meant to address.[31] These points are set out in the RAF's answering papers.

[47] As we see it, the key question which must be answered, as the authorities demonstrate, is whether a case has been made, based on policy considerations of fairness, equity and reasonableness, that medical schemes regain what they have paid in discharge of their contractual and statutory obligation, indirectly from the fiscus, through the financially ailing RAF, relying on the principle of *res inter alios acta* and whether subrogation is applicable to claims submitted by victims of accidents to the RAF. One of those policy considerations is whether it is conscionable that the RAF, in competition to funding the millions of motor vehicle claimants, many of whom are indigent persons, be concerned with funding medical scheme premiums of the small financially privileged group who already have access to private healthcare. But first, the reach of the Mbongwe J Judgment must be determined.

Discussion – subsequent directives and res judicata

[48] The conclusions reached by the second judgment with which we respectfully disagree, ignore the harmful and impermissible catch all phrase added by Discovery Health to the judgment of Mbongwe J that 'the RAF Act does not provide for the exclusion of benefits received by the victim of a motor vehicle accident from a private medical scheme for past medical expenses (paragraph 27), '*regardless of whether*

[31] See paras 76-79 below.

they constitute a prescribed benefit under the MSA'.[32] Discovery Health submits that through the subsequent directives, the Fund seeks to reverse the decision of Mbongwe J by advancing different reasons to the same question but that different reasons which may lead to different outcomes may not affect the identity of the question. It says Mbongwe J ruled that the policy decision advanced in the first directive is that it is unlawful for the RAF to reject a claim for past medical expenses on the ground that a medical scheme has already paid for those expenses, irrespective of whether the payment was in discharge of its contractual or statutory obligation. These contentions are ill conceived as we demonstrate in the following paragraphs.

[49] It is important to remind ourselves of the relief sought by Discovery Health before Mbongwe J. It was stated in the notice of motion as follows:

> "2. The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is declared unlawful.
> 3. The directive issued by the Acting Chief Claims Officer of the first respondent on 12 August 2022 is reviewed and set aside.
> 4. 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."

[50] The order granted by Mbongwe J effectively mirrored the relief sought, reading as follows:

> "42.1 The directive issued 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."

[51] The main reasoning underpinning this order is contained in several paragraphs starting from paragraph 29 to the following effect:

> "[29] Thus the directive challenged in the present proceed[ings] 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

[32] Refer to para 36 of this Judgment.

> 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.
>
> …
>
> [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 of 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.
>
> …
>
> [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."

[52] Our established rules of interpretation as espoused by our senior Courts do not allow for the approach advocated by Discovery Health. The addition by Discovery Health of the catch all phrase, '*regardless of whether they constitute prescribed minimum benefits under the MSA'* to the *ratio* of the learned Mbongwe J's Judgment is impermissible. The Judgment in its *ratio* does not even anticipate the catch all phrase added by Discovery Health. A simple exercise of attributing meaning to the words of the judgment, the tenor and context of the judgment as a whole, including its order, reveals that there was no such consideration by the Court at all.

[53] There is nowhere in the judgment that the Court deals with the obligations imposed on medical schemes, through the MSA and its regulations 7 and 8, to pay PMB's and EMC's in full, irrespective of the option to which a claimant member belongs. No where does the judgment refer to risk pooling of financial resources drawn from young and healthy members, to subsidise the elderly and less healthier members to fund, *inter alia*, the PMB's or EMC's.

[54] The Court in *African Farms* made the point, at 562A, that the ground of the demand (the *causa petendi,* or the *origo petitionis*) in the earlier proceedings must be the same as in the later proceedings. At 562B, it noted that "if the merits of the action which is instituted, were not examined in the previous proceedings, that may be an answer to the *judicati exception*". The question before Mbongwe J solely related to whether the RAF could rely on its 12 August directive, to avoid payment of the disputed medical expenses, on the basis that the medical scheme had paid them, and the accident victim had not suffered any loss. In *Firestone South Africa (Pty) Ltd v Genticuro AG*,[33] the court made some observations on the interpretation of court judgments and orders, stating:

> "The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what [its] subjective intention was in giving it."[34] (Citations omitted.)

[55] Those "well-known rules" of interpretation have themselves evolved, which evolution has been elucidated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[35] *University of Johannesburg v Auckland Park Theological Seminary and Another*, [36] and *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*.[37] The effect of these judgments is that

[33] 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A).
[34] Id at 304D-G.
[35] [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[36] [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).
[37] [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

interpretation is a unitary exercise, where the text, context, and purpose are considered holistically, without any of them taking precedence. Although the outcome should prefer a sensible interpretation, it should not be at the expense of the document's clear language.

[56] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*,[38] the SCA said:

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[39]

[57] Bar the procedure followed by the RAF before implementing the directive, which Mbongwe J found fell foul of PAJA, a holistic reading of the Mbongwe J judgment makes plain that its manifest purpose was to prevent the RAF from implementing a directive that would enable it to avoid paying accident victims claims for the disputed medical expenses,[40] and thus negate the RAF's obligations as set out in section 17 of the RAF Act. Discovery Health itself rooted its case within section 17 of the Act as evidenced from the following in its founding affidavit before Mbongwe J:

> "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."

[58] As for the legal premise of the third directive, this issue was not before Mbongwe J nor was it canvassed in the judgment. As wide as the order may seem, once the context is taken into account, we are unable to conclude that Mbongwe J ruled that in every instance, without exception, the RAF will forever be liable for past medical expenses involving road accident victims who are members of medical aid schemes. The Mbongwe J order evidently flows from section 17 of the RAF Act which means, it cannot without more, be extrapolated to apply where the statutory obligations

[38] [2012] ZASCA 49; 2013 (2) SA 204 (SCA).
[39] Id at para 13.
[40] See para 54 above.

of a scheme to pay PMB's and EMC's based on the provisions of the Medical Schemes Act nor where the exclusions set out in section 19 of the RAF Act, are implicated.

[59] A further reason given by Mbongwe J for setting aside the 12 August directive was that there was a lack of consultation. In our view, this further limits the reach of the Mbongwe J Judgment, as it shows a recognition that there may be lawful ways by which the RAF could refuse to pay for the disputed medical expenses, otherwise there would have been no need to mention that there was no consultation.

[60] Could it be that the second and third directives are ousted on the basis of issue estoppel? In *Aon South Africa (Pty) Ltd v Van den Heever NO and Others*,[41] the Court, quoting its decision in *Porritt*[42] observed:

> "Following the decision in *Boshoff v Union Government* 1932 TPD 345, the ambit of the *exceptio res judicata* has, over the years, been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements, those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quastio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed."[43]

[61] In *Boshoff v Union Government*,[44] this Court explained the same issue or fact as–

> "[w]here the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms."[45]

[62] A reading of Mbongwe J's Judgment makes it clear that the core issue he was called upon to decide related to the RAF's liability for the disputed medical expenses,

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[41] [2017] ZASCA 66; [2017] 3 All SA 365 (SCA); 2018 (6) SA 38 (SCA).
[42] *Porritt* above n 24.
[43] Id at para 23.
[44] 1932 TPD 345.
[45] Id at 350.

based on the premise of the first directive. The judgment phrased Discovery Health's opposition to the first directive as follows:

> "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*."[46] (Emphasis added.)

[63] As the second and third directives were issued subsequent to the handing down of the Mbongwe J Judgment, the learned Judge never considered them, nor could they have been considered by the SCA and Constitutional Court. What are we to make of this? In *Democratic Alliance v Brummer*,[47] the SCA said that–

> "[w]here the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court."[48]

[64] We are mindful that the respondents have stated that they do not seek a final pronouncement regarding their case founded on the subsequent directives as they intend to institute proceedings to finally deal with them. However, these directives are before us. Discovery Health has sought to demonstrate comprehensively why the justifications in these directives are unsustainable and are seeking interdictory relief in respect of them. These directives are thus relevant to the resolution of this matter.

[65] Before we consider the merits or demerits of Discovery Health's argument on the second and third directives, we consider it necessary to address the issue of secrecy permeating Discovery Health's papers. Much is made in Discovery Health's papers and in the second judgment regarding the RAF having kept secret the second directive whilst its application for leave to appeal the Mbongwe J Judgment served before the appellate Courts. Discovery Health claims that the RAF had a duty to disclose the second directive to those Courts. It is said that the RAF ought not to have waited for the applicant to bring these contempt proceedings and that it should have

[46] Mbongwe J Judgment above n 1 at para 8.
[47] [2022] ZASCA 151.
[48] Id at para 15.

sought clarification from the Courts on whether it could implement the directive. The RAF is condemned for having secretly issued and implemented the directive. It is said that because the directives related to the matter, the RAF had a duty to disclose it prior to implementing it.

