IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 23481/2016

In the matter between:

MARK JONATHAN FOOKWE **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

Coram: Justice J Cloete

Heard: 21 and 22 February 2024, 18 March 2024

Delivered electronically: 29 April 2024

JUDGMENT

<u>CLOETE J</u>:

<u>Introduction</u>

[1] On 7 July 2015 the plaintiff, a self-employed businessman, sustained serious injuries in a motor collision which resulted, inter alia, in him permanently losing most of the use of his right arm. Summons was issued against the defendant ("RAF") on 2 December 2016, with the RAF delivering its plea on 17 February 2017. After case management the matter was certified trial ready on 14 November 2022 in respect of both liability and quantum (including general damages). Thereafter a trial date was allocated, as a consequence of which the matter came before me on 21 February 2024.

[2] In a joint Practice Note filed on 9 February 2024 it was recorded that: (a) liability remained in dispute; (b) the RAF accepted the plaintiff's injuries qualified as serious and he was thus entitled to general damages (if liability was proven); and (c) both parties were ready to proceed to trial. At the commencement of the hearing counsel for the plaintiff placed on record that the RAF had now conceded liability (i.e. just over 7 years after the action was instituted) and that all head of damages had been agreed save for the plaintiff's claim in respect of past medical and hospital expenses.

[3] He also recorded the parties' agreement that an order could be granted (once its terms were finalised) in relation to the settled heads of damages. The RAF subsequently did an about turn and refused to permit any such order to be granted. During closing argument counsel for the plaintiff thus handed up his draft order.

[4] It is regrettably necessary to state that, despite confirming on 9 February 2024 that the RAF was also ready to proceed to trial, on the morning of the hearing its legal representative announced from the Bar that his client "required" a postponement since "an appeal was pending" in the matter of *Van Tonder v Road Accident Fund*[1] in which I handed down judgment on 1 December 2023 rejecting the RAF's argument in relation to past hospital and medical expenses. There was no appeal pending at that stage, but only an application for leave to appeal by the RAF set down for hearing on 29 February 2024 (which I subsequently dismissed on 1 March 2024). The postponement "required" was thus refused. In addition, the RAF's legal representative elected, without prior notification or indeed any explanation, to absent himself on the agreed date upon which argument was scheduled to be heard. The court thus only had the benefit of the plaintiff's submissions.

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1 [2023] ZAWCHC 305.

[5] During the trial the plaintiff testified and led the unchallenged evidence of Ms Thea Hoosain, a team leader in the Third Party Recoveries Department of Discovery Health, the medical aid scheme of which the plaintiff has at all material times been a member. The RAF led the evidence of Mr Nizaamodien Abdool, who in his testimony explained that he is employed by the RAF as a Senior Medical Bill Reviewer for the entire Western Cape (apparently he is solely responsible for that area). He reviews all claims for past medical and hospital expenses as well as medical supplier claims.

[6] Mr Abdool was of considerable assistance and, with consent of the RAF's legal representative, made himself available during an adjournment to meet with the plaintiff's legal team to narrow down the items claimed by the plaintiff to those which were actually disputed by the RAF. Ultimately, based on the evidence of the three witnesses, what was agreed during the meeting, and certain concessions sensibly made on the plaintiff's behalf, the following was undisputed.

[7] The plaintiff's total claim for past hospital and medical expenses amounts to R1 035 848.53 of which: (a) Discovery Health settled R301 071.79 but the RAF disputes liability to pay; (b) the RAF has rejected a further total of R17 210.98; and (c) because of a certain "internal directive" issued by the RAF, its bill reviewers have to reject claims which do not meet internal code requirements, in this instance amounting to another total of R161 828.17.

Amounts paid by Discovery Health

[8] The RAF did not plead any defence which supports, or even alludes to, the reasons for disputing liability in respect of the Discovery Health portion or why it is compelled to reject the "code" portion of the plaintiff's claim. As far as the Discovery Health portion is concerned, given the election of the RAF's legal representative to absent himself from closing argument, the best I can do is accept that the argument he

would have advanced on its behalf was identical to that raised by the RAF in *Van Tonder*. (It would otherwise make no sense for the RAF to have "required" a postponement pending the "appeal" in *Van Tonder*). As far as the "code" portion is concerned, I at least have the evidence of Mr Abdool.

