HOT OFF THE BENCH

Taylor v Road Accident Fund and a related matter

[2020] JOL 48990 (GJ)

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 37986/2018

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

16/11/2020
DATE

SIGNATURE

In the matter between:

TAYLOR, MARILYN DORIS Plaintiff

and

ROAD ACCIDENT FUND Defendant

Case Number: 13753/2019

In the matter between

MATHONSI, HLENGANI VICTOR Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

Summary: Settlement of RAF matters under circumstances where the RAF unrepresented and deliberate misrepresentations made by plaintiff's attorneys. Parties don't seek that settlements be made an order of court but settlements constitutionally invalid. Payment by RAF in terms of settlement would constitute irregular expenditure in the circumstances and would be ultra vires. Conduct of legal representatives referred to the Legal Practice Counsel; conduct of doctors referred to Health Professions Counsel of SA; conduct of actuary referred to Actuarial Society of SA.
Common cause that the RAF is trading under insolvent circumstances.

FISHER J:

Introduction

[1] These two cases represent a cautionary tale for the RAF and those who rely on it – which is all South Africans and especially those who are made vulnerable and suffer greatly as a result of motor vehicle accidents. This judgment deals with the reach of courts under circumstances where the parties have acted in concert with one another to settle a trial action under dubious circumstances and seek to avoid court oversight of the settlement.

[2] In both matters the plaintiff and defendant say that they have settled and they are adamant that they neither need nor want the Court's imprimatur. This is perplexing because it has always been the practice in our courts that, when settlement of matters which are before a court ensues, the court in which the claim was instituted is asked to make the settlement agreement an order of court. Indeed, it is unusual for this not to occur, in that it allows for execution of the orders. However, both the attorneys for the plaintiffs, De Broglio Inc (De Broglio) and the RAF have strenuously sought to avoid this Court's oversight of the settlement agreements.

[3] What is of most concern, is that these two cases are not isolated instances, but are examples of a general approach which most courts are met with daily in their attempts at fostering and maintaining judicial oversight in the RAF environment. These cases expose defiant attempts by legal representatives to avoid judicial scrutiny of

settlements entered into with the RAF under circumstances which are strongly suggestive of dishonesty and /or gross incompetence on the part of those involved.

[4] I have thus, notwithstanding that the parties are agreed that I have no jurisdiction and seek a removal of the matters from the roll, asked that I be addressed on the validity of the settlements and the legality of the RAF's position in the matter.

Fraud and maladministration in the RAF arena

[5] The Road Accident Fund (RAF) is a juristic person established by the Road Accident Fund Act[1] (the RAF Act) as amended. The RAF is a critical organ of state which provides compulsory social insurance cover to all users of South African roads. The RAF Act is a social security measure which is part of the arsenal of the State in fulfilling its constitutional duty to protect the security of the person of the public and in particular of victims of road accidents.[2] The primary and ultimate mission of the RAF is to render a fair, self-funding, viable, and effective social security service to victims of motor accidents.[3]

[6] The main source of income received by the Road Accident Fund is a levy that is based on fuel sales (the RAF Fuel Levy)[4] the RAF Fuel Levy is, in effect, a

[1] 1996 (Act No. 56 of 1996 - the RAF commenced operations on 1 May 1997, assuming at the time, all the rights, obligations, assets and liabilities of the Multilateral Motor Vehicle Accidents Fund. Prior to 1997, the system of compulsory motor vehicle accident insurance was governed at various times by the Motor Vehicle Insurance Act 29 of 1942; theCompulsory Motor Vehicle Insurance Act 56 of 1972; the Motor Vehicle Accident Act 84 of 1986); the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989)

[2] *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC), paras 66 and 80

[3] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC), para 54

[4] The RAF Fuel Levy income is a charge levied on fuel throughout the country and the quantum of the RAF Fuel Levy per litre is determined by the National Treasury on an annual basis. The RAF Fuel Levy is currently at 193 cents per litre for the 2018/19 financial year. The South African Revenue Service (SARS) administers the collection of the Fuel Levy and pays it to the RAF.

compulsory contribution by the public to social security benefits. The amount of the Fuel Levy collected annually is more than R 40 billion[5].

[7] A central power of the RAF is 'the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle.[6]

[8] Thus, it stands to reason, that if there is no loss or damage, the RAF does not have the power to settle a claim and if it purports to do so, this would be *ultra vires*.

[9] Since May 2020, RAF cases which are currently in their various stages of litigation before the courts have been relieved of external legal representation in the form of the firms of attorneys who ply their trade (some exclusively) in acting for the RAF in personal injury cases. The new policy has been approved by both the Board of the RAF and the Minister of Transport (the Minister). Apparently, it is part of a drive to settle trial matters rather than run them. The premise is that this will save legal costs.

[10] Whilst this may seem to be a cost cutting and thus money saving measure, it has, in my view and experience, rendered the RAF system, which is already on the verge of total collapse, even more exposed and vulnerable to malfeasance and incompetence.

[11] The answering affidavit of Collins Phutane Letsoalo, the current Acting Chief Executive Officer (CEO) of the RAF, recently filed in case number: 17518/2020, was placed before me. This was an application by firms of erstwhile RAF panel attorneys to review and set aside the decision of the RAF to dispense with services of its panel attorneys with effect from 1 June 2020. In such affidavit Mr Letsoalo said the following in explanation for the move:

'the current system is fraught with irregularities, fraud and corruption. It involves panel attorneys, plaintiffs' attorneys, the Fund's own claims handlers and officials in the finance

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[5] The RAF Annual Report for the year ending March 2019 shows the following : Total revenue during the 2018/19 financial year increased to R43.24 billion from R37.34 billion in the previous year. This increase was mainly due to 30 cents per litre (c/l) increase in the RAF Fuel Levy from the beginning of the financial year. This represents almost 13% of the total pump price for the period. The net deficit of the RAF continued to climb sharply during the 2018/19 financial year the despite the increase in the Fuel Levy.

[6] Section 4(1)(b)

department. Some firms of attorneys receive disproportionately more files than other firms. This is not supposed to happen because the Fund has a vendor rotation system ("VRS") in terms of which firms are allocated files on a rotational basis, to ensure equal distribution of work. Fraudulent claims are settled by some of the panel attorneys without a proper investigation the quantum of claims exaggerated in collusion between the panel and plaintiffs' attorneys. Some of the attorneys belonging to the panel attorneys charge the Fund multiple times for appearing in Court on a single day. They also falsify invoices rendered by medical experts. All this has come at a huge cost to the Fund.'

[12] The most recent available Annual Report of the RAF - being for the year ending March 2019 (the Annual Report) refers to the fact that there were, during that year, 560 attachments of RAF bank accounts. Simply put, the RAF is unable to pay its debts when they fall due and is thus bankrupt.[7]

[13] Recent attempts have been made to change what is universally deplored as an unjust and inefficient use of State funds. The Road Accident Benefit Scheme (RABS) Bill (B17 2017) has been introduced by the Minister in an attempt to change the existing system by establishing a Road Accident Benefit Scheme Administrator to administer and implement a scheme which is not based on fault and which, inter alia, allows for income support to be paid monthly rather than in large actuarially calculated lumps sums and for benefit payments to cease once a beneficiary returns to work or dies. General damages claims are also to be limited in terms thereof as are claims by persons who are not South African citizens. I make no comment on the benefits or otherwise of RABS, save to state that the present system is unworkable, unsustainable and corrupt and that a viable alternative must be found if the RAF is to perform its statutory function. Recent news reports suggest that the approval by Parliament of the Bill is currently stymied in Parliament.