[66] The second directive relies, *inter alia*, on the provisions of the MSA and its regulations. It canvasses the statutory obligation placed on medical schemes to pay PMBs or EMCs; the fact of medical schemes having no reimbursement right after honouring their statutory obligations arising from the MSA; that medical schemes have no authority to contract out of their statutory obligations and cannot coerce members to recover from the RAF what is not a loss or damage suffered by the members. The directive further sets out the required actions when assessing claims. We are not persuaded that this is a well made point. The issues in the second directive were not ventilated before Mbongwe J; they carry substantial policy and legal issues. The Constitutional Court has repeatedly made known its reluctance to deal with matters freshly raised before it without the benefit of the reasoning of lower Courts. There is a veritable list of authorities that demonstrate that the Constitutional Court, in particular, eschews the idea of being the first and last Court to pronounce on an issue, unless the interests of justice demand that it does so.[49] The same applies to the SCA as an appellate court.[50]

The second directive and the res inter alios acta principle

[67] Discovery Health commences its argument on the new directives by underscoring the century's worth of jurisprudence dealing with *res inter alios acta* and the doctrine of subrogation. Relying on the jurisprudence, Discovery Health concludes that the prospects of the two directives are bleak. The *res inter alios acta alteri nocere non debet,* or simply *the res inter alios acta* principle, as it is known, was dealt with in *Santam Versekeringsmaatskappy Bpk* v *Byleveldt*,[51] where the learned Trollip JA acknowledged that the principle is–

[49] *Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC 6; 2021 (6) BCLR 584 (CC) at para 18; *Jacobs and Others v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC) at para 84; *S v S and Another* [2019] ZACC 22; 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC) at para 23.
[50] *Women's Legal Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 26.
[51] 1973 (2) SA 146 (A) ("*Byleveldt*").

"a slippery one, difficult to grasp firmly and to apply with any certainty or confidence in assessing claims for bodily injuries (cf. too the remarks in *British Transport Commission v Gourley*, 1956 A.C. 185 at pp. 199, 206 - 7). The reason is that many of the *res actae* of a plaintiff relating to his injuries (e.g., contracts with others for medical treatment) do have a direct and manifest bearing on the assessment of his economic loss, and, although they are *inter alios*, they must be admissible in evidence and taken into account *inter partes*, if justice is to be done between them."[52]

[68] The learned Judge continued:

"'The application of the *maxim* to the law of evidence is obscure... In its literal sense it also fails, because it is not true that a man cannot be affected by transactions to which he is not a party; illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life would supply them.'
The rule expressed by the maxim must therefore be qualified. But where is the line to be drawn? Broom on *Legal Maxims*, 9th ed., p. 621, states the qualification thus:
'Where the acts… of others have any legal operation material to the subject of inquiry, they must necessarily be admissible in evidence, and the legal consequence resulting from their admission can no more be regarded as *alios acta* than the law itself.'"[53]

[69] He concluded:

"That appeals to me as being good law and sound common sense. Of course, whether the act has 'any legal operation material to the subject of enquiry', or what 'the legal consequence' is of admitting it in evidence, may have to be determined by having regard to equity, reasonableness, or public policy, if the law itself so requires.
…
Some colour is undoubtedly given to the argument by the use of the word 'wrongdoer', which is an emotive term, tending to evoke antipathy against him. But, I think, the argument is rather bleached of all that colour when it is borne in mind that in these modern times almost every defendant in a bodily injury case in this country is an innocent master, principal, or insurer of the wrongdoer (see Mr. *Luntz's* article in 81 G S.A.L.J. at p. 290...). Moreover, the argument really begs the question in issue here. That question is what, according to law, is the *quantum* of Byleveldt's economic loss, and not, is the defendant entitled to the benefit of any item? The defendant is liable for neither more nor less than that *quantum*, irrespective of whether or not the defendant gets any 'benefit' in the process of fixing that *quantum*."[54]

[70] It must be observed from *Byleveldt* that the learned Judge of Appeal firstly, (i) rejects the notion that a person cannot be affected by transactions to which he/she is not a party; (ii) advocates against the indiscriminate application of the principle and

[52] Id at 172D-F.
[53] Id at 172E-H.
[54] Id at 172G-H and 172F-G.

suggests that it be applied subject to qualification; (iii) points out that the reliance on the principle takes away focus from the real issue, which is not what benefit the defendant gets but what the quantum of the claimant's loss is; and finally, (iv) concludes that the question whether acts of others have any legal operation to the enquiry and what the legal consequences might be must be determined by having regard to equity, reasonableness and public policy, if the law itself so requires. Simply put, the question of which collaterals are deductible must be determined by reference to equity, reasonableness and public policy.

[71] The *res inter alios acta* principle was again subjected to scrutiny in *Standard General Insurance Co Ltd v Dugmore NO*.[55] Here the court was more blunt in its reasoning:

> "The question is one of demarcation only: which benefits are deductible from the plaintiff's claim? Various approaches to the question of demarcation have been developed here and in England… None of those approaches has escaped criticism, a fact readily acknowledged by our courts (*Dippenaar's* case at 915 A - 916 H) and academic writers…
> Boberg (The Law of Delict vol 1, 1984: at 479) succinctly states: 'The existence of the collateral source rule can therefore not be doubted; to what benefits it applies is determined casuistically: where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.
>
> It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country (*Santam Versekeringsmaatskappy Bpk v Byleveldt*, supra at 150 F) and in England (*Parry v Cleaver* [1970] AC 1 at 14 and 31) it is acknowledged that policy considerations of fairness ultimately play a determinative role. Perceptions of fairness may differ from country to country and from time to time; the task of courts is to articulate the contemporary perceptions of fairness in their respective areas of jurisdiction."[56]

[72] Referencing *inter alia Erasmus Ferreira & Ackermann and Others v Francis*,[57] the Court once again confirmed that it is a value judgment involving policy considerations of fairness that must guide the Court in determining what is deductible when considering an award of damages. This, the Supreme Court of Appeal confirmed in *Road Accident Fund v Cloete NO and Others*,[58] a mere ten days after

[55] [1996] ZASCA 89; 1997 (1) SA 33 (SCA); [1996] 4 All SA 415 (A) ("*Dugmore*").
[56] Id at paras 7-8.
[57] [2009] ZASCA 54; 2010 (2) SA 228 (SCA); [2009] 3 All SA 500 (SCA) at para 17.
[58] [2009] ZASCA 126; [2010] 2 All SA 161 (SCA); 2010 (6) SA 120 (SCA).

Bane v D'Ambrosi,[59] which, as we know, concluded that payment made by a claimant's medical scheme is *res inter alios acta*. In a dispute before an arbitrator, involving the award of damages to certain Belgian claimants, the Fund contended for a deduction of certain social security benefits insurance payout. The matter landed before the High Court. Neither side was satisfied with the outcome of the High Court. The claimants' main attack was that the High Court had no jurisdiction to entertain the matter at all. Stating the principle, once again, without deciding whether the benefits had to be deducted from the award, the Court stated:

> "[29] In any event, with regard to the latter aspect, this court has held that questions regarding the deductibility of collateral benefits cannot be answered by reference to a single juridical test; instead, 'it is acknowledged that policy considerations of fairness ultimately play a determinative role'. Moreover, '[p]erceptions of fairness may differ from country to country and from time to time; the task of Courts is to articulate the contemporary perceptions of fairness in their respective areas of jurisdiction.
>
> [30] More recently, this court, after quoting the above extract from Dugmore's case, expressed agreement with the statement that 'questions regarding collateral benefits are normative in nature; they have to be approached and solved in terms of policy principles and equity' and that, in doing so, 'there should always be a weighing-up of the interests of the plaintiff, the defendant, the source of the benefit as well as the community in establishing how benefits resulting from a damage-causing event should be treated'.

[73] Writing for the majority, Harms DP, as he then was, answered the question, essentially agreeing with the principles as stated by Griesel AJA:

> "[47] Griesel AJA has dealt with the question but chose to leave it open (at paras 29-30). I prefer to answer the question with reference to the authorities quoted by him: it is a value judgment."

[74] Discovery Health relies on decisions such as *Van Tonder v Road Accident Fund*,[60] *Road Accident Fund v Bosch and another*[61] and *Van Heerden v Road Accident Fund*,[62] all of which come from courts presided by single Judges. It includes the *ratio* in *Bane* v *D'Ambrosi* and concludes that the RAF's reliance on the subsequent directives has already been considered and decided by other Courts and that based on the doctrine of precedent the directives are of no assistance to the RAF.

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[59] [2009] ZASCA 98; 2010 (2) SA 539 (SCA); [2010] 1 All SA 101 (SCA) ("*Bane*").
[60] [2023] ZAWCHC 305 ("*Van Tonder*").
[61] Unreported judgment of the Gauteng High Court, Pretoria, Case No 8664/2024 (5 February 2024) at para 17.
[62] [2022] ZAECQBHC 37 ("*Van Heerden*").

We have not as yet considered the subrogation question and the section 19(d) premise of the third directive. Nevertheless, the reasoning by Trollip JA is not dealt with by Discovery Health.