[9] In *Van Tonder* the RAF had contended that due to an internal "policy" or instruction, all claims for past medical expenses paid by a medical aid scheme are excluded by virtue of s 19(d)(i) of the Road Accident Fund ("the RAF") Act[2] and/or regulations 7 and 8 of the Medical Schemes Act.[3] I rejected that argument. For convenience I quote the relevant paragraphs of *Van Tonder*:

'[8] Section 19 reads in relevant part as follows:

*"**19. Liability excluded in certain cases. —**The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—…*

(c) if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by—

(i) any person entitled to practise as an attorney within the Republic; or

(ii) any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or

(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;…"

*[9] Regulation 7 of the Medical Schemes Act defines "*prescribed minimum benefits" *as including "*any emergency medical condition"*. Regulation 8(1), in referring to "*prescribed minimum benefits" *provides "*[s]ubject to the provisions of this regulation, any benefit option that is offered by a medical scheme must pay in full, without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit conditions".

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2 No 56 of 1996.

3 No 131 of 1998.

[10] *The RAF's argument in relation to s 19(d)(i) is that because the plaintiffs, as members of their medical aid schemes, agreed to reimburse such scheme any amounts paid over by the scheme to service providers, this amounts to an agreement falling within the exclusionary provision of that subsection. In* Road Accident Fund v Abdool-Carrim and Others[4] *at issue was the proper interpretation of s 17(5) read with s 19(d) of the RAF Act. The court summarised the crux of the appeal before it as follows:*

"[3] Where a third party is entitled to compensation and has incurred costs in respect of medical services which are recoverable from the Fund, s 17(5) permits 'suppliers' who have rendered such services the right to claim their costs directly from the Fund without having to claim from the third party. It also provides, and this is the contentious part, that 'such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned…'. Section 19(d) renders a third party claim unenforceable against the Fund if he or she has entered into an agreement with someone other than an attorney or someone who falls within a class of persons referred to in s 19(c)(ii) in accordance with which he or she has undertaken to pay the person for their services after settlement of the claim. The narrow question in this appeal is whether the phrase 'subject, mutatis mutandis, to' in s 17(5) renders s 19(d) applicable not only to third party claims but also to those of suppliers in the sense that should a supplier enter into such an agreement the supplier's claim against the Fund becomes unenforceable…"

[11] The court found as follows:

"[11] 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 <u>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.</u>

[12] Support for the above interpretation is to be found in the main purpose of the Act referred to earlier 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

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[4] 2008 (3) SA 579 (SCA).

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 with 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. Moreover it is illogical for the third party claim to be valid and enforceable but the supplier's accessory claim not (except where the supplier has not complied with the prescribed formalities).

[13] 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.'

(my emphasis)

[12] By parity of reasoning this puts paid to the RAF's s 19(d)(i) argument. The RAF's other contention, placing reliance on the regulations quoted above, is that because a medical aid scheme is bound to pay certain minimum benefits without any deduction (one of which is treatment for an emergency medical condition) this precludes the scheme from relying on the doctrine of subrogation; and accordingly since the scheme cannot claim repayment from its member by virtue of subrogation that member, if he or she is a third party claimant against the RAF, cannot claim against the RAF for past medical expenses.

[13] In Rayi NO v Road Accident Fund[5] *the court dealt with the question whether the RAF was liable to compensate the plaintiff for past hospital and medical expenses in light of the fact they had already been paid by Bonitas medical aid scheme. Zondi J (as he then was) found as follows:*

[5] [2010] ZAWCHC 30 (22 February 2010).

'[12] It is clear to me that a procedural remedy which is available to the supplier of goods or services in terms of section 17(5) of the [RAF] Act is not available to Bonitas. It paid past medical expenses on behalf of the plaintiff. It did not supply goods or provide services on behalf of the plaintiff. Bonitas can therefore not claim directly from the defendant the expenses it incurred on behalf of the plaintiff in terms of section 17(5) of the Act.