The Courts as bulwark against corruption

[7] On average, the Fund was R11.3 billion in arrears per month with finalised claims that could not be paid due to cash constraints. As at 31 March 2019, current liabilities of the RAF exceeded current assets by R31 billion (2017/18: R29 billion).

[14] One of the main bulwarks against venality and incompetence in public bodies is judicial oversight. It must be recognised that, by far the largest percentage of litigation in most courts in the country (in some, more than 90%), is undertaken against the RAF.

[15] The courts have, for years, worked tirelessly in their attempts to stem the tide of fraud in the RAF arena, however the task has always been and continues to be an intractable one. The approach of attorneys and the RAF seeking to avoid the court's jurisdiction by forgoing orders of court in settled matters is just the latest gambit. It comes as part of backlash to concerted attempts by the judiciary to enhance its oversight role where pubic funds are at stake in personal injury claims. This area is clearly vulnerable to corruption in that people are not litigating with their own money but with a seemingly endless supply of State funds. This can tend make them less vigilant and more careless and there is broadened scope for malfeasance.

[16] The RAF is *sui generis* in relation to its funding model. It is a constantly and automatically renewable fund. The RAF is regarded by National Treasury as the second largest contingent liability after Eskom. The large sums flowing into the RAF make it an attractive target for fraudsters in form of syndicates and individuals. The Annual Report recounts that for the year ending 2019 'a large number of attorneys have been struck off the roll, doctors and SAPS officials arrested, and several touts sentenced for fraud related matters'. It reports further that 'Close on 2,100 fraudulent claims to the value of R1.45 billion were identified before payments were made and nine people were arrested for fraud against the RAF.'

[17] Whilst it is unsurprising that plaintiffs' attorneys should opt for less judicial scrutiny of their settlements, it is difficult to understand why the RAF should seek to avoid such oversight. It currently seems that, as fast as the Judiciary puts in place measures in an attempt to stem the tide of corruption in this field, the more moves are contrived by plaintiff's attorneys and the RAF to circumvent these attempts. This is obviously of greater concern now that the RAF is unrepresented by attorneys as there is now even more scope for malfeasance and manipulation. This unprotected position

that these public funds find themselves in has obviously not escaped those who wish to exploit the Fund. These cases are but two instances of widespread exploitation.

[18] The fact that the firm, De Broglio happens to be the attorney representing the plaintiff in both the cases before me, whilst more than co-incidental in that it shows a pattern of doing business, should not be taken as an indication that De Broglio stands alone in its approach. In my experience, similar tactics are used by attorneys across the board each day in our courts. And attorneys learn tactics from each other. Whilst there are many attorneys in this field who behave in a manner which embraces openness and honesty, there is, in my experience, a trend towards avoiding transparency and court oversight and this has intensified in the wake of the decision to stop external legal representation of the RAF and the drive to settle all matters, seemingly at any cost.

[19] I move now to dealing with steps taken by the judiciary in an attempt to enhance transparency in the process.

Recent steps taken to put in place controls and to enhance scrutiny by the judiciary

[20] On 05 July 2019 the Judge President of the Gauteng Division, Dunstan Mlambo (the JP) issued a Practice Directive 2 of 2019 which was aimed at regulating trial actions for damages against the State, including the RAF (Practice Directive 2).

[21] A new daily Case Management Court was set up pursuant to this directive to provide for a process which would allow for judges to manage cases more closely before certifying them trial ready. Practice Directive 2 was carefully crafted to allow for the Case Management Court to be alerted to any problems or inconsistencies including those between the expert forensic reports filed and the pleaded claim. The benefit to the plaintiff's in this matter was that they were provided with machinery to compel the Defendant to co-operate in trial preparation and compliance in moving the matters forward. The plaintiff was often hamstrung by the dilatory conduct of the RAF in these matters and the Directive sought to alleviate this situation by allowing for the closer case management of cases by a judge. A new Trial Interlocutory Court with

enhanced resources was also set up to complement the Case Management scheme so that court orders for non-compliance could be obtained more expeditiously.

[22] On 02 October 2019, the JP issued Practice Directive 2.1 (Practice Directive 2.1) directed specifically at settlement agreements which had been identified by the courts as a vulnerable area where practical oversight by the courts was needed in that vast amounts of public funds were at stake and no evidence was led. Paragraphs 2 and 3 of Practice Directive 2.1 reads as follows:

"Every settlement/consent draft order presented [should] be interrogated by a Judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which order is premised are justified in relation to the law, the facts, and the expert reports upon which they are based.
Because no evidence is adduced under oath, as might have been presented on the trial, the Court may further require that the submissions relied upon should be confirmed by affidavit or oral evidence as more fully stipulated hereunder."

[23] The powers and function of the RAF have been dealt with above. It is helpful to set out a description of the other role players - i.e. the main protagonists- in any claim in respect of which the plaintiff has filed a summons and the RAF its plea and possible counterclaim. This will assist in understanding how the respective rights and duties operate within the process.

Dramatis Personae

[24] The plaintiff - the plaintiff is the person who has suffered a loss as a result of the motor accident for which he or she seeks to be compensated. Plaintiffs who have suffered a loss which they believe was due to the fault of the driver/owner of the insured motor vehicle (the insured driver) will either seek compensation directly from the RAF or approach an attorney for assistance. Many attorneys advertise themselves as experts in the field of RAF and personal injury claims. Some survive exclusively on such custom. De Broglio is one of the larger of such firms. On the other end of the scale there are touts who devote themselves to sourcing potential clients for firms. They can often be found in hospitals and mortuaries and have contacts who are ambulance drivers, paramedics, and tow-truck drivers. Even the police can be

persuaded to be of assistance in the furnishing information. It hardly needs to be said that information of this nature is furnished in exchange for cash. All that is needed to make a claim is for a collision to have occurred and some evidence of injury. The investigations leading to the construction of the claim proceed from these facts.

[25] *The Loss*[8] - can take the form of the loss occasioned to those who were dependants of a person who has died as a result of an accident or a claim by the person injured himself.

[26] The loss falls into two types. The first is known as special damages. This is actual patrimonial loss and generally takes the form of loss suffered by having to pay for medical treatment; loss suffered due to the fact that the claimant is not able to carry out his employment obligations (past loss of earnings) and loss that is suffered as a result of the fact that the plaintiff has suffered an incapacitation which is likely to affect his ability to earn an income in the future (loss of earning capacity). The second is known as general damages and its purpose is to compensate the plaintiff for damages which cannot quantified with reference to actual patrimonial loss. The object of such damages is to compensate the plaintiff for damages which, although non- patrimonial in nature, are nonetheless considered to be worthy of compensation – such as pain, suffering, discomfort, loss of amenities of life, disfigurement. There are times when the award of damages for loss of amenities or discomfort may dovetail with each other – such as where the doing of one's job is not impossible but is made more arduous and requiring of more fortitude by the injury. One can discern from this that a court must exercise some wisdom in determining these matters – with the help of evidence of course.