[75] There clearly is no reference to *Byleveldt* and the subsequent cases other than to *Bane* v *D'Ambrosi.* To conclude on the issue of *res inter alios acta*, we have now seen that more than 52 years ago, our senior Courts made it pellucid that questions regarding deductibility of collateral benefits are to be answered with reference to policy considerations of equity, reasonableness and fairness and that the court's function is to articulate the contemporary perceptions of fairness and equity. Notwithstanding the long history of the *ratio* in *Byleveldt*, *Dugmore*, and *Cloete*, Discovery Health, does not engage with it. As we had initially indicated, the question is not as simple as Discovery Health makes it before this Court. The question to be answered then is whether there are policy considerations of equity, fairness and reasonableness that militate for this Court to conclude that payment made by a medical scheme in discharge of its statutory obligation, as provided for in the MSA, should be recovered from the RAF on the basis of the *res inter alios acta* principle. We can only conclude that these cases carrying this veritable principle were not brought to the attention of the Mbongwe J.

The doctrine of subrogation and whether it finds application in the context of a claim for the disputed medical expenses against the Fund

[76] The RAF submits that the principle of subrogation, which finds application in indemnity insurance contracts, does not apply to medical schemes. To make its case, the RAF makes three principal submissions. Firstly, it distinguishes itself from an insurer; it avers that medical schemes are not insurers; and finally it distinguishes a medical scheme from an insurer by reference to the Explanatory Memorandum to the Second Draft Demarcation Regulations made under section 72(2b) of the Long-term Insurance Act,[63] published by National Treasury (Explanatory Memorandum).[64] We deal with these in turn.

The RAF is not an insurer

[63] 52 of 1998 ("LTI Act").
[64] Available at: https://www.treasury.gov.za/public%20comments/Demarc/Annexure%20B.pdf.

[77] The RAF submits that it is not an insurer; it is not underwritten and is not governed by the provisions of the Short Term Insurance Act[65] (STI Act), which governs short term insurers. The RAF is a recipient of public funds and is governed by amongst others, the Public Finance Management Act.[66] It further refers to two directives issued by the Financial Services Board (FSB), the predecessor of the Financial Sector Conduct Authority (FSCA), which governs insurance companies and that issued by the South African Reserve Bank (SARB). In terms of the former, the Fund is exempted from complying with the provisions of the STI Act, while the latter classifies the RAF along with the Compensation Commission for Occupational Injuries, the Compensation Fund, and the Unemployment Insurance Fund as Social Security Funds.

Medical schemes are not insurers

[78] With regard to medical schemes, the RAF submits that they too are not insurers. It says that the nature of the contract between a medical scheme and its members is governed by the MSA and the undertaking made by the scheme is spelt out in the definition of the business of a medical scheme[67] which is distinguishable from a contract of insurance. It submits that medical schemes operate on the basis, *inter alia*, of risk pooling of good and bad risk and community rating. The RAF refers to community rating and submits that, based on the principle, contributions charged against members of a medical scheme may vary only in respect of cover provided and the number of dependants on the plan. Members, whether they be high or low risk pay the same contribution. Whereas medical schemes may not discriminate between individuals on the basis, inter alia, of their race, age, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health,[68] insurers are permitted to discriminate based on, for example, age, by making the insured pay

[65] 53 of 1998.
[66] 1 of 1999.
[67] Section 1 of the MSA defines "business of a medical scheme" as "the business of undertaking liability in return for a premium or contribution—
(a) to make provision for the obtaining of any relevant health service;
(b) to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; and
(c) where applicable, to render a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme."
[68] Section 24(2)(e) of the MSA.

a higher premium on the basis of age.[69] The premium charged by an insurer, submits the RAF, is based on that discrimination where high risk individuals pay higher premiums than those said to be of low risk. Finally, it notes that medical schemes are governed by the MSA while insurance is governed by the STI or the LTI Acts.

[79] In further distinguishing medical schemes from insurance, the RAF refers to the Explanatory Memorandum, which distinguishes insurance from a medical scheme. The RAF submits that the demarcation regulations were aimed, amongst others, at distinguishing insurance from a medical scheme. These distinctions, avers the RAF, make the case plain that medical schemes are not insurers and that the principles of *res inter alios acta* and subrogation, which find application in insurance contracts, do not apply to claims for the disputed medical expenses. To the extent that this Court finds that the principles apply to medical schemes, the RAF submits that the common law ought to be developed to have regard to the nature of the rights accorded to third parties under the RAF Act, as well as members of medical schemes under the MSA in so far as they are intended to provide for the progressive realisation of the right to social security guaranteed in the terms of section 27 of the Constitution.

The Rand Mutual Case

[80] The Court in *Rand Mutual*,[70] made the following useful remarks:

> ''In its literal sense the word "subrogation" means the substitution of one party for another as creditor. In the context of insurance, however, the word is used in a metaphorical sense. Subrogation as a doctrine of insurance law embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance. The gist of the doctrine is the insurer's personal right of recourse against its insured, in terms of which it is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss."[71]

Discussion

[69] Regulation 7.3(4) of the LTI Act provides:
"Despite subregulation (2) (b), an insurer may in respect of contracts referred to in category 1 in the table under Regulation 7.2 (1) require a policyholder that enters into a contract after a specific age to pay a higher premium than a policyholder that entered into the contract at a younger age, provided that the same higher premium is payable by all policyholders entering into a product line after a specific age." Indemnity insurers too charge very high premiums for drivers under 25.
[70] Above n 16.
[71] Id at para 12.

[81] Discovery Health proceeds from the premise that the SCA confirmed that under the doctrine of subrogation, a medical scheme can sue the RAF in its own name or the name of its member claimant. For this proposition, it relies on *Rand Mutual Assurance* and quotes paragraphs 19 to 24 of that judgment. It further notes that this principle has been specifically applied in the context of litigation against the RAF, and honoured by the RAF since its inception, until now. The principle has, in addition, been expressly confirmed by the SCA in *Bane* v *D'Ambrosi*. We disagree that the principle of subrogation applies to claims submitted against the RAF by claimants, as we shall soon demonstrate.

[82] *Rand Mutual* had to do with the insurer of an employer, Harmony Gold Ltd, asserting its right to recover what it had paid under a claim arising from COIDA from the respondent. The appellant, an insurer licensed to insure employers against liability arising from COIDA had paid a claim relating to the injuries suffered by an employee of Harmony, one Mr Young. Young was injured as a result of negligent driving of a motor vehicle, during the course and scope of his duties. The appellant, as a result of the policy, paid Young. The respondent is liable for damages arising out of the negligent driving of a motor vehicle. Section 36 of COIDA however, limited the class of people who can recover monies paid for a claim under COIDA only to the Director-General (DG) or the employer. But the appellant was neither the DG nor the employer; it had also not obtained a cession from the employer but decided to sue in its own name as opposed to that of the insured employer. This was the sole issue in *Rand Mutual*. In reasoning the issue towards a finding for *Rand Mutual*, the Court said:

> "The insured's indemnity claim has been paid in full. The insured employer was accordingly entitled to recover from the respondent, not only by virtue of s 36(1)(b), but also under ordinary legal principles. However, the employer did not seek to recover; the appellant did not obtain a cession; and the appellant did not sue in the name of the insured but in its own name. This, and only this, non-compliance with the subrogation doctrine was, according to the respondent, fatal to the appellant's claim, and the court below agreed.
>
> During argument the question was raised whether the rule that the insurer must sue in the name of the insured forms part of our law and, if so, whether it could be justified. The answer requires a consideration of the history of the reception of the English law of subrogation, the nature of the

> rule that a subrogated claim must be brought in the name of the insured, and a reflection of whether the rule requires adaptation or amendment."[72]

[83] Not only is there no reference to a medical scheme in the judgment, there exists no basis upon which the case can be used as authority that a medical scheme, an entity fundamentally different from an insurer, in the manner in which it is governed, and operates, is entitled to rely on the principle. As *Rand Mutual* demonstrates, the principle was inherited from English law more than a century ago and transplanted into our law of indemnity insurance. We may further refer to the proscription placed on the Registrar of Medical schemes not to approve any benefit option, where a scheme offers more than one benefit option, until they are satisfied in terms of section 33 of the MSA, that such benefit option, amongst others, includes the prescribed minimum benefits, is financially sound; shall be self-supporting in terms of membership and financial performance; and will not jeopardise any other benefit option.

[84] One must also remember that medical schemes are "not-for-profit entities that are owned by their members and are managed by boards of trustees. They are however, surrounded by (and confused with) a number of for-profit entities that provide a range of services such as administration, marketing, managed care, consulting and advisory services."[73] A scheme's income can only ever be derived from the members' contribution and investments. Insurance companies on the other hand, whether they be indemnity or non-indemnity insurers are for profit institutions. A medical scheme will pool all the members' contributions to fund members' claims and any surplus funds are transferred, in accordance with the regulations, to the scheme's reserves for security and benefit of the members. Any medical scheme registered under the MSA, amongst others, assumes liability for and guarantees the benefits offered to its members and their dependants in terms of the rules. No medical scheme may pay bonuses or dividends.[74]

[85] Respectfully it must be stated that *Bane* v *D'Ambrosi* did not decide the issue of subrogation. This is apparent from this extract:

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[72] Id at paras 10-11.
[73] S Ramjee and T Vieyra "Neither here nor there: the South African medical scheme industry in limbo" (conference paper presented at the Actuarial Society of South Africa's 2014 Convention, Cape Town International Convention Centre, 22–23 October 2014).
[74] Section 24(5) of the MSA

> "It is not for the appellants to dictate to the respondent as to how he should structure his expenditure, and the fact that he is, for the present at least, a member of a scheme does not mean that that arrangement will continue into the foreseeable future. Moreover, it would be surprising if the scheme to which he belongs does not provide for the principle of subrogation, which will mean that the respondent will ultimately have to transfer any compensation paid to him by the appellants to his medical scheme. It is not necessary, however, to explore this aspect in any greater detail."[75]

[86] In making this observation, we are mindful of the admonition by the Constitutional Court in *Turnbull-Jackson* v *Hibiscus Coast Municipality and Others*,[76] on the doctrine of precedent.[77] It is time that we confront the reality that the principle of subrogation, which applies to insurance, does not apply in the context of medical schemes. In further considering the issue, one must take into account that the RAF is not an insurance entity and its sole means of income is not premiums as is the case with insurers but a fuel levy. Such levy cannot rationally be compared to an insurance premium which considers a broad range of issues before an insurer concludes on the correct premium.

