

SOUTH AFRICA / JUDGMENT

Van Tonder v Road Accident Fund (2023/013183) [2024] ZAGPJHC 1009 (7 October 2024)

[2024] ZAGPJHC 1009

COURT

South Gauteng High Court, Johannesburg

BEFORE

T Lipshitz

CASE / FILE NUMBER

2023/013183

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG

DIVISION, JOHANNESBURG

CASE

NUMBER: 2023-013183

[1]

REPORTABLE :

[2]

OF INTREST TO OTHER JUDGES: YES/NO

[3]

REVISED:

7

October 2024

In

the matter between: Van
Tonder : Craigh-Clinton
Plaintiff
And
ROAD
ACCIDENT FUND
Defendant

JUDGEMENT

T LIPSHITZ AJ

INTRODUCTION

1. This matter concerns an application for default judgment arising from a delictual claim brought by the plaintiff against the defendant. The plaintiff seeks compensation for bodily injuries sustained by the plaintiff in a motor vehicle accident on 9 March 2020. The plaintiff suffered significant injuries, including a severe head injury with neurological consequences, such as epilepsy, as well as psychological and cognitive impairments. Additionally, the plaintiff sustained several rib fractures, lacerations on the left knee and foot, and a fracture of the pelvis with the left pubic ramus extending into the symphysis.
2. The defendant conceded the merits of the claim on 26 October 2022. Consequently, the sole remaining issue for determination is the quantum of damages.
3. In the course of these proceedings, the Court was required to address the following issues:
 - 3.1. The effect of the late filing of the notice of intention to defend and plea;
 - 3.2. Whether a “without prejudice” offer, which appeared to contain a tacit admission regarding the seriousness of the plaintiff’s injuries as contemplated by Section 17 of the Road Accident Fund Act 56 of 1996 (“the RAF Act”), read with Regulation 3[1] (“the Regulations”), could be considered by the Court, or whether such an offer is protected by privilege;
 - 3.3. The quantum of damages to be awarded.
4. These matters will be addressed in detail in the sections that follow.

The Late Delivery of the Notice of Intention to Defend and the Abuse of the Court’s Process

5. The plaintiff initiated an action against the defendant on 14 February 2023. Despite proper service, the defendant failed to respond to the summons within the period prescribed by the Uniform Rules of Court (“URC”) and neglected to file a notice of intention to defend. Moreover, the defendant made no effort to engage with the plaintiff to resolve the matter amicably. In the interim, the plaintiff underwent several medico-legal evaluations by various experts, and their reports were duly prepared. Having complied with all procedural

requirements, the plaintiff subsequently approached this Court for default judgment in terms of Rule 31(5) of the URC.

6. A default judgment hearing was set for 30 April 2024, and the defendant was duly notified of the hearing date through a notice of set down served on 20 March 2024.
7. However, on 28 April 2024—just two days prior to the scheduled hearing—the defendant filed a notice of intention to defend, followed by the filing of its plea on 30 April 2024, the day the default judgment was to be heard. The defendant’s plea comprised general denials and a special plea, alleging that the plaintiff’s injuries were not serious as contemplated by Section 17(1) of the Road Accident Fund Act 56 of 1996, read with Regulation 3. This position was taken despite the fact that the defendant had not previously rejected the plaintiff’s RAF4 forms in writing, nor had it formally contested the seriousness of the injuries at any prior stage. On the contrary, the defendant, just 4 days later, made a “without prejudice” offer with respect to general damages, thereby revealing an inconsistent stance.
8. When the matter was called, the defendant’s legal representative argued that the case could not proceed to default judgment, asserting that the filing of the plea precluded such a course of action. Counsel for the plaintiff contended that the defendant’s

conduct—particularly the late filing of both the notice of intention to defend and the plea—constituted an abuse of the court’s process. Plaintiff’s counsel urged the Court to follow the reasoning in *Delpont v Road Accident Fund* (GJ)[2], treating the belated filing as an abuse and allowing the matter to proceed to default judgment despite the defendant’s tactical

manoeuvre.