[27] For accidents that occurred after 1 August 2008, general damages are only paid if a serious injury has been sustained, which is in line with the RAF Amendment Act[9] (the Amendment Act). The Amendment Act amended the RAF Act to limit the RAF's liability for compensation in respect of claims for general damages to instances

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[8] I have personified some aspects of the process for the sake of form and continuity in setting out the background.
[9] 19 of 2005.

where a "serious injury" has been sustained.[10] A medical practitioner has to determine whether or not the claimant has suffered a serious injury by undertaking an assessment prescribed in the RAF Regulations. The practitioner performing the injury assessment has to prepare an RAF 4 report which deals with the assessment of the injury in terms of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (*AMA Guides*). If the injury is found to have resulted in 30% or more the whole person impairment (WPI) according to the methodology provided for in the *AMA Guides*, the injury should be assessed as serious.[11]

[28] If the evaluation is that the 30% of WPI cannot be reached, non-patrimonial loss may still be claimed if the injuries fall within the "narrative test", namely (a) resulting in a serious long-term impairment or loss of a body function; (b) constituting permanent serious disfigurement; (c) resulting in severe long-term mental or severe long-term behavioural disturbance or disorder; or (d) resulting in the loss of a foetus. A plaintiff may use either of the two tests to establish serious injury and in such a manner qualify for compensation for non-patrimonial loss.

[29] A medical practitioner must complete and submit a serious-injury assessment report on the RAF. If the RAF is not satisfied that the injury has been correctly assessed it must reject the serious-injury assessment report within 60 days and furnish reasons for the rejection; or direct that the third party submit himself or herself, at the cost of the Fund, to a further assessment. Thereafter, the RAF must either accept the further assessment or dispute the further assessment within 90 days. An Appeal Tribunal, consisting of three independent medical practitioners, has been created to hear these disputes.[12]

[30] The composition of the compensation portion of claims as it is set out in the Annual Report, however, indicates that a major component of claims that the RAF pays out (in cash) is in respect of general damages and loss of amenities of life.[13] This

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[10] *Road Accident Fund Regulations*, 2008. GG 31249, Notice number 770 of 21 July 2008, The Regulations became effective on 1 August 2008.

[11] Section 17 (1) rw s 17(1A) of the RAF Act
[12] RAF Regulation 3
[13] RAF Annual Report for year ending 2019.

is an area where there is much scope for misrepresentation of the true position. I will come to this point again with reference to the facts of these cases.

[31] *The plaintiff's attorney* - the attorney (or the firm- often represented by a team of attorneys) are the recipients of the plaintiff's custom as client. The financial relationship proceeds on the understanding that if the plaintiff does not succeed in his or her claim she will not have to pay for the services of the attorney but if he/she does succeed, even partially, the attorney will be paid his attorney client fee from the proceeds received from the RAF. By law, it should work out that the attorney will take fees in the region of 25% of the capital amount received. In the Annual Report it was estimated that as much as 26% (28% incl. VAT) of all claims disbursements (excluding direct claims) processed by the RAF are paid to plaintiffs' attorneys as opposed to claimants. The attorney thus has an incentive from a personal point of view as well as that of serving the interests of his client: the bigger the settlement the bigger the fee. The clients are, as a rule, asked to sign an agreement with the attorney which deals *inter alia*, with how the fees will be earned in accordance with the success attained.

[32] *The RAF's (erstwhile) attorney* - The RAF is a national public entity listed in Schedule 3A of the PFMA[14]. The RAF, as part of its function under the PFMA, appointed a panel of attorneys by way of public tender which panel it drew on for the appointment of attorneys to any given case. As I have said, since May 2020 the mandate of these attorneys in respect of the matters that they are dealing with has terminated and the RAF is currently not represented in actions before the courts. This has had the effect that the personnel who are dealing with the actions have been called upon to manage same without the assistance of a firm of attorneys – and all the resources that this brings, including advice and administrative assistance. Of course this purported cost saving comes at a price. The effect of the RAF being unrepresented includes the inability to run trials that are set down for hearing and to deal with interlocutory applications and other matters preparatory to trial. I will say more on this later.

[33] I was informed by Mr Lance Johnstone, a Senior Litigation Manager of the RAF who appeared at my request to deal with the Taylor case, that there had been a

[14] Public Finance Management Act 1 of 1999.

general instruction from superiors in the RAF to settle all trials. It seems that this may be preparatory to a new regime which is hoped for in the form of the RABS. However, as these cases show, such an approach, if not properly managed, is a recipe for abuse of the Courts' process, the provisions of the RAF Act, the PFMA and ultimately of the Constitutional prescripts to which the RAF and those that serve and interact with it are bound.

[34] *The South African Police Services*- Every motor vehicle road accident is by law required to be reported to the police. The police have a special form which is completed by the officer receiving the report of the accident. This is usually supplemented with further investigation depending on the severity of the accident in relation to casualties. The form provides fields for manuscript completion and so elicits salient information relating to the incident.

[35] *Hospitals and Clinics*- The medical facilities which attend to victims of motor accidents are enjoined to keep records in relation to the nature and extent of the injuries and the treatment, and investigations undertaken in relation thereto. These records are objective evidence and are relied on by the medico legal experts.

[36] *The medico-legal experts* - From a general perspective in this field, opinion evidence in reports and otherwise is often framed in a manner which is tendentious to either one or the other side's position. Experts often work exclusively for plaintiffs or for the defendant. This has the potential to cause a particular bent and often yields diametrically opposed opinions which arise from the same injuries. Furthermore, the experts are employed on the basis that ultimately their fees will be paid by the RAF in the event of an even partially successful claim. I have no doubt that many experts operate on the basis that if the RAF is not ultimately ordered to pay their costs they will not get paid.

[37] In the United Kingdom, the conduct of expert witnesses was recently scrutinized in the landmark case of *Jones v Kaney*[15], which resulted in the expert's immunity from being sued for professional negligence being abolished by the Supreme

[15] 2011 UKSC 13

Court. The possibility that a South African Court may follow this approach would, no doubt, have a chastening effect on experts in our courts.[16]

[38] Of particular pre-eminence in the expert coterie is the industrial psychologist. The task of the industrial psychologist is to work closely with the other experts in order to set up probable scenarios as to how the injuries as identified and reported on by the other experts are likely to affect the plaintiff in the workplace. By far the largest claims are those for loss of earning capacity. It is in this realm of suppositions, projections and contingencies that there should be an assessment by the court of how the individual plaintiff should be compensated for his or her loss, accepting the opinions of the experts who are qualified in the particular field such as orthopaedic surgeons and neurologists. These experts are of importance in the enquiry as by far the most common injuries in motor accidents are broken bones and brain injuries. In the case of more obvious injuries, such as coma, broken limbs or open wounds, which have received emergency treatment in hospitals pursuant to the accident and which are thus usually a matter of record, a court will more readily accept that the injuries were sustained in the accident and the RAF will generally admit this. It is in cases where the injuries relied on are not so obvious or so obviously caused by the accident that more care is required as to this inquiry and more reliance is placed on the expert opinions in order to establish a causal nexus between injuries and loss.

[39] *In Lee v Minister of Correctional Services*[17] (per Nkabinde J for the majority) recognised that the 'but for' (or *sine qua non*) test as stated in *International Shipping Co (Pty) Ltd v Bentley*[18] was the most frequently employed theory of causation but found that it was not always satisfactory when determining whether a specific omission

[16] The case involved a psychologist (Kaney) instructed as an expert witness in a personal injury claim, who was said to have negligently signed a statement of matters agreed with the expert instructed by the opposing side, in which she made a number of concessions that weakened the claim considerably. As a result, according to the injured claimant (Jones), he had to settle the claim for much less than he would have obtained had his expert not been careless.

