Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2020/12687

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

DATE 03/02/2025

In the matter between:

NTOKOZO FRANCINA MACHI PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

NGENO, AJ

[1] Plaintiff's claim against the defendant is for damages suffered as a result of personal injuries sustained in a motor vehicle accident that occurred on 13 April 2019 at N2, Main Harding Road, Izingolweni KwaZulu Natal Province. Plaintiff sues herein in her personal capacity.

[2] At the time of the accident, the plaintiff was a passenger in a motor vehicle bearing registration numbers: ND [redacted] driven at the time by her husband Vusumuzi Abednigo Machi (the insured driver).

[3] The sole cause of the accident was as a result of the negligent driving of the insured driver who lost control of the motor vehicle while he was driving.

[4] Following the accident, the plaintiff was taken by ambulance from the scene to Hibiscus Hospital. She was diagnosed to have suffered bodily injuries which included Orif Fermus, Debridement compound wounds, Bilateral Orif Tibias and External fixation on the right ankle. She was hospitalised for two months.

[5] At the time of the accident, she was 52 years and was self-employed and owned a spaza shop. She also had a scholar transport business.

[6] The defendant conceded liability on merits on the basis that it was liable to pay the plaintiff 100% of proven or agreed damages.

[7] The parties have already settled loss of earnings and the defendant has also provided the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act[1] for payment of future medical and related expenses.

[8] The only issue that remains to be resolved between the parties is the issue relating to general damages and past medical expenses. Accordingly, this court is called upon to determine the appropriate award, if any, that the defendant will be liable to pay the plaintiff for these specific head of damages.

[9] In determining the award, regard will be had to the nature and extent of injuries as borne out by hospital records, expert reports and comparable decided cases on similar injuries.

[1] 56 of 1996.

[10] In support of her claim, the plaintiff appointed various experts which include an Orthopaedic Surgeon, Plastic Surgeon, Occupational Therapist, Industrial Psychologist and an Actuary. The summary of their findings will be discussed below.

[11] The defendant did not file any expert reports nor did it call witnesses to testify on its behalf. Accordingly, the defendant has no version and does not dispute the evidence contained in plaintiff's expert reports.

[12] The plaintiff made an application for the factual evidence contained in her affidavit and the reports of her experts to be admitted into evidence in terms of rule 38(2) of the Uniform rules.

[13] Although the defendant had initially entered a notice to oppose the rule 38(2) application, at the commencement of the trial, counsel for the defendant made submissions to the effect that the defendant was no longer persisting with its opposition to the application.

[14] In the absence of opposition to the application and after having considered and satisfied myself that a proper case had been made, I, accordingly, granted the application.

[15] The plaintiff also testified in person. The issues relating to the date and place of the accident are largely common cause.

[16] The plaintiff testified that as a result of the accident, she has and is still experiencing challenges with her ankles and her feet are no longer flexible as she is no longer able to walk on her own. She testified that she feels continuous pain because of the iron rods that have been put in her knees.

[17] She testified that she asked the doctor to remove the iron rod from her knees but was told by the doctor that she will be severely paralyzed if the rods were to be removed.

[18] She testified that before the accident, she was a busy person who owned a spaza shop and she has now been negatively affected by the accident. After the accident, she cannot do anything and is supported by her sisters.

[19] She testified further that she experiences severe pain at night and sometimes uses pain tablets. She can walk using crutches for a short distance. She also uses a walker and a wheelchair.

Orthopaedic surgeon

[20] According to Dr Mjuza, the orthopaedic surgeon appointed by the plaintiff, following the accident the latter suffered multiple injuries which include lacerations on the right elbow medial, fractures of both femurs, injuries on both ankles, fractures of both legs and blunt abdominal injuries.

[21] The sequelae of the injury include severe right knee pains, she will no longer be able to walk or stand without support due to severe pain on both legs and ankles and has pain in the left hand middle and ring fingers and the right thigh.

[22] In his report, Dr Mjuza states that the medical treatment the plaintiff received includes analgesics, x-rays, CT scans, ICU care, multiple operations to lower limbs, mobilization with a wheelchair and four leg walker.

[23] He concludes by stating that the septic abdominal scar, scars to the lower limbs and femoral structures are healed. The equinus on the left ankle was fixed and arthrodesis was also performed as well on the same ankle.

Occupational Therapist

[24] In the report prepared by Thembisile Mahlangu, the occupational therapist appointed by the plaintiff, it is stated that the plaintiff had an external fixator on the right lower leg which was later removed. She also states that the plaintiff was issued with a wheelchair and a walking frame.