[13] Bonitas can recover from the defendant the payment it made on behalf of the plaintiff and for which the defendant is primarily responsible by way of an action based on the principle of subrogation. It may sue the defendant in its own name or in the name of the plaintiff. (Rand Mutual Assurance Co Ltd v Road Accident Fund 2008 (6) SA 511 (SCA) at para 24). Subrogation embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance…

[15] In my view, settlement by Bonitas of the plaintiff's past medical expenses does not relieve the defendant of its obligation to compensate the plaintiff for the past medical expenses he incurred. Payment by Bonitas was made in terms of the undertaking made by the plaintiff to Bonitas in terms of which Bonitas agreed to settle the plaintiff's past medical expenses on the understanding that upon a successful recovery from the defendant, the plaintiff would reimburse Bonitas for all the costs it incurred on plaintiff's behalf in connection with the claim against the defendant.

[16] The obligation which the undertaking imposes on the plaintiff towards Bonitas does not arise until such time that there is a successful recovery of the past medical expenses by the plaintiff from the defendant. The defendant primarily remains liable to the plaintiff for the payment of the past medical expenses and the liability of Bonitas to the plaintiff for the past medical expenses is secondary to that of the defendant. The defendant should pay the past medical expenses to the plaintiff who should upon receipt of payment account to Bonitas in terms of the undertaking.'

(my emphasis – see also Ackerman v Loubser;[6] Mooideen v Road Accident Fund;[7] D'Ambrosi v Bane and Others;[8] Watkins v Road Accident Fund.[9]*)*

[6] 1918 OPD 31 at 36.
[7] Unreported judgment of Davis J in this Division under case number 17737/2015, delivered on 11 December 2020.
[8] 2010 (2) SA 539 (SCA).
[9] Unreported reasons for Order by Van Zyl AJ in this Division under case number 19574/2017, delivered on 8 February 2023.

[14] There is no dispute that both Mr Van Tonder and Mr Le Roux have contracted with their medical aid scheme(s) to reimburse the scheme any amounts paid by the RAF for past medical expenses. The RAF was unable to refer me to a single authority to the effect that, despite the long line of decisions to the contrary on the doctrine of subrogation, regulations 7 and 8 of the Medical Schemes Act somehow nevertheless override the well established legal position…'

[10] *Van Tonder* was cited with approval in *Road Accident Fund v Sheriff of the High Court for the District of Centurion East and Another*[10] and *Road Accident Fund v Malgas.*[11] I am given to understand that following a refusal of leave to appeal in *Road Accident Fund v Sheriff of the High Court for the District of Centurion East and Another* the petition by the RAF to the Supreme Court of Appeal was unsuccessful. I understand that in *Van Tonder* the RAF has similarly petitioned the Supreme Court of Appeal but I am not aware of the outcome of that petition. In *RAF v Malgas* the court, dealing with the same argument raised by the RAF in *Van Tonder*, also referred to the Supreme Court of Appeal decision in *Road Accident Fund v Abdool-Carrim and Others* and found that:

'[14] What the Abdool-Carrim judgment establishes is the following: The provisions of the RAF Act must be considered within the context of the purpose of the Act. The principal object of the RAF Act is "to establish the Fund to pay compensation for loss or damages to third parties wrongfully caused by the driving of motor vehicles. The Act's main purpose is to provide the widest possible protection to third parties". It protects victims of motor vehicle accidents who otherwise would have suffered as a result of the inability of the wrongdoer to pay damages.

10 [2024] ZAGPPHC 149 (19 February 2024) at paras [28] to [30].

11 Unreported judgment of Van Zyl DJP in application for leave to appeal, case no 126/2020 Eastern Cape Local Division, Gqeberha, delivered on 5 March 2024 at para [18].