[17] 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC).
[18] 1990 (1) SA 680 (A).

caused a certain consequence. In finding that there was a need for flexibility in the causation assessment[19] she had the following to say:

'Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case'.

[40] Nugent JA's assessment as to causation in *Minister of Safety and Security v Van Duivenboden*[20] is also apposite here. He stated as follows:

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.'[21]

[41] It is only once the causation (both in the sense that the injury was caused by the accident and that these injuries resulted in the sequelae contended for) has been established by the plaintiff that the evaluation of the amount to be awarded for the plaintiff's loss can ensue. If causation is not established the enquiry ends and the plaintiff must fail.

[42] However, the inquiry is not always clear-cut. The assessment described by Colman J in *Burger v Union National South British Insurance Company*[22] is instructive as to the application of the inquiry to be undertaken by a court in assessing damages:

'It was pressed upon me that, as the burden of proof was on the plaintiff, it would be for her to prove the effects of the collision, and that she was entitled to compensation only for those effects which she proved. In so far as that submission relates to pure questions of causation, I accept it, as other Courts have done in such cases as Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (AD). It is on that basis that I exclude from

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[19] Ibid at [41].
[20] 2002 (6) SA 431 (SCA).
[21] Ibid at [24].
[22] 1975 (4) SA 72(W) at 74F-75F.

consideration the black-outs, which have not been shown to my satisfaction to be causally related to the collision. I disregard for the same reason the plaintiff's theory or suggestion that the collision was the primary cause, or a cause, of her matrimonial troubles. I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the onus is on the plaintiff, to act on the possibility least favourable to her. Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like Turkstra Ltd v Richards 1926 TPD 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the quantum of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the 'informed guess' referred to by Holmes JA in Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (AD).'

[43] The expert witnesses are enjoined by court directive and general procedure to meet and see if they can find common ground on salient aspects of the matter. They are expected to prepare and sign what is known as a joint minute. In terms of Practice Directive 2 the parties' attorneys are required to jointly, prepare and sign a document, styled SUBMISSIONS IN SUPPORT OF SETTLEMENT/CONSENT DRAFT ORDER in which the facts and opinions upon which the agreements are premised, are set out, appropriately cross-referenced to the source documentation relied upon, and the connection demonstrated between the facts and the conclusions of the experts[23].

[44] Whilst a court is not bound by the agreements reached by the experts and they are thus not conclusive of any issue, the importance of agreement on various points hardly needs be emphasised.

[23] Practice Directive 2 para 4.

[45] *The Assessor*- Assessors are appointed by the RAF to conduct investigations and fact checks into the claims. They verify matters such as employment details, familial connections as to dependants, eye-witness accounts of the accident and other matters which require verification in the trial preparation and settlement process. Assessors fees are, for the most part, disbursements of the RAF and the fact that expenditure is often curbed due to lack of funds can lead to a failure to investigate properly and a reliance on the facts as stated by the plaintiff in making the claim. It is not unusual for the RAF to have no version as to the facts of an accident to put forward at trial because no investigation has been undertaken, even at a most fundamental level.

[46] *The Claims Handler/s and other internal RAF checks and balances*- the RAF has within its structures checks and balances designed to facilitate investigations by the RAF into the prospects of success in cases, with a view to its further prosecution or settlement. There is generally one or more Claims Handler dealing with a case. I am not privy to the internal workings of the RAF infrastructure however it is clear that the claims handlers are called upon to make decisions and recommendations as to the conduct of the matters and particularly whether the RAF should settle on proposed terms. It seems that the larger the amount involved, the more senior the officials called upon to approve settlements. However, the command chain of officials vetting any settlement is only as strong as its weakest member and the team members rely on each other for information and especially for recommendations as to settlement. As I have said, the claims handlers could previously have relied on the expertise of the RAF's attorneys, but this avenue is now closed to them.

[47] The cases under examination are examples of how the system can fail if proper scrutiny is not applied. The reveal also that the RAF is dependent, to a large extent, on the motivations as to settlement of plaintiff's attorneys. These RAF officials can be forgiven for expecting plaintiff's attorneys to furnish them with facts as to the injuries and prospects which, at very least, accord with the evidence and which are not false. This is true also of a court called upon to approve a settlement. Whilst it is appreciated that a plaintiff's attorney should enter a negotiation with the RAF with the aim of maximising the amount settled on, this should not to be achieved by way of chicanery.

[48] *The Actuary* – The parties routinely seek to assist the court in its assessment of the appropriate amount payable by resort to the expertise of an actuary. Actuaries

rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia,* from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff's position using various assumptions and scenarios which should obviously have some foundation in fact and reality.

[49] The general approach of the actuary is to posit the plaintiff, as she is proven to have been in her uninjured state and then to apply assumptions (generally obtained from the industrial psychologists) as to her state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff both pre and post morbidity. The loss is calculated as the difference in earnings derived between the pre- accident or pre morbid state and post- accident or post morbid state. In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and other factors unconnected with the plaintiff's injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of "contingency" allowances. These are applied by the court dealing with the case in order to adjust the loss to reflect as closely as possible to real circumstances of the plaintiff. This is a delicate exercise which is an important judicial function.

[50] The report of the industrial psychologists is pivotal to the actuarial calculation. This is because the actuarial calculation must be performed on an accepted scenario as to income, employment, employment prospects, education, training, experience and other factors which allow for an assessment of the likely career path pre– and post the injuries.

[51] It thus stands to reason that, if the base scenarios adopted by the actuary are fallacious, the actuarial calculation is of no value to a court or to the RAF officials engaged in negotiating a settlement. If the income at date of the accident is over-stated even by a few thousand rand, this will lead to a significant inflation of the proposed loss in that the calculation is exponential. Thus for example the difference between an income of R 5000 per month as opposed to one of R7000 is calculated over a period of 15 years is R610 000 extra on the claim. Thus even a relatively modest claim is easily and significantly inflated by means of this ploy.

[52] A further variable is the plaintiff's career prospects - for example the probability of promotion pre and post-accident. Often suggestions as to the likelihood of promotion and furtherment of education to this end are without any evidential foundation and wholly improbable. Put simply, if the scenario presented to the actuary is contrived, the result will be significantly inaccurate.

[53] The *locus classicus* as to the value of actuarial expert opinion in assessing damages is *Southern Insurance Association Ltd v Bailey* NO[24] where Nicholas JA said the following :

'Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or differently put the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case'[25]

[54] Where an official of the RAF is called on to perform this delicate judicial assessment, one would hope that this would occur on the proper facts and

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[24] 1984 (1) SA 98 (A).

[25] bid at116G-117A. See also *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A).

untrammelled by the plaintiffs' attorneys machinations. However, this is not the case here.

[55] *The Court* - As I have said, the court must hear the trial if it runs and generally is called on to make an order of any settlement.

[56] It is against this background that the treatment and handling of the two cases before me must be viewed.

The Taylor Case

[57] When the trial action commenced before me on 12 October 2020 on the TEAMS virtual platform, I was told by counsel for the plaintiff, Mr van den Barselaar that the matter was 'almost settled', that five signatures had had to be obtained in relation to the offer to be made by the RAF and that it was his information that much headway had been made as to the outstanding approvals.