[25] She states that the plaintiff continues to take pain medication over the counter. She notes that although the plaintiff denied taking any chronic medication, she had been taking anti-retroviral medication since 2016.

[26] In her report, Ms Mahlangu also states that the plaintiff was admitted at ICU on 13 April 2019 and was moved to the ward on 17 April 2019. She also notes that the plaintiff had a colostomy bag and catheter when she was hospitalised.

[27] She further states that the plaintiff has and experiences challenges when walking and must use a walking frame for balance. She cannot sustain standing for a long time and has difficulties in executing daily activities.

[28] She also notes that the plaintiff has scars on the lateral part of each knee, lateral and medial part of each ankle, abdomen and the right upper limb. She states that the plaintiff uses a basin to wash herself and cannot take a shower. She sits on the toilet seat when she bathes.

Plastic and Reconstructive Surgeon

[29] According to Dr Lalbahadur, the plastic and reconstructive surgeon, the plaintiff had multiple operations to surgically reduce and internally fix the fractures of both the femurs and the legs.

[30] She has extensive scarring involving the arm, elbow, abdomen, thigh and legs together with the left ankle.

[31] The scars cannot be improved by surgical revision and should be accepted as a serious permanent disfigurement.

[32] On the modified Oswestry Low Pain Disability Questionnaire, a score of 66% shows that the plaintiff is crippled.

General Damages

[33] In her particulars of claim, the plaintiff claimed an amount of R800 000.00 for pain and suffering, partial and chronic disability and loss of amenities of life.

[34] On 16 October 2024, the plaintiff issued a notice to amend her particulars of claim in respect of general damages to an amount of R1 300 000.00.

[35] The defendant did not object to the said amendment within the ten-day period referred to in rule 28(2) after receipt of the notice to amend[2]. The ten-day period within which to raise an objection by the party affected by the amendment expired on 30 October 2024.

[36] What would have followed after the lapse of the ten-day period contemplated in rule 28(2) was for the plaintiff to effect the amendment in terms of rule 28(5)[3].

[37] It is apposite to mention that the amendment is effected by delivery of each relevant page in its amended form[4]. It should follow that if the relevant pages in the amended form are not delivered or if there is no application for leave to amend made to the court, the consequences are that the notice to amend would become ineffectual.

[38] At the commencement of the trial, counsel for the defendant made an application for postponement of the trial on the basis that the matter was not ripe for hearing as the amendment afforded them an opportunity as a party affected by the amendment to make any consequential adjustment to the documents filed by them as contemplated in rule 28(8).

[39] The plaintiff opposed the application for postponement and viewed the attempt by the defendant as a dilatory tactic. I refused the application for postponement. The reasons for refusal of the application for postponement were that the

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[2] Rule 28(2) of the uniforms rule reads: "The notice referred to in sub rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected".
[3] Rule 28(5) of the uniform rule reads: "If no objection is delivered as contemplated in sub rule (4), every party who received notice of amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in sub rule (2), effect the amendment as contemplated in sub rule (7).
[4] Rule 28(7) of the uniform rules.

defendant did not appoint any experts, its plea contained bare denials and did not offer a version.

[40] As at the date of commencement of trial, the amendment of the plaintiff's particulars of claim relating to quantum on the general damages as contemplated in rule 28(5) had not been effected. Worse, even during the trial, there was never an application made by the plaintiff to seek leave of the court to effect the amendment.

[41] I am aware that the fact of the amendment of the plaintiff's particulars of claim never being effected is not of her making but the negligence of her legal representatives. I am, however, constrained by the knowledge that amendment of pleadings is effected in terms of the rules of court and failure to comply renders the amendment ineffectual.

[42] In view of the fact that the amendment of pleadings in relation to the quantum on general damages was never effected, this court will not be in a position to consider the proposed amount of R1 300 000.00 referred to in the notice to amend in respect of general damages. Accordingly, the matter will be determined on the basis of the particulars of claim unamended.

[43] What follows below is the assessment of damages that the plaintiff suffered in respect of general damages, regard being had to the nature and extent of injuries sustained and comparative cases.

[44] The nature of injuries that the plaintiff sustained as a result of the collision are not in dispute. The injuries, and there is no doubt, are very serious. The plaintiff suffered multiple orthopaedic injuries which resulted in severe pain and multiple operations.