[15] Section 19(d) places a limitation on the objective of the RAF Act to provide the widest possible protection. Its effect is to limit the obligation of the Fund to pay compensation to a third party claimant despite the fact that that party may otherwise have a valid and enforceable claim for compensation. The question whether or not an agreement entered into by the third party claimant with persons other than the ones referred to in paragraph (c) of section 19 would render the third party's claim unenforceable, must be considered in the context of the purpose of the section itself and the limitation it places on the right of the third party to be compensated. Its purpose, said the court in Abdool-Carrim, is to protect the third-party claimant from entering into champertous agreements. Its purpose is not to render the third party's claim unenforceable where the agreement in issue serves an otherwise legitimate purpose. It is accordingly not every agreement that would fall foul of section 19(d), but only those agreements which the legislature intended to protect the third party claimant against.'

[11] Having regard to the aforementioned decisions, I remain unpersuaded that there is any merit in the RAF's argument in relation to s 19(d)(i) of the RAF Act and/or regulations 7 and 8 of the Medical Schemes Act. It follows that this defence must fail and the plaintiff is entitled to payment of the full amount settled by Discovery Health of R301 071.79.

Amounts rejected

[12] Turning now to the items totalling R17 210.98 rejected by the RAF. This is made up as follows:

12.1 13 September 2015: payment to Wynberg Pharmacy of R294.90 (item 23 Table A, Exhibit B). Reason for rejection: no legible invoice;

12.2 29 September 2015: payment to Balego and Associates, United States of America (net of shipping costs) of R8 714.80 (Exhibit D1). Reason for rejection: availability in South Africa of similar anaesthetic patches;

12.3 16 September and 21 September 2021: payment to acupuncturist Mr P Ruther of R1 928 (items 338 and 339, Table B, Exhibit B). Reason for rejection: no proof or indication on invoice whether registered with relevant professional body;

12.4 15 November 2023: payment to neurosurgeon Dr D Welsh of R726 (item 393, Table D, Exhibit B). Reason for rejection: no causal link to injuries; and

12.5 20 November 2023: payment to radiologists Morton and Partners of R5 547.28 (item 393, Table D, Exhibit B). Reason for rejection: no causal link to injuries.

[13] In respect of the first item, the plaintiff accepted the relevant invoice is now so faded (8½ years later) that it is illegible. However his testimony was that purchased were an armsling and Dolorol Forte (pain medication), both of which were as a direct result of his injuries. He also testified about his excruciating nerve pain which he described as *'relentless… like being in a pot of boiling oil 24/7'*. He reached a point where he became severely depressed and at one stage, suicidal.

[14] As a result the plaintiff tried every alternative treatment he could find to lessen the pain. This is why he purchased the anaesthetic patches (the second item, Exhibit D1). He researched the availability of this product in South Africa but was not able to

source it. The pain was also why he was treated by the acupuncturist concerned (the third item).

[15] Mr Abdool, who holds an honours degree in physiotherapy, has 20 years experience and is currently studying towards a masters degree in public health, testified that when the anaesthetic patches were purchased by the plaintiff in the USA their active ingredient (lidocaine) was indeed not available in South Africa. However there was an equivalent called Emla which could only be obtained on prescription. Had the plaintiff sourced Emla after consultation with a medical professional the RAF would not have rejected this item since there would be a *'clinical reason'* to support it. Mr Abdool explained however that he could not say whether the dosage in the patches purchased by the plaintiff and those in Emla was the same, and did not dispute the plaintiff's evidence that the patches greatly relieved his pain.

[16] Regarding these three items it is my view that the first should be allowed, given also the undisputed evidence of the plaintiff that the Wynberg Pharmacy invoice was previously submitted to the RAF when it was still legible. As to the second, and in the absence of any evidence by Mr Abdool regarding the cost of Emla patches at the time, I will adopt a Solomonic approach and allow the plaintiff 50% thereof, i.e. R4 357.40. The third item is disallowed based on the absence of any evidence that Mr Ruther was registered with his professional body.