9. The Court extended an opportunity for the defendant to file an affidavit explaining the substantial delay. The defendant, however, chose not to avail itself of this opportunity. In the absence of an explanation, I can only infer that the filing of these documents at such a late stage was a deliberate attempt to delay proceedings, thereby forcing a removal of the matter from the roll. Such a delay would clearly prejudice the plaintiff, who would then have to wait an indeterminate period for a new trial date, further prolonging the resolution of the claim and deferring compensation for years to come.
10. Upon further inquiry, the defendant’s legal representative disclosed that the primary defence related to contesting the plaintiff’s factual earnings, both pre- and post-accident. I questioned whether the defendant would suffer any prejudice if the matter proceeded, allowing cross-examination of the plaintiff’s witnesses on this issue within the allocated court time. The defendant’s representative conceded that no prejudice would result from proceeding on this basis.
11. The Court is vested with inherent powers to regulate its processes, particularly to prevent the abuse of such processes. In the present case, I have considered the following factors:

- 11.1. The considerable delay between the initiation of the action and the filing of the defendant's plea;
 - 11.2. The defendant's failure to provide any reasonable explanation for its conduct;
 - 11.3. The plea itself, which comprises nothing more than bald denials and fails to raise a prima facie defence; and
 - 11.4. The prejudicial delay that would follow if the matter were removed from the roll, only to be re-enrolled on a later trial date, with no material improvement in the defendant's position.
12. In view of these considerations, I am satisfied that the defendant's conduct constitutes an abuse of the court's process. I find that there is no justifiable basis for removing this matter from the roll of default judgments. Accordingly, the proceedings continued, allowing the defendant an opportunity to cross-examine the plaintiff's witnesses on the limited issues as set out above.

SUMMARY OF PLAINTIFF'S EVIDENCE

13. The plaintiff brought an application in terms of Rule 38(2), read with Section 3(1) of the Law of Evidence Act 45 of 1998, seeking leave to introduce evidence before this Court. Specifically, the plaintiff sought to admit medico-legal reports, corroborated by confirmatory affidavits deposed by the relevant experts and the plaintiff's own affidavit. This application was duly granted, and these affidavits form part of the evidentiary material before this Court.
14. The following experts evaluated the plaintiff:
- 14.1. Dr. Graad – Orthopaedic Surgeon;
 - 14.2. Dr. Fine – Psychiatrist;
 - 14.3. Dr. Bingle – Neurosurgeon;
 - 14.4. C. Joyce – Clinical Psychologist;
 - 14.5. H. du Preez – Occupational Therapist;
 - 14.6. Dr. Vlamingh – Industrial Psychologist; and
 - 14.7. G. Whittaker – Actuary.
15. At the time of the collision, the plaintiff was 44 years of age. He was known to be diabetic, managed by chronic medication, including Glucophage and insulin injections. Aside from this condition, the plaintiff had no other pre-existing medical ailments.

16. The plaintiff completed his schooling in 1992 with a Grade 12 qualification. The plaintiff completed Standard 8 and obtained a three-year Business Management diploma. He served in the South African Defence Force for six years before entering the motor industry, where he held positions as a salesman, dealership principal, and tow-truck owner/driver. In January 2018, the plaintiff founded Cornerstone Wellness Centre, a private rehabilitation facility for men struggling with addiction.
17. At the time of the accident, the plaintiff was both the owner and manager of Cornerstone Wellness Centre, which operated as a live-in programme with a minimum duration of eight months, accommodating up to thirty-six men. The centre provided accommodation, three meals daily, one-on-one counselling, and coaching sessions. The plaintiff was deeply involved in every aspect of the centre's operation, working seven days a week, often fifteen hours daily. His duties ranged from meal preparation and grocery shopping to participating in physical activities and counselling. He also handled disciplinary matters and fundraising efforts for the centre.
18. According to his accountant, the plaintiff drew R25,000 per month for personal expenses from the business.
19. On 9 March 2020, the plaintiff was involved in a motor vehicle accident, resulting in significant trauma. He reported that he lost

consciousness at the scene and remained trapped in the vehicle for approximately three hours before receiving medical assistance.

Paramedics transported him to Akasia Hospital, where he was initially treated and stabilised. He was later transferred by helicopter to Milpark Hospital, where he was admitted to the ICU. The plaintiff underwent two surgical procedures: an open reduction internal

fixation of the right acetabulum and a total hip replacement. He was discharged on 2 April 2020 and subsequently transferred to a rehabilitation facility, from which he was discharged on 9 April 2020, ambulating with bilateral crutches.