[58] The litigation officer/claims handler handling the case, Mr Ngoaka Nkgapela confirmed this at the hearing telephonically via the telephone of Mr van den Barselaar as he was not on the TEAMS link. I thus, at the instance of Mr van den Barselaar, allowed the matter to stand down to the following morning (Tuesday 13 October). Mr van den Barselaar made it clear that he was fully prepared to conduct the trial if the matter did not settle and that he would ask for a default judgment.

[59] The settlement negotiations had been initiated a week before the trial in terms of a written settlement proposal contained in an email dated 06 October 2020 (the Proposal) signed by Ms Zandalee de Swart of De Broglio and addressed to Mr Nkgapela. In terms of the Propsal the plaintiff's attorneys offered to settle at an amount in excess of R 3.3 million. The Proposal is important as to the function that it was meant to play in the determination of the settlement. It presented not only an offer but also a detailed set of representations as to fact.

[60] The next morning I was duly addressed by Mr van den Barselaar, who expressed that he was 'disappointed' as the offer which had been forthcoming from the RAF was not at the figure which was being discussed the previous day with Mr Nkgapela. In fact, he said, the offer was 'less than half' of that amount. He asked that I allow the matter to stand down for what I assumed was a further attempt at settlement. He offered that it would be regrettable if the plaintiff had to take a default judgment against the RAF – given its present state of being unrepresented.

[61] I had taken the opportunity presented by the delay in proceedings to read the pleadings, expert reports, and actuarial report and I had some serious concerns. These included that there did not seem to be a compelling case for the plaintiff – even on her own experts' reports - and the fact that a significant amendment to the pleadings had been effected by the filing on Caselines of amended pages a matter of days before the hearing and pursuant to a notice delivered electronically some three weeks before the hearing. This amendment sought to inflate the quantum claimed from R1 080 600 in the original pleadings to R 3 348 530 in the 'newly amended' pleadings. In the normal course, any self-respecting attorney for the RAF would have objected to a notice of intention to amend which was purportedly filed three weeks before trial or at least would have sought a postponement to deal with the amendment.

[62] It is important that the Trial Certification process had been undertaken on the basis of the relatively modest original claims on the various heads of damages (the loss of earning capacity, for example, was initially only R 285 000, but after amendment it had swelled to R 1 639 777).

[63] The case involves a claim by an office assistant who had been earning a salary of R 5500, she was 45 years old at the time of the accident and is currently 49 years old. Her injuries are orthopaedic and, by all accounts, completely healed. There are only anecdotal reports of pain especially on exertion.

[64] In the joint minutes of the orthopaedic surgeons it is agreed that the plaintiff does not qualify for general damages. This is definitively the end of any claim for general damages or, at least, it should be.

[65] The plaintiff did not return to work after the accident. She indicated variously to experts who assessed her position for the trial, including her own witnesses, that she was retrenched or replaced or dismissed on her return to her employment. An objective corroboration undertaken by the RAF's Industrial Psychologist reveals, however, that she was neither replaced, retrenched nor dismissed and that she would have been given her job back if she had wanted it. In fact, the objective evidence suggests that she resigned.

[66] I put some of the more material concerns to Mr van den Barselaar and indicated that I would require that I be addressed as to the quantum and perhaps he would like to lead evidence, if indeed he was of a mind to move for a default judgment. It was submitted to me that he would argue that I should have no regard to the RAF's medico – legal reports as they were not on oath. De Broglio, on the other hand, had hastily filed confirmatory affidavits of its experts some days before trial. Having heard my concerns about the case, Mr van den Barselaar sought to stand the matter down for further instruction.

[67] On his return a short time later he had done a complete turnabout. He said that he had now advised his client to accept the offer of the RAF and that 'sanity had prevailed'. As I have said, he had told me that she was previously adamant that she would only settle for the amount initially discussed (i.e. one that was double the amount of the settlement offer now made). He said that he now believed that it was a fair offer and that he had made a mistake as to the quantum involved previously.

[68] I thus asked that the draft settlement order be drawn up for my approval so that I could vet the agreement and give an order. Mr van den Barselaar submitted that the settlement did not require the Court's approval as no order was being sought. I was informed that the new policy for De Broglio and the RAF was to settle trial matters between themselves and not require a court order as per the JP's Practice Directive re Settlement Procedure. I was told that this was 'to save costs' – but this does not make sense in relation these matters as I was available and fully prepared to vet the settlement agreement and no further costs would have been incurred by my doing so.

[69] It is clear to me that this new approach is more about avoiding court scrutiny than it is about saving costs.

[70] The amount ultimately settled for was R 1 300 000, but a lot more was proposed and motivated for on the basis of the Proposal. I will say more about this later. There was no doubt that the amount settled on was significantly inflated.

[71] I indicated that I would not relinquish my oversight in the matter and that, in the circumstances, I was, at very least, entitled to enquire into the validity or otherwise of the settlement. I thus asked that the Mr Nkgapela and Mr Johnstone, both of whom had signed off on the settlement to appear and confirm the settlement agreement.

[72] On 14 October 2020, Messrs Johnstone and Nkgapela of the RAF duly appeared on TEAMS according to my direction. They confirmed that the matter had indeed become settled.

[73] Mr Johnstone told me at the hearing that he had been given a very short time to vet the matter for approval (only hours) but did his best because the matter was set down for hearing. He confirmed that he agreed that the Proposal by De Broglio had been significantly inflated. He said he had thus reduced it. He indicated that he had to approve many settlement offers in a day and that he relied on his staff and the plaintiff's legal representatives for accurate information in relation thereto.

[74] There can, in my view, be no doubt that Mr van den Barselaar and Ms de Swart were both well aware of the force of the contents of the Proposal in the context of the settlement engagement and the representations made therein.

[75] It is apposite, at this stage, to highlight some of the more material irregularities in this matter.

[76] As I have said, Mrs Taylor's job involved, in the main, making tea and coffee for staff members, some light cleaning and keeping stock of refreshments and cleaning products for a salary of R 5 500.

[77] She completed Grade 9 at school. She reported to the industrial psychologists that she was however now studying further to obtain her grades 10, 11 and 12. However, notwithstanding that the Industrial psychologists both pertinently note that there is no proof of these further studies, none was ever put forward. A career

progression is, however, squarely relied on in the actuarial calculation based on these alleged studies.

[78] The injuries contended for on behalf of Mrs Taylor going into the hearing were a fractured pelvis and a ruptured bladder. These were repeated in the Proposal and added to these was an injured knee. The plaintiff's expert urologist however confirmed that there was no case for a ruptured bladder. There had been blood in Ms Taylor's urine after the accident but this resolved with bedrest. Some obstruction and congenital weakness in the bladder was established by means of a cystogram (scan of the bladder). There was no evidence of a knee injury, other than Ms Taylor's anecdotal account.

[79] The injury to the pelvis, being orthopaedic, meant that the main expert witnesses for the parties' were their orthopaedic surgeons. Both doctors expressed that there were anecdotal complaints of pain by Mrs Taylor. These, if true, would have an impact of her work as an office administrator. However both orthopaedic surgeons stated emphatically in their joint minute that, in their opinion, Mrs Taylor did not qualify for general damages. This indicates that they did not regard the injury as serious for these purposes.