[45] The plaintiff was hospitalised from 13 April 2019 to 08 June 2019. This is a period of almost two months. From 13 April 2019 to 17 April 2019, she was placed in the intensive care unit of the hospital.

[46] As already indicated above, the plaintiff was diagnosed to have suffered blunt abdominal injuries, laceration on right elbow, closed fractures on both femurs, left tibial plateau fracture, open fracture on the right leg and fracture dislocation of the left ankle.

[47] The plaintiff had an external fixator on the right lower leg even though it was later removed. According to the orthopaedic surgeon the whole person impairment (WPI) is 60%.

[48] According to the Plastic and Reconstructive Surgeon, plaintiff had multiple operations to surgically reduce and internally fix the fractures of both the femurs and the legs. She has extensive scarring involving the right arm, elbow, abdomen, thighs and legs together with the left ankle. The Plastic and Reconstructive Surgeon states that the scars cannot be improved by surgical revision and should be accepted as a serious permanent disfigurement.

[49] The Plastic and Reconstructive Surgeon also states that on the modified Oswestry Low Back Pain Disability Questionnaire, a score of 66% shows that she is crippled.

[50] She underwent operations to fix her ankles and had a laparotomy performed for his abdominal injuries.

[51] She received acute care in casualty and later admitted for definitive care of her injuries.

[52] She continues to suffer pain on her back and lower limbs and uses a walking frame and a wheelchair. She was mobilised in a wheelchair for many months and later prescribed a four-leg walker which she uses to date.

[53] When it comes to bathing, she still experiences difficulties as she uses a basin and can no longer take a shower. She must sit on the toilet seat when bathing.

[54] She has difficulties with executing daily activities and cannot carry or move objects around the house. She can only perform some of the activities while sitting down. She still uses the wheelchair when going to the shops.

[55] She cannot sustain standing for long and can only use warm water on her left foot as it is sensitive. She suffers both emotional and physical challenges. She feels very sad as she has become dependent on others.

[56] Since there is no evidence to the contrary from the defendant, I have no difficulty in accepting the evidence from all the experts appointed by the plaintiff. I also have no difficulty in accepting the plaintiff's evidence as it was uncontested.

[57] On the conspectus of all the evidence as contained in the experts' reports, I come to the conclusion that the accident has had a serious impact on the livelihood of the plaintiff. This is so, because the uncontested evidence points to the fact that as a result of the accident, the whole person impairment (WPI) is 60%, a percentage that is double the threshold set by the Road Accident Fund in order to qualify for general damages.

[58] It is trite that the court has a general discretion on the amount it should award for damages. Such discretion must be exercised judiciously and not arbitrarily. In exercising its discretion, the court must be guided by what is fair and just in the circumstances of a particular case.

[59] In assessing damages, the court must have regard to comparable cases. In *Protea Assurance Co Ltd vs Lamb*[5], the court had the following to say:

> "Comparable cases, when available should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are relevant in the assessment of general damages."

[5] 1971(1) SA 530 A.

[60] It must be emphasized that comparable cases merely serve as a guideline as each matter must be assessed and determined on its own merits. They are in no way binding on the court when it makes a determination of a fair and reasonable compensation. They only serve as a useful reference for what the other courts have deemed appropriate but their significance is restricted to that purpose alone[6].

[61] Counsel for the plaintiff has referred me to the matter of *Fouche v RAF*[7], in that matter plaintiff was awarded R1 400 000.00 and the current value is R1 954 249.00. Although the injuries sustained by the plaintiff in that case are substantially similar to those sustained by the plaintiff in this case, this case is distinguishable from that case in that the plaintiff was not found to have suffered any brain injury, loss of teeth, contusion of chest, laceration of spleen, laceration of liver and other lacerations I have not mentioned herein.

[62] I was also referred by the plaintiff's counsel to the matter of *Tsotetsi v Road Accident Fund*[8] where the plaintiff was awarded an amount of R850 000.00 for general damages. The current value of the award is R1 263 631.00. This matter even though the injuries are not exactly the same as in *casu*, is substantially similar to the matter under consideration. The plaintiff was hospitalised for three months and had multiple operations. The plaintiff in this matter was hospitalised for almost two months and had multiple operations. I have also compared the injuries sustained by the plaintiffs in both cases and I am of the view that the injuries sustained by the plaintiff in the matter under consideration are more serious.