[17] I deal with the fourth and fifth items together. The plaintiff testified that he consulted with neurosurgeon Dr Welsh on 15 November 2023 to address his persistent lumbar pain which manifested itself at a stage following his arm injury. He confirmed that

Dr Welsh's invoice (Exhibit D5) pertained to this consultation. The invoice itself describes the purpose of the consultation as *'problem-focused history'*. The plaintiff's unchallenged evidence was further that Dr Welsh referred him for an MRI scan since in his professional opinion, using the plaintiff's words *'my body alignment was out as a result of my arm injury'.* The fifth item, pertaining to radiologists Morton and Partners, was for that MRI scan. The invoice (Exhibit D4) bears the description *'MR lumbar spine, limited study'*.

[18] Mr Abdool countered this by testifying that the plaintiff's hospital records immediately following the collision made no mention of a lumbar injury and this only appeared in later medico-legal reports. To my mind, Mr Abdool's acceptance of a lumbar condition featuring in later medico-legal reports serves to confirm the plaintiff's version. The fourth and fifth items are thus allowed.

[19] Accordingly, based on the above, the total amount rejected by the RAF of R17 210.98 falls to be reduced by R4 357.40 as well as R1 928, and the plaintiff is entitled to payment of R10 925.58.

Another internal directive

[20] As previously indicated the last defence pertains to yet another of the RAF's internal directives. Mr Abdool testified that *'recently'* the RAF has issued a verbal (not written) instruction to all relevant employees that, irrespective of whether claims submitted for past medical and hospital expenses pre-date that instruction, all claims are to be rejected if the supporting invoices or vouchers do not comply *'strictly'* with

in-house requirements pertaining to International Classification of Disease (ICD) codes. His evidence was further that if a claim is rejected on this basis the rejection is communicated to the RAF claims handler dealing with the specific matter who is, as far as he is aware, supposed to convey it to the claimant concerned.

[21] Mr Abdool was unable to refute that this instruction has never been conveyed to the plaintiff, or that the rejections now relied upon by the RAF were also not conveyed to the plaintiff at any stage until Mr Abdool met with the plaintiff's legal team during the former's testimony. Accordingly even if the instruction could somehow apply retrospectively (which it cannot) the plaintiff was deprived of the opportunity to submit invoices or vouchers which did comply with (whatever) that instruction's content is, which too was unexplained save for Mr Abdool's testimony that *'the definition of "invoice" requires practitioners' full details and coding needs to be correct'.*

[22] In *S v Mhlungu and Others*[12] the Constitutional Court made clear that:

'[65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation…

[67] There is still another well-established rule of construction namely, that even if a new statute is intended to be retrospective insofar as it affects affected rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings…'

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[12] 1995 (3) SA 867 (CC) at paras [65] to [67].

(See also *Kaknis v Absa Bank Ltd; Kaknis v Man Financial Services SA (Pty) Ltd* 2017 (4) SA 17 (SCA) at paras [10] to [11]).

[23] In *Sithole v Road Accident Fund*[13] the court, dealing with an internal directive issued by the RAF on 12 August 2022, held as follows:

'[23] Even if an "internal directive" of the defendant and which is not aligned with the Road Accident Fund Act, was capable of being binding on third parties, which it is not, certainly the approach regarding retrospectivity would be similar to that which has been set out in the case law quoted above… If an organ of state is bound by the settled law, as referred to above, how much more should it not be applicable to an internal directive, albeit for external application, in such an organisation?'

[24] In *Mautla and Others v Road Accident Fund and Others*[14] the applicants sought the review and setting aside of decisions made by the RAF to adopt and implement a management directive, a supplier communication notice, a board notice and a claim form substitution notice, all relating to the manner in which it receives and deals with claims that are submitted to it. These decisions were purportedly implemented to *'better achieve its purpose and to improve operations'.* The Full Court held as follows:

'[24] The right to claim compensation in terms of the Act is a right that is enjoyed by every person within the Republic, subject to compliance with the requirements of the Act. On this aspect section 4(1) of PAJA, which requires procedural fairness in matters where the rights of the public are "materially and adversely" affected, is engaged.

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[13] [2023] ZAGPJHC 869 (28 July 2023).