The third directive and the Abdool-Carrim[78] case

[87] The legal premise for the third directive was not before Mbongwe J. It is incorrect that the *ratio* in *Abdool Carrim* vindicates Discovery Health's argument. The context in the *Abdool Carrim* case is the following: Several medical suppliers had contracted with an entity known as A-Fact. A-Fact was not a firm of attorneys. Its services comprised mainly, the evaluation the prospects of a third party's claim and the supplier's prospects of a successful recovery from the Fund. The services were rendered in terms of a written agreement between the supplier and A-Fact, in terms of which, after payment from the Fund, the suppliers would pay A-Fact a fee. The services were rendered with the Fund's knowledge for over a period of four years. Suddenly, the RAF decided that the agreement between the medical suppliers and A-

[75] *Bane v D'Ambrosi* above n 59 at para 19.
[76] [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC).
[77] Id at para 56:
> "The doctrine of precedent decrees that only the ratio decidendi of a judgment, and not obiter dicta, have binding effect. The fact that obiter dicta are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as obiter what is otherwise binding precedent. Only that which is truly obiter may not be followed. But, depending on the source, even obiter dicta may be of potent persuasive force and only departed from after due and careful consideration."

[78] *Road Accident Fund v Abdool-Carrim and Others* [2008] ZASCA 18; [2008] 3 All SA 98 (SCA); 2008 (3) SA 579 (SCA) ("*Abdool-Carrim*").

Fact was struck by the provisions of section 19(d). Having reasoned the issue, the SCA rejected the RAF's argument.

[88] Given the contentions by Discovery, the reasoning of the Court prior to arriving at its conclusions requires some exposition. It said:

> "The phrase 'subject mutatis mutandis to' means literally 'subject, with the necessary changes, to'. Any alterations must in their context be 'necessary.' By making the supplier's claim 'subject, mutatis mutandis, to the provisions applicable to that of the third party, the legislature, in my view, intended to make the supplier's right to claim from the Fund conditional upon the validity and enforceability of the third party's claim and not to render the supplier's claim unenforceable against the Fund by reason of an agreement with a person other than an attorney to pay such person, after settlement of the claim a portion of the compensation in respect of the claim.
>
> Support for the above interpretation is to be found in the main purpose of the Act referred to earlier [which is to afford third parties the widest possible protection] and also to the accessory nature of the supplier's claim. In my view, the Fund's interpretation of the effect of s 17(5) is incorrect. It is not necessary to substitute 'supplier' for 'third party' in s 19(d) to give efficacy to the subsection. On the contrary the substitution places it at odds with the Act's purpose, and from the Fund's perspective, achieves nothing. For if a third party's claim is valid and enforceable and the supplier's is not, the Fund would still be liable to compensate the third party who in turn remains contractually liable to the supplier. The consequence is that a third party may be faced with a claim from a supplier without having been paid and would be denied the benefit of s 17(5) without any fault on his or her part. This result could hardly have been what the draftsman intended.
>
> It is understandable that the legislature would seek to protect third parties, many of whom are indigent, from entering into champertous agreements, which is probably what s 19(d) intends to achieve. But there is no apparent reason to restrict the contractual freedom of suppliers, many of whom are professional people, institutions or companies from contracting with whoever they choose to process their claims. They should be capable of looking after themselves."[79]

[89] The context relates to a supplier agreement with the claimant. Importantly, Discovery, the medical scheme, is not a supplier. The contract between Discovery medical scheme and its members is not based on the success of a claim from the fund. On the contrary, when the scheme pays PMB's and EMC's it is not only discharging a contractual obligation but a statutory one. We conclude that the legal premise of the second directive was not before Mbongwe J. For that reason, the legal

[79] Id at paras 11-13.

premise for the second directive is not struck by the *res judicata* rule. Discovery Health's reliance on *Abdool-Carrim* in attacking the second directive cannot be upheld.

[90] Discovery Health goes on to suggest that the agreement between a scheme and a member is not a champertous one. It submits that medical schemes do not finance their members' claims nor share in the successful payout. Instead, claimants have an obligation to reimburse their medical scheme for the whole, and not a portion of their claim relating to past medical expenses.

[91] It is a standard requirement of medical schemes' rules, that their members reimburse the medical scheme for payments in respect of past medical expenses recovered from the RAF, submits Discovery Health. The obligation of the claimant to reimburse their medical scheme does not arise until such time that there is a successful recovery of the past medical expenses by the claimant from the RAF. It concludes that section 19(d) must be interpreted together and harmoniously with the obligation imposed on medical schemes members under section 32 of the Medical Schemes Act to avoid conflicts.

Discussion

[92] The challenge facing Discovery Health and the medical schemes it represents goes beyond questions of interpretation of its rules. The rules published by the Discovery Medical scheme are only for its members and the scheme and not third parties like the RAF. The rule dealing with recovering from the RAF what the scheme has paid in discharge of its contractual and statutory obligations is a rule of Discovery Medical Scheme's own making. It cannot bind third parties, including the RAF. The Government Employees Medical Scheme (GEMS), the third largest scheme in the country, does not oblige members in its rules to claim any past medical expenses from the Fund. Conceivably, GEMS accepts that it cannot recover what it is statutorily required to pay by way of PMB's and EMC's from the RAF.

[93] In addition to what has been mentioned in this Judgment, there are a plethora of provisions in the MSA governing the solvency and liquidity of medical schemes. They are set out in Chapter 7, section 35[80] and include sections 36, 37 and 38 on

[80] Chapter 7 of the MSA deals with Financial Matters and provides as follows:

oversight arrangements. In simple language, the independent financial viability of a medical scheme is put beyond dispute when one has regard to the provisions of the MSA. Given the undisputed independent financial viability of the medical scheme outside of any possible recovery from the RAF, should the financially ailing RAF be concerned with funding the medical contributions paid by the small fraction of privileged citizens who have access to private healthcare as opposed to funding the competing needs of claimants who are victims of motor accidents, the majority of whom are indigent?

Whether there are any policy considerations in favour of excluding collateral benefits received by a claimant from a medical scheme by way of payment of PMB's and EMC's, on the basis of res inter alios acta?

[94] We raise the following considerations without necessarily answering the question: The following facts about the RAF may not be disputed: It is a schedule 3A

"35 (1) A medical scheme shall at all times maintain its business in a financially sound condition by—
(a) having assets as contemplated in subsection (3);
(b) providing for its liabilities; and
(c) generally conducting its business so as to be in a position to meet its liabilities at all times.
(2) A medical scheme shall be deemed to have failed to comply with the provisions of subsection (1) if it does not comply with subsection (3), (4), (5), (6) or (7).
(3) A medical scheme shall have assets, the aggregate value of which, on any day, is not less than the aggregate of—
(a) the aggregate value on that day of its liabilities; and
(b) the net assets as may be prescribed.
(4) A medical scheme shall not be deemed to hold an asset for the purposes of this Act to the extent to which such asset is encumbered.
(5) A medical scheme shall have such assets in the Republic in the particular kinds or categories as maybe prescribed.
(6) A medical scheme shall not—
(a) encumber its assets;
(b) allow its assets to be held by another person on its behalf
(c) directly or indirectly borrow money; or
(d) by means of suretyship or any other form of personal security, whether under a or accessory obligation, give security in relation to obligations between other persons,
without the prior approval of the Council.
(7) Subject to the provisions of this section a medical scheme may invest its funds in any manner provided for by its rules.
(8) A medical scheme shall not invest any of its assets in the business of or grant loans to—
(a) an employer who participates in the medical scheme or any administrator or any arrangement associated with the medical scheme;
(b) any other medical scheme;
(c) any administrator and
(d) any person associated with any of the abovementioned.
(9) For the purposes of this Act the liabilities of a medical scheme shall include—
(a) the amount which the medical scheme estimates will be payable in respect of claims which have been submitted and assessed but not yet paid;
(b) the amount which the medical scheme estimates will become payable in respect of claims which have been incurred but not yet submitted, and
(c) the amount standing to the credit of a member's personal savings account."

entity in terms of the Public Finance Management Act.[81] It is funded from fuel levies via the Customs and Excise Tax. That the Fund is struggling financially and is not adequately funded is no secret. Recently, it found itself in collision with the regulator in *Road Accident Fund* v *Auditor-General of South Africa (AGSA) and Others*.[82] On 20 December 2021, the AGSA issued a disclaimer on the Fund's financials, as a result of the Fund's choice of accounting methodology, which was not approved by the regulator. The disclaimer, in the relevant part read:

> "The financial statements contained material misstatements in claims expenditure, current and on-current liabilities and disclosure notes which were not adequately corrected subsequently, which resulted in the financial statements receiving a disclaimer of opinion. The accounting authority did not put adequate measures in place to ensure that the financial statements are prepared in accordance with the appropriate accounting framework. This was due to use of IPSAS 42 in formulating account[ing] policy which is in conflict with the standard of GRAP"[83] (the Disclaimer).