[63] I have found the matter of *Noble v Road Accident Fund*[9] to be instructive in the determination of a fair and just compensation to be awarded to the plaintiff. In that matter, the plaintiff was found to have sustained various fractures in the

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[6] *Minister of Safety and Security v Seymour* 2006(6) SA 320 SCA; *Allie v Road Accident Fund* Allie v Road Accident Fund [2003] 1 SA 144 (C); [2003] 1 SA 144 (C).
[7] (9619/2015) [2017] ZAGPPHC 1253 (16 August 2017).
[8] (7510/2013) [2016] ZAGPPHC 463 (1 June 2016).
[9] (39254/2008) [2011] ZAGPJHC 6 (24/02/2011).

ankle, right foot with scarring, right femur, right hand. These fractures are substantially similar to those sustained by the plaintiff in this matter. The award was R600 000.00 and the current value is R1 212 000.00.

[64] The defendant's counsel referred me to the matter of *Schmidt vs Road Accident Fund*[10] and contended that the amount of R600 000.00 awarded in that matter was fair and just. The current value of that award is R1 200 000.00. By suggesting this amount, defendant's counsel was conceding that the injuries are serious.

[65] I have taken into account multiple impairments and plaintiff's residual functioning which came as a result of the accident together with the fact that the accident has left the plaintiff with permanent scars which should be taken as permanent disfigurement. I have also taken into account the plaintiff's emotional state following the accident.

[66] In the circumstances and in view of the nature of the injuries sustained by the plaintiff and the sequelae thereof, I come to the conclusion that the fair and just amount of compensation for injuries sustained by the plaintiff for general damages would have been R1 300 000.00. I, however, and for the reasons I have stated above when I dealt with plaintiff's notice to amend, cannot award more than what plaintiff has asked for in her particulars of claim. Accordingly, plaintiff is entitled to compensation of an amount of R800 000.00 for general damages.

Past Medical Expenses

[67] I now turn to deal with the damages relating to past medical expenses incurred by the plaintiff due to the injuries sustained. It is common cause that following the accident, plaintiff had received medical treatment.

[68] During the trial and in order to prove damages for past medical expenses, plaintiff wanted to rely on the affidavit by Ms Olga Isolde Scott who is a senior manager at Medscheme. Ms Olga Isolde had in the affidavit referred to a list of vouchers

[10] 2006 JDR 1065 (W).

as evidence that plaintiff was treated for the injuries sustained as a result of the accident and those vouchers were settled by the medical scheme, Bonitas.

[69] Counsel for the defendant objected to the determination of the damages relating to past medical expenses on the basis that first, there was no application in terms of rule 38(2) for the evidence contained in the affidavit of Olga Isolde Scott to be admitted as real evidence and second, the vouchers relied upon by the plaintiff were never formally discovered in terms of rule 35 of the uniform rules.

[70] Even though the vouchers were not discovered, evidence points to the fact that the list of vouchers was sent to the defendant by email on 26 July 2021. The defendant has therefore been in possession of the vouchers for more than three years and would not have been taken by surprise when the said vouchers were used as evidence to prove the plaintiff's claim.

[71] The defendant insisted that the plaintiff ought to have followed the court rules as contemplated in rule 35 of the Uniform rules if she wanted to use the vouchers as evidence to prove past medical expenses. When the court enquired how the defendant would be prejudiced by the evidence relating to the vouchers, counsel for the defendant could not show any prejudice that the defendant would suffer.

[72] The object of discovery as contemplated in rule 35 of the uniform rules is to make sure that all the parties involved in litigation are aware of the documents that are going to be used in the trial. The purpose is to eliminate surprise.

[73] The court, in the exercise of its discretion and after satisfying itself that there was no prejudice occasioned by the non-discovery of the vouchers on the defendant, allowed the plaintiff to lead evidence on the vouchers.

[74] In proving her claim, the plaintiff called Olga Isolde Scott, referred to above, to testify on her behalf. She testified that she is responsible for identifying motor vehicle claims for Medscheme.

[75] She testified that the plaintiff is a registered member of Bonitas, a medical scheme that is administered by Medscheme. She testified that Bonitas paid all the medical expenses as evidenced by vouchers that were submitted to this court to prove plaintiff's claim. The total amount of the plaintiff's claim as evidenced by the vouchers is R 1 425 849.74.

[76] I have earlier referred to an affidavit in respect of which no application was brought in terms of rule 38(2) for it to be accepted as real evidence. She confirmed that she was the deponent to the said affidavit.

[77] She testified that there is an agreement between the medical scheme and its members that the amount paid by the medical scheme for the treatment of the member's injuries arising out of negligent driving of a motor vehicle shall be repaid by that member to the medical scheme upon the member receiving compensation from the defendant. That agreement applies to the plaintiff as well.