[14] [2023] ZAGPPHC1843 (6 November 2023).

[25] It is common cause that at no stage was there any consideration afforded to any of the rights of the public by calling for participation and input in respect of the anticipated Decisions. It was done without the implementation of any procedurally fair process/es. The Decisions taken were without engagement with any affected persons or the public and were without more imposed upon them.

[26] The claim form and requirements for the submission of a valid claim are the gateway to any claim for compensation and hence there is a necessity for proper consideration and consultation before any such requirements that are not specifically prescribed by statute can even be considered, let alone imposed.'[15]

[25] The Full Court also emphasised that the RAF Act does not contemplate two sets of rules – one by regulation and another by "Board Notices".[16] It set aside all the decisions as unlawful.

[26] Lastly, in *Legal Practitioners Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others*[17] a Full Court, albeit dealing with other challenges in respect of, amongst others, a notice issued by the RAF (which at least in that case was made public, the opposite of what has occurred in the present case) held as follows:

'[41] We turn next to the challenge that is made to the Board Notice. It will be recalled that the Board Notice was published by the RAF in terms of s 4(1)(a) of the RAF Act. The Board Notice includes a schedule which sets out the documents the RAF requires for the lodgment of a claim. The Board Notice is also formulated on the basis that it is an

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[15] Referring to *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA).
[16] At para [66].
[17] [2024] ZAGPPHC 294 (20 March 2024).

amendment of the RAF 1 claim form "as provided for in Regulation 7(1) of the RAF Regulations, 2008".

[42] Section 4(1)(a) provides that the powers and functions of the RAF include "the stipulation of the terms and conditions upon which claims for the compensation contemplated in section 3 shall be administered*".(our emphasis) Can the RAF's power to administer claims in terms of s 4(1)(a) overlap with the power given to the Minister to prescribe the particulars of the form that must be completed to make a claim under the RAF Act, as detailed in s24 read with s26 of the RAF Act? This cannot be so. The RAF Act affects a division of powers. Section 1 defines "prescribe" to mean "by regulations under section 26". Section 24(1) provides that a claim for compensation and the accompanying medical report under s 17(1) shall "be set out in the prescribed form, which shall be completed in all its particulars". Section 26(1) confers the power on the Minister to make regulations "regarding any matter that shall or may be prescribed in terms of this Act". One such matter is the prescribed form to make a claim. Section 11(1)(a)(v) provides that the Board of the RAF may make recommendations to the Minister in respect of any regulation to be made under the RAF Act.*

[43] It is for the Minister then to make the regulation that prescribes what form must be completed (and its contents) to make a claim for compensation. The Board of the RAF may make recommendations to the Minister, but the Minister decides. Whatever power the RAF enjoys to administer claims in terms of s 4(1)(a), it cannot trespass upon the Minister's power in terms of s 24(1) read with s 26(1). To hold otherwise would contemplate a situation in which the Minister and the RAF could specify for different and contradictory requirements for persons to make a claim. The legislature could never have contemplated such a conferral of powers...'

[27] In the present matter this court is left in the dark as to whether or not the "directive" issued by the RAF pertaining to codes falls solely within its administrative powers and functions, but even if it does, that "directive" cannot apply retrospectively to the

plaintiff's claim. Not only is this settled law but in the particular circumstances of this case, the abject failure by the relevant RAF Claims Handler(s) to even notify the plaintiff of rejection because of an alleged ICD code issue cannot redound to the detriment of the plaintiff. There was simply no fair or transparent process, and it cannot be that the plaintiff is non-suited because the RAF decides internally, without more, that he should be. It follows that the plaintiff is also entitled to payment of the last disputed amount of R161 828.17.

[28] Finally, in respect of costs, there is no reason why they should not follow the result. In order to prevent any unnecessary delay in having my order issued, I make the order in the terms annexed, marked "X".

J I CLOETE

For plaintiff: Adv W **Coughlan**,
Instructed by: FDP Attorneys (Ms S Pappin)

For defendant: Mr S **Mushwane** of the State Attorney
Instructed by: The Road Accident Fund