[95] The result of the change in accounting methodology is that the RAF's liabilities suddenly plunged from the R327 billion reflected in the 2019/2020 financial year, to R34 billion reflected in the 2020/2021 financial year. This astronomical improvement in the RAF'S financial statements was said to be attributable to the RAF adopting an accounting standard known as IPSAS 42, which effectively changed its treatment of payables and liabilities in its annual financial statements. A financially healthy fund would find no reason to adopt accounting systems that would place it in a polarised position with regulators on the basis that its financials are distorted by such accounting system.

[96] The RAF is not an insurer. Unlike insurers, it does not underwrite risk and does not charge a premium reflecting the extent of risk it has assumed. Bar the limited instances isolate in law, it does not/cannot exclude any person from cover.

[97] The RAF in its answering papers refers to the widening of the gap between those citizens who can afford private health care and those who cannot, in the event it is compelled to continue to fund the disputed medical expenses. We understood this to refer to the inequality that exists in South Africa, of which we take judicial notice.

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[81] Act 1 of 1999.
[82] [2024] ZAGPPHC 358; [2024] 3 All SA 914 (GP).
[83] Id at para 1.

Indeed, South Africa is said to be one of the most unequal societies in the world, with a Gini Index Income inequality of close to 70%.

[98] Given the myriad of social challenges facing this developing country, is there justification based on policy considerations, fairness and reasonableness, for the government to concern itself with protecting the interests of medical schemes? The contestation before us is simply about whether the RAF's funds should continue being used to replenish the coffers of medical schemes. The subrogation principle perpetuates the lie that a road accident victim actually has a claim against the RAF when in truth and in fact, that claim was satisfied by the medical scheme.

The directives as administrative action

[99] Mbongwe J accepted that the directives are administrative action. When Discovery Health was unhappy with the first directive, it initiated review proceedings to ensure that it was reviewed and set aside. Before us, Discovery Health seeks an order to interdict the RAF from implementing the subsequent directives. We find there is no case for such an order.

[100] The discussion above relating to the second and third directives makes it clear why we do not find the second and third directives as unlawful. A case for unlawfulness must be made out, and Discovery having failed to do so, the directives remain operative until set aside by a court. The second judgment, referring to *Merafong* and *Aquila Steel*, amongst others, suggests that the two directives should be treated as invalid. We respectfully disagree. There are no parallels between the conduct of the RAF in this case and that which occurred in the two cases. The RAF, as my reasoning suggests, issued directives in lawful discharge of its statutory function of evaluating and settling claims. In line with the provisions of the RAF Act, it issues directives from time to time to aid the administration of claims. We have already found that the two directives and their legal premise are not *res judicata*. There is thus no question of subverting the Mbongwe J Judgment. We have also confronted the merits of the argument raised by Discovery Health regarding these two directives. These directives stand until reviewed and set aside. In contrast, the imbroglio that occurred in *Aquila Steel* of double approvals and the incapacity and incompetence highlighted by the Court in that case finds no application in the present case.

Conclusion

[101] What we were called to decide in this case is whether by relying on the two subsequent directives, the Fund breached the Mbongwe J Judgment. We find that it did not. Discovery Health has also not made out a case to interdict these and/or to set them aside as unlawful. The result is that they remain operative.

[102] It is clear therefore that until the RAF's application for leave to appeal was refused by the Constitutional Court, the RAF was not in default of complying with the Mbongwe order. As it happened, when the Constitutional Court handed down its ruling, the RAFs subsequent directives had already been issued. That being the context, and in line with the views we have expressed, the second and third directives remain applicable. For this reason, we conclude that the declaratory relief sought by Discovery Health cannot be granted.

Costs

[103] Both parties agreed that costs should follow the result and that the matter was complex enough to justify costs of two counsel, on scale C. As mentioned earlier, Discovery Health must bear the costs of the striking out application as this was necessitated by its inclusion of the impugned material in its replying affidavit.

[104] We therefore grant the following order:

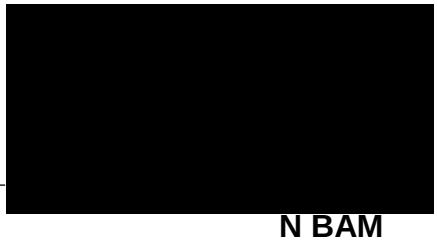
Order

1. The application is dismissed with costs, such costs to include the costs of two counsel, on scale C.
2. The costs are to include the costs related to the strike-out application.

D MLAMBO

JUDGE PRESIDENT OF THE HIGH COURT

GAUTENG DIVISION



N BAM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

OPPERMAN, J (dissenting)

[105] I have had the privilege of considering the first judgment. I am unable to agree in all respects.

[106] The first judgment concludes that the issues decided in the Mbongwe J order and judgment are not the same as the issues dealt with in the second and third directives. Put differently: it concludes that the subject matters dealt with in the two subsequent directives do not fall within the reach of the Mbongwe J order. It thus follows from these findings (with which I respectfully disagree) that such issues and findings are not *res judicata* as against the RAF, and the RAF was entitled to issue new directives in the form of the second and third directives which directives stand until set aside based on the application of "*the Oudekraal principle*".[84]

[107] Contrary to the main judgment, I conclude herein that the issues raised in the second and third directives: (a) fall within the reach of the Mbongwe J order and are thus *res judicata* as against the RAF and; (b) the policy considerations underpinning *Oudekraal* as to why state organs should not be permitted to disregard what they subsequently come to consider to be unlawful administrative decisions, do not apply in this case. I agree with the author Pretorius that the *Oudekraal* principles, "are not immutable, and are subject to qualification".[85] To find that the *Oudekraal* principles

[84] *Oudekraal* above n 28. Few judgments have received as much attention in the 20 years since its handing down but one thing that has crystallised is that it is erroneous to speak of the principle in the singular as the SCA enunciated several principles. See DM Pretorius "Oudekraal after fifteen years: the second act (or, a reassessment of the status and force of defective administrative decisions pending judicial review)" (2020) 31(1) *Stell LR* 3 ("*Pretorius*").

[85] *Pretorius* id at page 6.

apply in this case would, in my respectful view, be a misapplication of those principles and permit abuses of power and an evasion of the Court's role as sole arbiter of lawfulness of administrative action – the exact conduct that is prohibited by and cautioned against by the Constitutional Court in *Kirland.*[86] But first, the scope of the Mbongwe J order.

Res judicata

[108] The RAF's 12 August 2022 directive[87] required that all claims for past medical expenses that had been paid for by medical aids be rejected and that the reason to be provided for such repudiation of those claims was that the claimant sustained no loss or incurred no expenses relating to the past medical expenses claimed because the medical scheme had paid them. Mbongwe J set aside the RAF's 12 August 2022 directive and declared it unlawful. The main reasoning underpinning his order has already been quoted in the first judgment, to which I would add paragraph [27] and the first sentence of paragraph [29], which read:

> "[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 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 in determining his claim for past and future hospital and 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.''

[109] I agree with the first judgment that the orders granted by Mbongwe J must be interpreted in the light of his judgment as a whole and the *ratio* for his decision in

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[86] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 103 ("*Kirland*").