[78] She testified that the vouchers presented as evidence and which form part of the plaintiff's claim were all paid by the medical scheme. There is no dispute that the medical expenses incurred by the plaintiff were as a result of the treatment she received for her accident related injuries.

[79] In terms of section 17 of the Road Accident Fund Act, the defendant is liable to compensate claimants for all proven damages including past medical expenses.

[80] The question that the court must ask itself is whether vouchers already paid by the medical scheme should form part of the damages that have been suffered by the plaintiff. If the vouchers have already been paid by the medical scheme, can it be said that the plaintiff really suffered damages under those circumstances?

[81] The issue of whether the defendant is liable to pay disputed past medical expenses already paid by the medical scheme notably came up in our courts at

the Pretoria High Court in the litigation matter of the defendant and Discovery Health (Pty) Limited.[11]

[82] The applicant therein, Discovery Health (Pty) Ltd, sought an order setting aside the defendant's directive dated 12 August 2022 which was communicating to the managers of the defendant to reject all claims of past medical expenses already settled by medical schemes. In his judgment, Mbongwe J stated the following[12]:

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

[83] The clear understanding or agreement referred to in the passage above quoted from Mbongwe J's judgment is the same understanding or agreement that this judgment refers to in paragraph 81 above wherein the plaintiff entered into an agreement with Bonitas to the effect that once the defendant has settled the claim relating to past medical expenses, same will be repaid to the medical scheme.

[84] In his judgment, Mbongwe J makes it unequivocally clear that the defendant is liable to pay a claim relating to past medical expenses which the claimant has incurred for treatment of injuries arising out of the negligent driving of a motor vehicle even though the medical expenses had already been settled by the medical scheme. In his judgment and quoting from *D'Ambrosini v Bane* 2006(5) SA 121 (C), Mbongwe J states the following:

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

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[11] *Discovery Health (Pty) Limited v Road Accident Fund and Another* (2022/016179) [2022] ZAGPPHC 768 (26 October 2022).
[12] *Discovery Health (Pty) Limited v Road Accident Fund and Another* at para 6.

[85] Mbongwe J also quoted from *Rayi NO v Road Accident Fund* (9343/2000) [2010] ZAWCHC 30 as follows:

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

[86] The ratio of Mbongwe J in his judgment was influenced largely by the reasoning adopted by Van Zyl J in *D'Ambrosini v Bane* matter who reasoned as follows:

> "This is a fallacious argument in that it ignores the established fact that, at the time he suffered such injuries, the plaintiff was, and still is, a member of a medical aid scheme, which has, in fact, raised his premiums in return for all embracing cover. He has not received, nor is it envisaged that he will, in future, receive any benevolent or ex gratia payments from such scheme. There is hence no question that any payments made to him by the scheme are in the nature of deductible social insurance benefits. I am in respectful agreement with Gautschi AJ in the Thomson case (par [41] above) that a medical aid scheme, such as that of which the plaintiff is a member, is, in substance a form of insurance. In my view, it is no different from any other form of indemnity insurance which offers cover against injury or damage in return for premium payments."

[87] In his reasoning, Mbongwe J also adopted the principle which was set out in *Zysset and Others v Santam Ltd* 1996(1) SA 273 (C) at 277H-279C which stated as follows:

> "The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed...Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the

compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action.

Notwithstanding the aforegoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of the account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contract of insurance for which he has paid the premiums and (b) money and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff."

[88] There can be no doubt that the reasoning of Mbongwe J and the authorities that he quotes from to get to his conclusion make it abundantly clear that payments made by the medical scheme on behalf of its member can never be in the nature of deductible social benefits. This is so, because such benefits and obligations arise from his membership of the scheme which constitutes a type of indemnity insurance and are matters between the member and the scheme alone.

[89] The issue of disputed past medical expenses already paid by the medical scheme also came up in the recent judgment of the full court in *Discovery Health (Pty) Ltd v Road Accident Fund and Another*[13]. The dispute also involves the same parties, namely, Discovery Health (Pty) Limited and the defendant.

[90] In paragraph 45 of the full court's judgment penned by Judge President Mlambo J, the court stated the following:

"paragraphs 30-34 of Mbongwe Judgment are no authority for the proposition that medical schemes have a right of recovery from the RAF, through their members,

[13] (2023/117206) [2024] ZAGPPHC 1303 (17 December 2024).