[80] The plaintiff's representatives however ignored this and made their bid for settlement to the RAF officials based on a report of Dr Kevin Scheepers, a general practitioner. Dr Scheepers' report, on the face of it, constitutes a gross overstatement of the injuries. His 'findings' are also completely at odds with the plaintiffs own urologist and, to a large extent, with the orthopaedic experts. There is no basis on which the conflicting report of Dr Scheepers, who is not specialist in urology or orthopaedics can be relied on to establish a proper quantum. The report of the plaintiff's orthopaedic surgeon Dr Hans H Volkersz appears to be based, for the most part, on the plaintiff's anecdotal accounts of pain. He also ventures his opinion in relation to her allegedly painful knee – which is not related to the accident. His report does concede however that at the time of the accident x-rays of the knee were normal.

[81] In the joint minute prepared by the orthopaedic surgeons (Dr Bogatsu being the RAF's expert witness) the following is stated in relation to the effects of the injuries on the plaintiff's future earning capacity: 'Both doctors note that she never returned to

work following this particular accident, Dr Bogatsu feels that she is currently not incapacitated. Dr Volkersz is of the opinion that she is not able to stand for long, walk far or sit for any length of time, severely compromising her possible employability'. And most importantly, 'both doctors defer to the opinion of an occupational therapist.'

[82] Reference to the report of the plaintiffs occupational therapist however shows inconsistency with the report of Dr Volkersz. In his report, Dr Volkersz indicated that Ms Taylor walked with a 'normal gait' whereas the plaintiff's occupational therapist reported that 'The claimant ambulated at a self-selected slow pace despite requests to increase her pace. She ambulated with a deviation in her gait cycle (i.e. a limp in her left lower limb and her steps were unequal in length). She held her right limb stiff at her side when walking.'

[83] As I have said, a further difficulty with the plaintiff's case is that there is an independent collateral source from the plaintiffs erstwhile employers which is to the effect that her version that she was dismissed because of her inability to work due to the alleged injuries, is false.

[84] All this notwithstanding, the Proposal included a claim for general damages of R950 000 which was motivated for on the basis that the plaintiff suffered the following damages: 'A complex fracture of the pelvis; a blunt trauma ruptured bladder injury causing bladder obstruction; a fractured lumbar spine of the 5th vertebrae; injury to left knee.'

[85] Reference to the plaintiffs own expert reports and other medical evidence shows this statement of the injuries is a misrepresentation, save in regard to the pelvic fracture.

[86] Loss of earnings in an amount of R 2 534 826 was claimed. In this regard Ms de Swart wrote 'we furthermore refer to the actuarial report and calculation, based on the report of the Plaintiff's Industrial Psychologist, as prepared by I. Kramer, annexed hereto marked "E". It provides for a future loss of R2,534,826 after application of a 12,5% pre-morbid and 27,5% post morbid, contingency.'

[87] Thus a total amount of R 3 484 826 was proposed by Ms de Swart in settlement of the claim.[26] As I have said, Mr van den Barselaar suggests that the amount of R 2 534 826 for loss of earnings was proposed in error.

[88] Reference to the actuarial report of Mr Ivan Kramer dated 06 May 2020 does not support the contention as to loss of earnings. He states, under oath, that he has done the valuation as at 1 June 2020. He states that he has based his report on information obtained from the report of the plaintiff's industrial psychologist and from the joint minutes of the industrial psychologists.

[89] He states that, according to her payslip dated January 2016, Ms Taylor earned a total income of R79,121 in the 11 months of the tax year to date and that thus she earned an average income of R7,193 pm (R86,316 pa). But this is patently false. Reference to the payslip in question reflects an income of only R 5 500 per month (which translates into R66 000 per annum). This is, in fact, confirmed in the joint minute of the industrial psychologists. Thus the information purportedly used by Mr Kramer is at odds with the objective evidence of salary and significantly misstates it. Recall the example above which shows that an elevation of the base salary figure has a significant impact on the actuarial calculation.

[90] Mr Kramer assumed on the basis that she had allegedly started to study towards a matric, that Ms Taylor had aspirations for career development. He thus assumed a career progression until age 55. In doing this he ignored the caveat of the industrial psychologists to the effect that there was no evidence of further studies. He thus worked on the assumption that her income would have risen evenly (in real terms) from R88,320 per annum at the accident date, to reach R136 000.

[91] It is on this basis that the figure for future loss of earnings was purportedly amended to raise the original claim for loss of earning capacity from R 250 000 - which, though still inflated in my opinion, was more in line with reality – to R1 639 777 (ie nearly six times the original claim).

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[26] The total in the proposal is stated as R 2 689777 but this is erroneous.

[92] An even more glaring anomaly in the calculation is this: The proposed amendment seeks to increase the claim for past loss of earnings to R 348 753.00 whilst this amount is already taken account of as part of the amount of R 1 639 777.

[93] Recall also, that from a factual point of view, there is objective evidence to the effect that the plaintiff was laid off work for only four months – which would equate to little more than R 2 200 past loss.

[94] I must explain why I refer to the amendment as 'purported.' The process of amendment in the present context is beset with complexity both procedurally and on the merits. This is exacerbated by the fact that the RAF has no attorneys. There are questions as to whether the electronic delivery of the purported amendment constituted proper delivery in terms of the rules of court. It seems to me that the persons served were neither qualified nor authorized to accept and deal with applications for amendment of this magnitude. At any rate, the amendment was to my mind not perfected.

Conclusion on Taylor

[95] Thus on the heads of damages in the original summons which remained as claims in the 'amended' particulars of claim - i.e. past loss of earnings; future loss of earnings; and general damages - there was an inflation of the figures purely on the basis of Mr Kramer's contrived report as follows : future loss from R285 600 to R 1 639 777; past loss from R 35000 to R 348 753; and general damages from R250 000 to R500 000. In total this is the amendment of the claim from R 570 600[27] to one of R 3 348 530. The following phrase was specifically added by amendment:

'The amount is as per the actuarial calculation of I Kramer dated 6 May 2020, attached hereto as annexure A.'

[96] To my mind the approach adopted by the plaintiff's legal representatives is nothing more than sleight of hand. There is no evidence that Ms Taylor lost her job as

[27] Bearing in mind the original claim for R 1000 000 took into account heads of damages not ultimately pursued such as past and future medical expenses.

a result of the accident; the use of Mr Kramer's actuarial calculation as a basis of the amended claim bears no scrutiny; and Mrs Taylor does not qualify for general damages on her own case. And yet, through the machinations of Ms de Swart of De Broglio and Mr van den Barselaar an offer of R 1 300 000 was extracted from the RAF. And this after there had been an internal recommendation of twice this amount – before this was reduced by Mr Johnstone.

[97] It is important that the proposal was far more than merely an offer. It contained a detailed motivation in the form of accepted facts that were materially at odds with the true facts and constituted, on the face of it, a deliberate misrepresentation of the claim and the evidence available to prove it. This raises questions as to the obligations of the plaintiffs' attorneys in the context of these negotiations. Officers of this court have obligations not to mislead RAF officials under circumstances where public funds are at stake.

[98] Mr van den Barselaar, duly instructed, persisted in the argument that I had no further jurisdiction in the matter as both parties had confirmed the settlement of the matter. As I have said, I thus asked that I be addressed by all parties as to whether, in the circumstances, there was a valid settlement and the extent of my jurisdiction given that I was not asked to make the settlement an order.

[99] I thus stood the matter down so that heads of argument could be filed and the matter fully dealt with. I also secured the appointment of an amicus curiae, in the form of Ms Adila Hassim SC and Mr Salukazana and admitted as a further amicus the Personal Injury Plaintiff Lawyers Association (PIPLA).