[87] It provided:

"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).

particular.[88] In my view though, there is a single primary *ratio* which underpins the entirety of Mbongwe J's judgment and determines the meaning of its orders, including the interdict: it is unlawful for the RAF to reject a claim for past medical expenses on the ground that a medical aid scheme has already paid for those expenses. This *ratio* is the basis for the order reviewing and setting aside the 12 August 2022 directive and interdicting the RAF from implementing it. This is clear from Mbongwe J's reasons. He held, amongst other things: (a) that the 12 August 2022 directive is inconsistent with the express provisions of section 17 of the RAF Act and is, consequently, unlawful;[89] (b) that section 17 of the RAF Act imposes an obligation on the RAF to compensate victims of motor vehicle accidents where bodily injuries have been sustained or death has occurred as a result of the negligent driving of a motor vehicle;[90] (c) that a claim for compensation against the RAF is a delictual claim and is therefore subject to the general rules concerning the quantification of damages for personal injury;[91] (d) that the compensation to which a claimant is entitled is the difference between their patrimonial situation before and after the delict has been committed;[92] (e) that the benefits received by a claimant from a private insurance policy are not considered for the purposes of determining the quantum of a claimant's damages against the RAF. This is because a benefit that accrues or is received from a private insurance policy originates from a contract between the insured claimant and the insurer for the explicit benefit of the claimant. The receipt of such a benefit by the claimant does not exonerate the RAF from the liability to discharge its obligation in terms of the RAF Act;[93] (f) that the RAF Act excludes or limits the RAF's liability in certain instances. It does not, however, provide for the exclusion from its liability where benefits for the same injuries have been received by victims of motor vehicle accidents from a private medical scheme for payment of past medical expenses arising from those injuries;[94] (g) that medical aid scheme benefits which a claimant has received, or will receive, are not deductible from their claim against the RAF for past and future hospital and medical expenses; and (h) that the RAF is not entitled to

[88] *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* [2021] ZACC 30; 2022 (1) BCLR 1 (CC) at paras 12 and 13.
[89] Mbongwe J Judgment above n 1 at para 29.
[90] Id at para 17.
[91] Id at para 19.
[92] Id at para 20.
[93] Id at paras 21-22.
[94] Id at paras 23-28.

seek to free itself from its obligation to pay full compensation to victims of motor vehicle accidents under section 17 of the RAF Act.[95]

[110] The SCA refused the RAF leave to appeal against the order and judgment of Mbongwe J. So did the Constitutional Court. As a result, these issues and findings are final and *res judicata*[96] as against the RAF.

[111] The second directive issued by the RAF as an internal memorandum on 13 April 2023 (and referred to herein as "the phantom directive") reveals that it was to be used for internal purposes only and was not to be distributed to external stakeholders.[97] Mr Katz, the deponent to the affidavits filed on behalf of Discovery Health, coined the term "Phantom Directive" because the RAF had refused to disclose the directive even upon request. It was deliberately concealed, not only from Discovery Health, but also from the Constitutional Court, a point to which I return later in this judgment. The first time Discovery Health had sight of the phantom directive was in this litigation and after the filing of the answering affidavit. It reveals that the first directive was to apply until 28 November 2022 and the phantom directive from 29 November 2022. The timeline of what was happening in the appeal courts is not insignificant: the Supreme Court of Appeal (SCA) dismissed the RAF's application for leave to appeal the Mbongwe J judgment on 31 March 2023, the phantom directive was issued on 13 April 2023 and on 24 April 2023, the RAF applied to the Constitutional Court for leave to appeal against the Mbongwe J judgment.

[112] The RAF sought to rely on the provisions of section 29(1) of the Medical Schemes Act and its regulations, in particular regulations 7 and 8, to refuse to pay medical costs which fell within emergency medical conditions (EMC's) or prescribed minimum benefit conditions (PMB's). Thus, so it contended, the RAF's decision to

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[95] Id at para 29.
[96] *Ascendis* above n 25 at paras 111 to 113; *Mkhize* above n 24 at para 36.
[97] The phantom directive commences with the following:
> **"NOTE:**
> *A. This is an internal memorandum/document for **internal purposes only**, administration of claims, and management of claims risk.*
> *B. **This document is <u>not</u> to be distributed to external stakeholders**.*
> *C. Each affected claim must be assessed on its own merits using the principles as provided for in the RAF Act, RAF regulations, all applicable directives, this directive and all relevant SOPs.*
> *D. The previous directive of 12 August 2022 is the subject matter of two separate court processes including an appeal and will apply in claims lodged during the period from date of the directive up until 28 November 2022.*
> *E. This directive shall apply to all claims submitted from 29 November 2022."* (Emphasis provided.)

repudiate in these circumstances is justified because the duty on medical schemes to pay for such expenses arises from the Medical Schemes Act (a statutory obligation and not a contractual obligation).

[113] In my view this Court is bound by the reasoning in *African Farms*[98] being that different reasons which might lead to a different conclusion, cannot affect the identity of the question which was decided, or which falls to be decided. Mbongwe J ruled that it is unlawful for the RAF to reject a claim for past medical expenses on the ground that a medical aid scheme has already paid for those expenses. Whether the payment by the medical aid scheme was made pursuant to its contractual or its statutory obligations does not seem to me to be relevant to what the RAF's statutory obligations are, which is to pay claims. To carve out from the term "expenses" the portions labelled prescribed minimum benefit costs and emergency medical condition costs and to contend that such lesser, 'carved out' costs are excluded because they derive from another statute not a private contract, in my view, cannot hold. Surely the lesser must be encapsulated by the greater?

[114] The first judgment argues that paragraphs 30-34 of the Mbongwe J Judgment do not support the proposition that medical schemes have a right of recovery from the RAF through their members to recover what they have paid in discharge of their statutory obligation to pay PMB's and EMC's in full as required by the MSA and its regulations 7 an 8. The first judgment draws the inference that such paragraphs evidence that the relevant provisions of the MSA and its regulations were not drawn to the attention of Mbongwe J as to suggest otherwise would mean that Mbongwe J, in dereliction of his duties, failed to uphold the law by granting an order that was neither competent nor proper and not in accordance with the Constitution or the law.

[115] Medical aid schemes' rules are given statutory force and are binding upon the scheme and its members by virtue of section 32 of the MSA. Discovery Health contends, and it was not disputed on the papers before us, that it is a standard requirement of medical aid schemes' rules for their members to reimburse the medical scheme for payments in respect of past medical expenses recovered from the RAF, which obligation does not arise until such time that there is a successful recovery of

[98] *African Farms* above n 24.

the past medical expenses by the claimant from the RAF. The statutory obligation on the medical aids to pay PMB's and EMC's does not detract from the RAF's obligation to do what its statute obliges it to do as the Mbongwe J decision affirmed. The provisions of the MSA and the RAF Act should be interpreted together and harmoniously in order to avoid conflicts. To interpret the MSA in the manner suggested in the first judgment would lead to the result that the one Act, the MSA, authorises reimbursement and the other, the RAF Act, prohibits it.

[116] A consideration which militates against the construction that the RAF Act prohibits reimbursement is that the legislature chose to expressly provide that payments received by the categories of persons in section 18 of the RAF Act must be deducted from compensation paid by the RAF.[99] It does not expressly or by implication provide for the exclusion of benefits a plaintiff for compensation in terms of the RAF Act had received from a Medical Aid Scheme for past medical and hospital expenses generally or PMB's and/or EMC's specifically.

[117] The third directive, also issued as an internal memorandum on 2 November 2023 and not distributed to external stakeholders, asserts that the RAF is not liable to compensate claimants who have agreed to reimburse their medical aid schemes for past medical expenses as such agreements fall within the exclusionary provision of section 19(d)(i) of the RAF Act. Once again the timeline is significant if regard is had to what was happening in the appeal courts: the Constitutional Court refused the RAF leave to appeal against the Mbongwe J judgment on 18 October 2023 and on 2 November 2023 the third directive was issued.

[118] Where an issue has been litigated to finality between the parties, it is not permissible for a litigant to seek to obtain a reversal of the decision of the same question by advancing different reasons.[100] This, in my view, is exactly what the phantom and third directives seek to do. New justifications are advanced for the continued implementation of the decision not to pay for past medical expenses on the ground that it has already been paid by the victim's medical aid scheme in whole or in part. Applying the *African Farms*[101] principle, it is simply not open to the RAF to repeat

[99] *Coughlan N.O. v Road Accident Fund* [2015] ZACC 9; 2015 (4) SA 1 (CC); 2015 (6) BCLR 676 (CC), at para 59 the Constitutional Court relied on section 18 in a different context to support this conclusion.
[100] Id at 563 A-D. The first judgment contains a pithy summary of this principle in para 54.
[101] Id.

essentially the same decision on a different basis, in circumstances where the decision has been finally held to be unlawful, has been interdicted by Mbongwe J and the RAF's attempts to seek leave to appeal against that finding have come to naught.

[119] Discovery Health has litigated on the issue, has obtained a final order that the decision was unlawful, and it was on that basis that the directive giving effect to that decision was set aside.

[120] I thus find that the principle of *res judicata* precludes the RAF from raising the arguments advanced in the phantom and third directives. As summarised in the first judgment, this principle applies even where the previous judgment may be incorrect. Finality is key. Whether the judgment is good, bad or indifferent, the principle has application to prevent endless litigation and abuses of Court processes which would arise from the re-litigation of issues between the same parties.

[121] I interpose to mention that the decision of Mbongwe J is not only binding as between Discovery Health and the RAF, but applies as against everyone. The judgment is one *in rem*[102] with a public character that transcends the interests of the litigating parties[103] and is "*conclusive against all persons whether parties or strangers to the litigation"*.[104] But this reality does not alter the application of the principle of *res judicata* in the circumstances of this case.

[122] It follows from this finding that in implementing the phantom and third directives, the RAF is in breach of the interdict granted by Mbongwe J.

[123] By virtue of my findings herein being that the RAF's new justifications for non-payment fall within the reach of the Mbongwe J order and judgment, I find that it is not permissible for the RAF to relitigate the issues decided by Mbongwe J on the basis of its new justifications. It is accordingly unnecessary for me to engage with the merits of the new justifications dealt with in the first judgment. I express no views on the sustainability of such new justifications.