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."[14]

[91] In reading the passage quoted from the full court's judgment, there is no doubt that the full court does not agree with the reasoning of Mbongwe J and the interpretation of the authorities he relies on. The reasoning behind the disagreement is simply that medical schemes cannot be compensated through their members what they have paid in discharge of their contractual and statutory obligations. The other reason for the disagreement is that the principle of subrogation does not apply to medical schemes as they are not insurance companies.

[92] The reasoning of the full court on the agreement concluded between the medical scheme and its member, which agreement has an effect of the application of the principle of subrogation is addressed in paragraph 46 of the judgment where the court relies on the following:

> "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."

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[14] *Discovery Health (Pty) Ltd v Road Accident Fund and Another* (2023/117206) [2024] ZAGPPHC 1303 (17 December 2024).

[93] In coming to the conclusion that the defendant is not bound by the agreement concluded between the medical scheme and its member, the full court further reasoned at paragraph 92 as follows:

> "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."

[94] The *ratio* of Mbongwe J and the judgments he relies on, is simply that the settlement of medical expenses by the medical scheme on behalf of its member cannot be taken into account when determining the appropriate amount of compensation relating to past medical expenses. The reasoning as I understand it, is that the premiums that a member pays to a medical scheme entitles that member to certain benefits and those benefits accrue for the benefit of the member alone and not for third parties such as the defendant.

[95] The judgment implies that if the defendant were to refuse to pay for the disputed past medical expenses, the refusal would amount to the defendant arrogating to itself a benefit that it otherwise is not entitled to.

[96] In the matter before me, I am not persuaded that such benefits would accrue to the member of the medical scheme for the simple reason that once the defendant has settled the claim relating to past medical expenses already paid by the medical scheme, the plaintiff is bound in terms of the agreement entered into by her and the medical scheme to pay the settled claim to the medical scheme. For

that reason, I am of the view that the benefit accrues to the medical scheme and not the plaintiff.

[97] It is for the above reason that I align myself with the judgment of the full court as penned by Mlambo JP that medical schemes are simply discharging an obligation placed upon them by the legislation and the contracts they enter into with their members. The contracts could only be binding *inter partes* and of course, if they are subjected to and pass legal scrutiny.

[98] I would have been prepared to award this claim pertaining to past medical expenses to the plaintiff had there been no agreement between her and the medical scheme. I am not prepared to award this claim, for the simple reason that I do not consider the payment of such award to the medical scheme upon settlement by the defendant as a benefit that accrues to the plaintiff as reasoned in the cases I quoted above.

[99] In any event, I, as a single judge, am bound by the doctrine of precedent to follow the decision of the full court. It is trite that a decision of a full bench of a division is binding on a single judge of the same division unless it is found to be clearly wrong. The decisions I have also referred to on this head of damages are decisions of single judges which rank lower than the decision of the full court.

[100] For the reasons I have set out above, the plaintiff's claim in respect of past medical expenses cannot succeed.

[101] I now come to the issue of costs. The plaintiff has been substantially successful in her claim against the defendant and for that reason the costs should follow the cause.

[102] In the result, I make the following order:

106.1. With regard to general damages, defendant is ordered to pay plaintiff an amount of R800 000.00;

106.2. The aforesaid amount must be paid within 180 days from the date of this order into the following Trust Bank Account:

[redacted] : [redacted]
[redacted] : [redacted]
[redacted] : [redacted]
[redacted] : [redacted]

106.3. The claim with regard to past medical expenses is dismissed.

106.4. Defendant is ordered to pay plaintiff's taxed or agreed costs on the High Court scale B including costs of the following experts:

106.4.1. Dr EA Mjuza (Orthopaedic surgeon);
106.4.2. Dr AM Lalbahadur (Plastic surgeon)
106.4.3. Ms T Mahlangu (Occupational Therapist);
106.4.4. Mr T Tsiu (Industrial Psychologist);
106.4.5. One Pangaea Actuaries

106.5. Plaintiff shall allow the defendant 180 days to pay the agreed or taxed costs after date of agreement or taxation failing which Plaintiff shall be entitled to recover interest on the costs at the rate of 11, 25% per annum from the date of the agreement or allocator.

[redacted] **T NGENO**

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

Heard on	:	05 & 06 November 2024
Judgment delivered on	:	03 February 2025

For the Plaintiff	:	Adv AE Smit Instructed by Tsietsi-Dlamini & Mahlathi Attorneys Alberton
For the Defendant	:	Mr TM Madasele Instructed by State Attorney, Johannesburg