The Mathonsi case

[100] Having postponed the Taylor case, I was allocated this new matter for trial. I was advised, prior to the hearing, through my Registrar that the matter had settled. The settlement proposed was R 400 000 in respect of general damages and R 1 375 360 in respect of future loss of earnings, giving a total of R 1 775 360. I was not

provided with the settlement but certain submissions were made as to the reasonableness of the settlement.

[101] As I had similar concerns with this matter to those I had raised in Taylor, I postponed the matter for hearing on the same day as the argument in Taylor.

[102] The facts of the case are briefly the following. Mr Mathonsi was a passenger in a taxi. The merits were conceded by the RAF. The injuries contended for were a fracture of the left Clavicle, scarring, and Multiple soft tissue injuries and abrasions (which generally don't make for lasting disabilities). At the time of the accident Mr Mathonsi was employed as a warehouse supervisor by a pharmaceutical company.

[103] The plaintiff's occupational therapist records that there is 'mild impairment' in movement of the arm and shoulder as a result of the injury. Mr Mathonsi did not lose his employment and was paid his salary whilst convalescing. By all accounts, Mr Mathonsi is a valued employee who meets his targets and has won a number of awards. One could be forgiven for concluding that Mr Mathonsi has suffered no damages at all. His injuries were well treated in State institutions and this has enabled him to return to work with only mild impairment, on the evidence of his own experts.

[104] The original claim pleaded was for R963 600 made up as follows: Past hospital - R10 000,00; Future medical – 200 000;Past loss of earnings – R 16 000; Future loss of earnings – R 537 000; General damages – R200 000.

[105] De Broglio also happens to be the firm of attorney representing the plaintiff in this matter. Ms Prishani Singh was the attorney concerned. The RAF, again, was unrepresented.

[106] As in the Taylor case this claim translates into a real claim for past loss of earnings, future loss of earnings, and general damages. The medical expenses are accommodated by direct payment by the RAF to the service providers.

[107] Thus, the total original claim in real terms amounted to R753 000 (made up of past loss of earnings in the amount of R16 000; future loss of earnings of R 537 000; and general damages of R 200 000).

[108] As in the Taylor case, there were purported amendments close to the hearing date. There were two notices for amendment brought in quick succession. A notice of intention to amend dated 18 August 2020 was purportedly delivered electronically to personnel at the RAF. The same difficulties as to authorization to accept service and qualification to deal with such an amendment as are set out in relation to the purported amendments in Taylor also apply here.

[109] In terms of this proposed amendment the general damages claimed were increased from R 200 000 to R 500 000 bringing the total claim to R 1 263 600. A further attempt to amend was made by notice dated 20 September 2020. In terms of this notice which was also served electronically, the future loss of earnings is increased from R 537 600 to R 1 754 234. Thus the claim was increased in accordance with this latest amendment by more than R 1 million to R2 480 234,00. Again, there are concerns that the claims officer on whom electronic service was effected does not have the assistance of an attorney.

[110] Once again, it is sought that the amendment be substantiated by means of the following insertion into the particulars of claim:

'The amount is as per the report of Actuary, Ivan Kramer attached hereto as Annexure 'A'.

[111] As in the Taylor, the Case Management Certification took place before amendment was sought in accordance with Mr Kramer's actuarial report. Again, the RAF only pleaded to the original claim and thus there was no formal engagement with the purported amendments on behalf of the RAF.

[112] The Serious Injury Report was, again, drawn by Dr Scheepers. In fact, the same team of Dr Scheepers (general practitioner), Dr Volkersz (orthopaedic surgeon) and Mr Kramer (actuary) were appointed by De Broglio to deal with this case.

[113] Mr Kramer did his calculations and prepared his report as at 14 October 2020. His report states that he has based his assumptions on the findings of the Industrial Psychologist.

[114] The report of the industrial psychologist says the following as to Mr Mathonsi's salary at the time of the accident:

'At that stage, his IRP5 show his earnings as being R108 938. This document, however, does not reflect his total income, as he earns other non-taxable allowances. In total, his earnings amounted to about R147 000 per annum.'

[115] There is no sign in the document bundles of any evidence of this alleged non-taxable extra income. Neither the industrial psychologist's report nor any of the documents reveal such income and no attempt was made to point me to any basis to accept the extra income. Thus, yet again, I was faced with added income assumed by Mr Kramer which is unsupported by any evidence. The income added translates to an amount of in excess of the R3 000 per month. I reiterate that the exponential effect of such additions on an actuarial calculation results in a greatly inflated lumpsum.

[116] As to the qualification for general damages, yet again, Dr Volkersz did not give his certification and Dr Scheepers' report was relied on. It seems that the plaintiff's attorneys were aware of the fact that Dr Scheepers report would not suffice to establish that the injury was serious enough to allow for a claim for general damages. Thus, approximately three weeks before the trial, a further report of Dr Leslie Berkowitz, Plastic Surgeon was filed. In terms of the report Dr Berkowitz opines that 'The patient has been left with a serious permanent disfigurement of his left shoulder as a result of this accident'.

[117] This is inaccurate if not deliberately false. The reports of the orthopaedic surgeons are to the effect that there is no disfigurement of the shoulder itself. Photographs of the scarring show a relatively neat and thin scar from the surgery. From my evaluation, this injury would not qualify as a serious disfigurement and thus does not qualify the plaintiff for general damages on the narrative test.

[118] Once again, the general damages were motivated for on the basis of the report of Dr Scheepers. I must also record my disquiet with the manner in which the evidence of Dr Scheepers has been placed before this court. Dr Scheepers purportedly attested to an affidavit confirming his report. However, reference to this affidavit shows that it is signed but not commissioned. Presumably, the intention was to obtain a

commissioning ex post facto the signature. This is improper and adds to the general sense that the matter has been dealt with in a dishonest and cavalier manner.

[119] There was furthermore no proper discovery in the matter. Only an unsigned discovery affidavit was filed on 11 September 2020.

[120] Case Management Certification, again, took place on the original cause of action on 03 September 2020. It is reflected on the practice note filed that the RAF has not provided the plaintiff's attorney with its attitude regarding the serious injury report of Dr Scheepers. As I have said, the evidence of Dr Berkowitz was latterly obtained in an attempt to qualify the plaintiff for general damages.

[121] Against this, background proposals were made to the RAF which generated a settlement offer from the Fund in an amount of R 1 775 360, which was accepted.

Conclusion on Mathonsi

[122] The plaintiff did not lose his employment due to the fractured clavicle. He was paid during his absence from work and suffered no discernible damages to his patrimony. Yet the RAF settled the claim for future loss of earnings in an amount of in excess of R 1.3 million and agreed to pay general damages of R 400 000 when the injuries were not serios enough to qualify the plaintiff for a claim for general damages. This occurred pursuant to a substantial amendment which was, again, purportedly effected after the Case Management Court had certified the matter ready for trial on the original pleadings. The reports of Dr Scheepers and Mr Kramer were, once again, employed to dubious end. I reiterate – if there had been serious injuries arising from injury the orthopaedic surgeon would have certified this and the belated filing of the report of Dr Berkowitz does not, in my view, serve to qualify the plaintiff for general damages.