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[102] *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd* [2018] ZASCA 77; [2018] 3 All SA 605 (SCA) ("*Lombardy*") at para 28.
[103] *Airports Company South Africa v Big Five Duty Free (Pty) Limited* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) at para 2.
[104] *Lombardy* above n 102 at para 28.

The Final Interdict

[124] Discovery Health seeks final interdictory relief in that it seeks to interdict the RAF from implementing the phantom and third directives.

[125] In order to obtain such relief, Discovery Health must establish the existence of a clear right, prove the occurrence or reasonable apprehension of an injury and demonstrate the absence of another satisfactory remedy.[105] The RAF argues that Discovery Health has not met these requirements.

[126] The RAF contends that Discovery Health does not have a right to interdict the RAF and its CEO from issuing directives. This is so, it argues, because sections 4 and 12 of the RAF Act permits it to issue directives that assist the RAF in discharging its statutory obligations in terms of the RAF Act.

[127] The authority to issue directives does not extend to rewriting the RAF Act or issuing directives directly contrary to the purpose of the RAF Act. My finding that such directives are but sub-sets of the first directive and hence hit by the Mbongwe J judgment, constitutes a finding of a clear right.

[128] The RAF argues that both the phantom and third directives are yet to be subjected to court scrutiny and therefore remain valid and binding. The RAF contends that it is incompetent for Discovery Health to seek to interdict the implementation of the phantom and third directives when it has not sought to review such directives.

[129] The RAF contends that because the phantom and third directives constitute administrative action, *Oudekraal* requires them to be treated as valid unless set aside by a court, as Discovery Health did with the first directive.

[130] As the RAF raises *Oudekraal* as support for the conclusion that even if the subject matter of the Mbongwe J judgment embraces and encompasses the subject matter of the later two directives, those two directives still have to be set aside on review before they can be said to be without legal effect. I am obliged to consider the application of *Oudekraal* in this context as well as the subsequent decisions in *Kirland*,

[105] *Setlogelo v Setlogelo* 1914 AD 221.

Merafong[106] and *Aquila Steel*, which, in my view, reveal that this premise, in the circumstances of this case, is incorrect.

[131] As a starting point, in *Oudekraal*, the Supreme Court of Appeal did not conclude that unlawful administrative action is always valid until set aside. If this were so the Courts would always be one step behind an agile administrator.

[132] In *Kirland*, the Constitutional Court held:

> "The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process."[107]

And:

> "The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. **The courts alone, and not public officials, are the arbiters of legality**."[108] (Emphasis provided.)

[133] In *Merafong*, the Constitutional Court confirmed *Oudekraal* and *Kirland* but importantly it explained what the decisions did not do:

> "But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful – and constitutionally invalid – administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.
>
> *Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. **As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of**

[106] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) ("*Merafong*").
[107] *Kirland* above n 86 at para 101.
[108] Id at para 103.

> **proactivity on public authorities. It all depends on the circumstances."**[109] (Emphasis provided.)

[134] In my view this is an instance where the administrative decisions (embodied in the phantom and third RAF directives) should be treated as invalid even though no action has been taken to strike them down. In *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others,*[110] the majority of the Constitutional Court considered the *Oudekraal* principle, along with its decisions in *Kirland* and *Merafong*. In *Aquila Steel*, a mining prospecting right was granted through unlawful administrative action and at a later stage, a further prospecting right was granted to another party following their application despite the relevant Act prohibiting the acceptance of such an application when a prospecting right had already been granted. The party who held the right first, relied on *Oudekraal* and *Kirland* to argue that even if they were unlawfully granted the right, the second party could not be granted the right on the basis of its (the first party's) right being a nullity. The majority of the Constitutional Court rejected this argument stating:

> "This is not right. *Kirland* and *Oudekraal* which it confirmed, do not make invalid administrative action legally valid. Nor do they invest them retrospectively with power to thwart rightful and lawful processes from prevailing at the time they took place. *Kirland* and *Oudekraal* are concerned with constraining misuse of the bureaucracy's power. They recognise that administrative action, even though invalid, may give rise to consequences that must be held lawful. As explained in *Merafong*, the import of these decisions was that government cannot simply ignore its own seemingly binding decisions on the basis that they are invalid. The validity or invalidity of a decision has to be tested in appropriate proceedings. **And the sole power to pronounce that decision defective, and therefore invalid, lies with the courts. The lodestar principle is that the courts' role in determining legality is pre-eminent and exclusive.** Government officials may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them. And, unless set aside, a decision erroneously taken may well continue to have lawful consequences."[111] (Emphasis provided.)

[135] But what exactly are we dealing with here? Discovery Health, armed with a court order, approached this Court to declare the RAF and its CEO in contempt of such order or, at the very least, in breach thereof because the RAF was continuing to repudiate past medical expenses claims where such expenses had been paid by

[109] *Merafong* above n 106 at paras 43-44.
[110] [2019] ZACC 5; 2019 (4) BCLR 429 (CC); 2019 (3) SA 621 (CC) ("*Aquila Steel*").
[111] Id at para 94.

medical aid schemes. At the hearing, there was no dispute that the RAF had been implementing the phantom directive at least from the 18th of October 2023 when the Constitutional Court spoke. This was allegedly justified because it, the party who had driven the litigation to the apex Court and who had filed affidavits in various courts claiming that the Constitutional Court decision in the Mbongwe matter would be *determinative of the question of whether the RAF has a duty to reimburse victims for claims for past medical expenses which had been paid by the medical aid scheme,*[112] now revealed that it had secretly issued the phantom and third directives, containing "new and better" reasons for not complying with the Mbongwe J order.

[136] The policy consideration articulated by Justice Cameron in *Kirland*, being that public officials may not take the law into their own hands when seeking to override conduct with which they disagree, he explained, arises from the rule of law. He emphasised that the courts alone, and not public officials, are the arbiters of legality. But the courts in this case had already ruled on the subject matter of the phantom and third directives, if not on the actual directives themselves. Subsequent directives cannot be issued to overrule the Constitutional Court's decisions or any other court for that matter. Once a declaration of invalidity of administrative action has been issued by the Highest Court that action is forever invalid unless and until the legislation changes. Nothing that the administrator (as opposed to the legislature) can do can change that. In *Pheko v Ekurhuleni City*,[113] the Constitutional Court held:

> "The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery."

[137] In my view, this Court should not condone the RAF's stratagem of using subsequent directives on the same subject matter to subvert the judgment of Mbongwe J, upheld as it was by the Highest Court. A public body cannot insulate itself from the law by adopting a policy not to comply with a court order. It is not open

[112] These instances have been listed in para 142 of this judgment.
[113] [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) at para 1.

to an organ of state whose conduct has been found to be unlawful by the courts to repeat that conduct in smaller parts if it can conjure up a new justification for doing so. If this were possible, it would enable organs of state to perpetually evade compliance with judgments of our courts by repeating their unlawful decisions and generating new justifications. It would undermine the effectiveness of our judicial system and turn the rule of law into a meaningless farce as an applicant would have to bring fresh review and interdictory proceedings, again and again, thereby permitting such organ of state to forever evade compliance with the law. That this was recognised by the RAF is evident from its secrecy in handling the new directives. That is contrary to the constitutional value of transparency, of "government in the sunshine" and is a hallmark of unconstitutionality.

[138] The *Oudekraal* principle, is "not an immutable rule, to be enforced dogmatically and indiscriminately. Like most rules of administrative law, it is subject to qualification".[114] To misapply the *Oudekraal* principle in this case would, I find, permit abuses of power and an evasion of the Court's role as sole arbiter of lawfulness of administrative action – the exact conduct that is sought to be avoided and cautioned against by the Constitutional Court in *Kirland*.[115] This finding dovetails with the policy considerations underpinning the doctrine of *res judicata*, being to prevent abuses of Court processes which would arise from the re-litigation of issues between the same parties. If I, as I do, rule that the issues are the same, such finding constitutes a bar to arguing such issues again. It certainly does not lie in the mouth of the RAF to say that the court is halted in its tracks from ruling that the conduct is prohibited in future until another court finds (again) that such conduct is unlawful. It has already ruled on it.

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

[140] Discovery Health has a judgment and order in its pocket which has walked through our Courts right to the apex court. It is seeking enforcement of that judgment and order. In my view, the conduct of the respondents is both inimical to, and seriously

[114] *Pretorius* above n 84 at page 6.
[115] *Kirland* above n 86 at para 103.

subversive of, a sound and efficient system of public administration. Allowing the RAF to "bypass" compliance with a judgment in these circumstances by these means would open the floodgates to directives and similar internal documents being used as a means of circumventing compliance with court orders.

[141] By conducting itself in this manner, the RAF is violating its obligations as an organ of state.[116] The RAF should conduct itself in accordance with its obligations in terms of sections 165(3), (4) and (5) of the Constitution.[117] Not only did the RAF breach its obligations, it did so by concealing its conduct from the Constitutional Court that decided its application for leave to appeal against the Mbongwe J judgment.

[142] The RAF has not explained why the Constitutional Court was not told that the appeal against the Mbongwe J judgment would, on the RAF's understanding of the state of play, be moot. If the phantom directive had the effect that is now contended for, being that it did not fall under the reach of the Mbongwe J order, why incur the costs of applying for leave to appeal? Why not tell the Constitutional Court that its scarce judicial resources should be applied to cases where the outcome has some practical effect and not to the one under consideration. Not only was the Constitutional Court not told of the phantom directive which allegedly rendered the Mbongwe J judgment moot in whole or in part, but the lower courts were repeatedly informed by the RAF that the Constitutional Court's decision would be *finally determinative of its duty to compensate claimants for past medical expenses paid by medical aid schemes*. In this court, the acting regional general manager of the Johannesburg region of the RAF deposed to an affidavit in which he confirmed that the Constitutional Court's decision in the Mbongwe J matter would be *determinative of the question of whether the RAF has a duty to reimburse victims for claims for past medical expenses which had been paid by the medical aid scheme*. On 22 August 2023, the acting regional manager of the RAF's Johannesburg branch again deposed to an affidavit in this court stating under oath that the Constitutional Court's determination of the Mbongwe appeal was determinative of the RAF's duty to pay for past medical

[116] It is also in breach of section 41 of the Constitution.
[117] These provide that:
"(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

expenses where the claimants' medical aid schemes have already paid for those. The deponent expressly undertook that if the Constitutional Court decides against the RAF, the RAF will make payment to the claimants for their past medical expenses. On 4 October 2023, the RAF's attorney of record deposed to an affidavit in this court, again confirming that the Constitutional Court's decision would be "dispositive" of the RAF's liability to pay for past medical expenses previously paid by medical aid schemes.

[143] Discovery Health is the 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. Discovery Health administers 18 restricted medical schemes, as well as Discovery Health Medical Scheme, the largest open medical scheme in South Africa with an open scheme market share of 57.1% covering a combined 3 461 328 beneficiaries as at 31 December 2020.

[144] Discovery Health launched the litigation before Mbongwe J in its own interest in terms of section 38(a), in the interest of its clients as a class of persons in terms of section 38(c), in the public interest in terms of section 38(d) and, in these proceedings, in addition to the section 38 interests, to vindicate section 165 of the Constitution.

[145] Mbongwe J recorded in his judgment that Discovery Health, its client medical schemes and their clients (the members of the schemes administered by the administrator Discovery Health) have a right to have members' claims assessed and processed lawfully and in accordance with the RAF Act. He also listed the consequences which would be visited on Discovery Health's scheme's members and their clients if the first directive issued by the RAF were implemented. He recorded that the rejection of claims to pay past medical expenses to claimants meant that medical aid schemes would no longer be receiving reimbursement for past medical expenses incurred for medical treatment of their clients whose rights to recover same from the RAF stood to be taken away from them; medical aid schemes would suffer a significant, unplanned loss of income that would require that they re-assess and increase monthly premiums payable by their clients to ensure the sustainability of the schemes; members would be prejudiced in that they would contribute to the RAF fuel levy but would not receive full compensation from the RAF in the event of sustaining injuries caused by the wrong-doing of a negligent driver; medical aid schemes might find it viable to exclude claims for medical expenses arising from motor vehicle

accidents which would entitle RAF claimants to claim for past medical expenses. This in turn, would undermine the very purpose of the schemes as members would be forced to incur the costs upfront and claim later.

[146] These consequences would seem to me to flow from the phantom and the third directives as they did from the first directive save that medical aid schemes would of course not be entitled to exclude claims for PMB's and EMC's arising from motor vehicle accidents as the MSA obliges them to make payment of such costs (whereafter they can claim for their members). This then satisfying the second requirement for a final interdict being the occurrence or reasonable apprehension of an injury. There can be no suggestion of an alternative remedy if one accepts that Mbongwe J's order was breached which I do.

Relief to be granted

[147] The applicant seeks a declarator that the respondents are in breach of the Mbongwe J order. The granting of this relief would follow upon a finding that the "defences" embodied in the phantom and third directives are *res judicata*.

[148] It would also follow upon a finding that the RAF interfered with the functioning of the courts – which I have found. In my view, the RAF has sought to make a mockery of the courts by issuing directives to evade what its statute obliges it to do, to enable it not to comply with a court order and it has kept relevant information from the Constitutional Court (the content and existence of the phantom directive). This conduct undermines the court processes and does little to ensure the independence, dignity, and effectiveness of the courts. All of this conduct evidences a disregard for the binding nature of court orders in general and Mbongwe J's judgment in particular. All of these findings would entitle the applicant to a declarator as sought being that the RAF is in breach of their constitutional obligations to adhere to and take all necessary steps to give effect to the Mbongwe J judgment.

[149] The applicant also seeks relief that the RAF and its CEO refrain from taking steps to implement the phantom and third directives. That relief would be competent on my finding that they traverse matter which is *res judicata* and that they breach sections 165(3), (4) and (5) of the Constitution.

[150] Section 172(1)(b) of the Constitution is triggered in all constitutional matters and the court's powers under this provision are not dependant on the court making a declaration of invalidity[118] under section 172(1)(a) which provides:

> "When deciding a constitutional matter within its powers, a court—
> (a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make an order that is just and equitable, including—
> (i) An order limiting the retrospective effect of the declaration of invalidity; and
> (ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[151] This court has a wide discretionary power to make any order that is just and equitable. "*The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function"*.[119] If I commanded the majority, I would have afforded the parties the opportunity to file heads of argument on the question whether this court should order remedial measures for claims repudiated on the basis of the phantom and third directives during the period 30 October 2023 to date of the granting of the interdictory order, the nature of such relief and matters ancillary thereto.

[152] The egregious conduct of the RAF described herein warrants the granting of a punitive costs order. In proposing the costs order, which includes a personal costs order against the second respondent, I have regard to the discretion I have which I exercise in favour of Discovery Health based on the facts which were placed before this court. I find the RAF's conduct described herein to be reprehensible and falling within the category of "exceptional" warranting the costs order sought. I find that the RAF and its CEO played a game of "catch me if you can" with Discovery Health by keeping its phantom directive concealed from all until the filing of the answering affidavit. The timing of the third directive suggests that it too was lying in wait to be sprung on Discovery Health, the medical schemes and the unsuspecting claimants. As I have observed, the timing is eloquent as to intention. The Constitutional Court refused the RAF leave to appeal on 18 October 2023 and the Third Directive was

[118] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).
[119] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

issued on 2 November 2023. I find it extraordinary, given the litigation history between the parties that such a “cloak and dagger” approach was followed.

[153] If I commanded the majority, I would have granted the following order:

153.1. It is declared that the first and second respondents are in breach of the court order of 27 October 2022 under case number 2022/016179 (*the judgment*).

153.2. It is declared that the first and second respondents are in breach of their constitutional obligations to adhere to and take all necessary steps to give effect to the judgment.

153.3. The first and second respondents are directed:

153.3.1. to take all steps necessary to give effect to the judgment, within 5 days of this order; and

153.3.2. within 15 days from the date of service of this order to report to this Court and the applicant's attorney in writing and on oath its compliance with paragraph 153.3.1 above and this Court order.

153.4. The first and second respondents are ordered to refrain from taking any steps to implement the directives issued by the second respondent dated 13 April 2023 and 2 November 2023 (*the further directives*).

153.5. The first respondent is ordered to refrain from rejecting, and failing to process and pay, claims for past medical expenses on the basis that the claimant's medical aid scheme had already paid for the medical expenses incurred by the claimant, including for prescribed minimum benefits and emergency medical conditions.

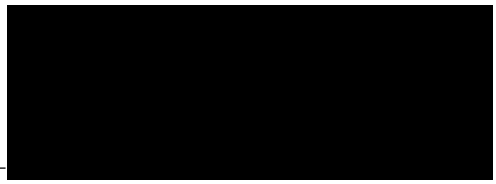
153.6. In respect of any claim for compensation under the Road Accident Fund Act 56 of 1996 that is currently being processed by the first respondent as if the further directives are applicable, the first respondent is ordered to immediately process the claim on the basis that the further directives are not applicable.

153.7. The parties are to file heads of argument on the question whether this court should order remedial measures for claims repudiated on the basis of the further directives during the period 30 October 2023 to date of the granting of this order, the nature of such relief and matters

ancillary thereto. Such heads to be filed within 20 days of the granting of this order whereafter this matter is to be enrolled for hearing.

153.8. The costs of this application, including the costs of two counsel where so employed, are to be paid as between attorney and client by the first respondent and jointly and severally by the second respondent in his personal capacity, the one paying, the other to be absolved.

153.9. The applicant may re-enrol this matter, if need be, on duly supplemented papers, for any further relief arising out of the orders above and the first and second respondents' compliance or non-compliance therewith.



INGRID OPPERMAN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicant:	W Trengove SC with him N Ferreira; M Salukazana and D Sive instructed by Edward Nathan Sonnenbergs Inc
For the First Respondent:	C Puckrin SC with him A Ngidi instructed by Malatji & Co Attorneys
For the Second Respondent:	JG Cilliers SC with him MT Shepherd instructed by Mpoyana Ledwaba Attorneys

Date of hearing: 21 June 2024

Date of judgment: 17 December 2024