Modus Operandi which emerges from both cases

[123] From these two cases, and others which I have heard, a modus operandi emerges as follows:

- A relatively modest claim is brought and the Case Management Court process is undertaken on these pleadings.
- In the actuarial calculation, the income of the plaintiff pre-accident is inflated and / or the aspirations of the plaintiff are exaggerated or even fabricated in order to suggest a career progression when there is none.
- These fallacious assumptions are used by the actuary to calculate a loss of earning capacity which yield significantly inflated figures because of the exponential nature of the calculation.
- This actuarial report is then used as a basis for an amendment of the claim without any oversight.
- The RAF is not represented and is overwhelmed by the sheer volume of cases and/or the officials are pliable. They thus place undue reliance on the representations of the plaintiff's attorney as to the loss.
- As to general damages, under-qualified and sometimes pliable doctors are used to suggest the injuries are more serious than they, in fact, are.

[124] Ironically, the RAF would have been substantially better off in both these cases if the RAF had simply allowed default judgment to be taken in that the Court would have been allowed to perform its function of evaluating whether there was evidence for the claim and whether the matter was procedurally compliant.

The effect of the purported settlements

[125] I was in due course addressed by four senior and junior counsel teams for each of the parties in the Taylor case and the two amici.

[126] As I have said, the plaintiff, the defendant, and PIPLA all made common cause. Their argument was as follows: Once the parties have settled a case, the Court's jurisdiction is terminated and it is of no consequence to the validity of the agreement whether it is extra – judicial or embodied in a court order. It was sought that the Court should simply remove the matter from its roll and have no further part in the matter.

Ms Hassim on the other hand provided an invaluable analysis of the legal prescripts pertaining to the Court's constitutional functions.

[127] The RAF is, of course, empowered to settle. But the settlement has to be lawful; it must be consistent with the Act and the Constitution. The RAF is obliged to comply with the fundamental values and principles governing the public administration under the Constitution, including section 195, which provides that the RAF has to ensure that disbursement or use of its funds is an efficient, economical and effective use of public resources. It is also required to be transparent and accountable.[28] Froneman J, on behalf of the majority in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd*[29] confirmed that 'a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law.'[30]

[128] The commencement, defence and conduct of litigation by organs of state constitutes the exercise of public power. It must be done in a constitutionally compliant manner upholding legality and the rule of law. The RAF has chosen to ignore this Court's pointed concerns and instead of insisting on an order of Court as a precondition to its settlement, which would be the rational approach it has chosen to acquiesce in the tactic adopted by De Broglio on behalf of the plaintiff. That the RAF is conducting its business in this reckless manner under insolvent circumstances is of great concern to this Court.

[129] What is clear in relation to these two cases is that the RAF officials did not act lawfully to conclude the settlements and for this reason they are void *ab initio*. Thus on this issue, I agree with Ms Hassim that there is no settlement.

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[28] *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC), para 62
Mvoko v South African Broadcasting Corporation SOC Limited
2018 (2) SA 291 (SCA), paras 32 to 35

[29] [2018] ZACC 33; 2019 (2) BCLR 165 (CC) para 13

[30] Ibid. See also *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 25 and 26.

[130] An audit of other matters settled since May 2020 is likely to yield similar concerns to those that arise in these matters. The fact that these settlements are subject to being reviewed and set aside is ultimately prejudicial to the plaintiffs.

Conclusion

Whilst De Broglio might believe that it has served the interests of its clients and itself in achieving a settlement agreement for a grossly inflated amount in circumstances where it has avoided this Court's jurisdiction, in fact it has placed them in jeopardy. To the extent that the settlements are unconstitutional they are unenforceable. And if payment is made pursuant thereto this would constitute irregular expenditure by the RAF and potentially make those approving such payments vulnerable to personal scrutiny by the Courts. The RAF is a public entity, as contemplated in Part A of Schedule 3 of the Public Finance Management[31] (PFMA) and is therefore subject to the onerous prescripts relating to public expenditure set out in the PFMA.[32] Thus, without further collusion by the RAF in relation to payment, the settlements are, in effect, worthless.

[131] Having said all of this however, both parties agree that the matter be removed from the role. Notwithstanding this court's concerns, it cannot interfere with the settlement but by review brought by an interested party. Such a review application is not before me.

[132] As I have said however, to my mind this cannot be the end of the enquiry. I have significant concerns about the manner in which the legal representatives of the plaintiffs and the RAF officials who have handled these matters have comported themselves. I also believe that the manner in which the reports of Dr Scheepers and Mr Kramer have been obtained, requires fuller investigation. I will thus not remove the matters from the roll. I have decided to refer their conduct to their respective professional bodies. To my mind, the conduct of the RAF officials involved in the

[31] Act 1 of 1999

[32] See for example Sections 2, 50, 51, and 57 of the PFMA

matters should also come under investigation, but that is a matter for the RAF. It is furthermore my view that the conduct of De Broglio, Mr van den Barselaar and Ms de Swart should be more fully investigated. I have thus referred their conduct to the Legal Practice Council (LPC)

[133] In my view, the fund should be liquidated and/or placed under administration as a matter of urgency. This is the only way that this haemorrhage of billions of rands in public funds can be stemmed and proper and valid settlement of the plaintiffs' claims be undertaken in the public interest. I have asked that this judgment be brought to the attention of the Minister of Transport, the Acting Chief Executive Officer of the Road Accident Fund, and the National Director of Public Prosecutions.

Costs

[134] Only De Broglio for the plaintiff sought costs for the hearing. It was conceded by both amici and the defendant that it was proper that no award of costs be made.

Order

[135] I make the following orders:

1. **In case 37986/2018 Taylor v RAF the following order is made:**

   a. The matter is postponed sine die.
   b. This judgment is to be brought to the attention of any court called upon to enforce the purported settlement agreement.
   c. The conduct of De Broglio inc, Ms de Swart, and Mr van den Barselaar is referred to the Legal Practice Counsel.
   d. The conduct of Dr Kevin Scheepers in this matter is referred to the Health Professions Council of South Africa (HPCSA).

e. The conduct of Mr Ivan Kramer is referred to the Actuarial Society of South Africa.

2. **In case 13753/2019 Mathonsi v RAF the following order is made:**
   a. The matter is postponed sine die.
   b. This judgment is to be brought to the attention of any court called upon to enforce the purported settlement agreement.
   c. The conduct of De Broglio inc is referred to the Legal Practice Counsel.
   d. The conduct of Dr Kevin Scheepers in this matter is referred to the HPCSA.
   e. The conduct of Mr Ivan Kramer is referred to the Actuarial Society of South Africa.

3. A copy of this judgment is to be delivered to:

   a. the Minister of Transport;
   b. the Acting Chief Executive Officer of the Road Accident Fund; and
   c. the National Director of Public Prosecutions.

4. Each party shall pay their own costs.

D FISHER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 November 2020.

Date of Hearing: 3 November 2020.

Judgment Delivered: 16 November 2020.

APPEARANCES:

In Case Number 37986/2018

For the Plaintiff	: Adv G J Strydom SC with Adv M Van den Barselaar.
Instructed by	: De Broglio Attorneys.
For the Defendant	: Adv M Antonie SC with Adv M Chauke.
Instructed by	: Mpoyana Ledwaba Inc.
Amicus Curiae	: Adv A Hassim SC with Adv M Salukazana.

In Case Number: 13753/2018

For the Plaintiff	: Adv N Motala
Instructed by	: De Broglio Attorneys.
For the defendant	: The defendant was unrepresented.