20. On 30 June 2020, the plaintiff was readmitted after experiencing twitches, seizures during sleep, and general suboptimal functioning. An electroencephalogram (EEG) confirmed a diagnosis of epilepsy, for which he was treated with Epilim, a chronic medication.
21. Following the accident, the plaintiff attempted to resume his role as owner and manager of the centre after five months of recuperation. However, due to the severity of his injuries, he was unable to return to his previous duties. His wife and other facility staff have assumed the majority of his responsibilities. His involvement has been limited to daily devotions and occasional one-on-one counselling sessions. The plaintiff can no longer perform his previous duties.

22. His post-accident income has remained at R25,000 per month, but the plaintiff's inability to market and manage the centre has led to a decline in the number of clients and increased operational costs. The centre now operates at a loss and is unlikely to remain operational for much longer.
23. According to the medico-legal reports and the RAF1 form, the plaintiff sustained the following injuries as a result of the collision:
- 23.1. Severe head injury, complicated by epilepsy;
- 23.2. Multiple rib fractures;
- 23.3. Lacerations to the left knee and foot;
- 23.4. A fracture of the pelvis with the left pubic ramus extending into the symphysis.

Expert Assessments

Dr. Graad

24. Dr. Graad confirmed that the plaintiff sustained a fracture dislocation of the right hip. He reported that the hip replacement was in satisfactory condition but recommended conservative management for post-injury pain and anticipated two revision hip replacements. Dr. Graad assessed the plaintiff's orthopaedic injuries at an 8% Whole Person Impairment (WPI) and opined that the injuries met the threshold of seriousness under Section 17 of the Road Accident Fund Act, read with Regulation 3, as contemplated by the narrative test.

Dr. Bingle

25. Dr. Bingle noted that the plaintiff exhibited a slight limp and bore unsightly scars on his right parietal and left frontal scalp, left knee, foot, and right gluteal area. He further noted neurocognitive and psychological sequelae, including chronic headaches, sleep disturbances due to pain, speech difficulties, and epilepsy. Dr. Bingle, referencing the outcome-based

approach and the opinions of the psychiatrist and clinical psychologist, concluded that the plaintiff likely sustained a significant traumatic brain injury. He also assessed the injuries under Section 17 of the Road Accident Fund Act, read with Regulation 3, under the narrative test.

Dr. Fine

26. Dr. Fine observed that the plaintiff walked with a limp and had hesitant, slurred speech, with noticeable memory impairment. He diagnosed the plaintiff with severe traumatic brain injury and significant organic brain damage, possibly indicated by the possible Glasgow Coma Scale (GCS) score of 6/15 and the treatment of ventilation. Dr. Fine also diagnosed Post-Traumatic Stress Disorder (PTSD), accident-related depression, and post-traumatic epilepsy.

C. Joyce

27. Ms. Joyce conducted cognitive and psychological tests, which revealed compromised functioning in several areas, including concentration,

memory, executive function, and attention. She noted dysfunction in the frontal lobe, manifesting in difficulties with task-switching and executive functioning. Joyce diagnosed the plaintiff with a moderate brain injury, highlighting the presence of axonal damage. She opined that spontaneous recovery was unlikely, given the time elapsed since the accident. Additionally, she diagnosed the plaintiff with PTSD, anxiety, and depression, which exacerbated his cognitive impairments.

H. du Preez

28. Du Preez's assessment indicated that the plaintiff's functional abilities had significantly diminished. He was now limited to sedentary to light physical tasks and rare to occasional mobility demands. Du Preez opined that, both physically and cognitively, the plaintiff no longer met the demands of his pre-accident occupation as the owner and manager of a wellness centre. She further concluded that the plaintiff was unlikely to secure or maintain employment in the open labour market, given his physical and cognitive limitations and the ongoing effects of epilepsy.

Mr Vlamingh

Pre-Accident Scenario

29. At the time of the accident, the plaintiff had only recently founded the wellness centre and had plans to expand its facilities. Construction was already underway when the collision occurred. The plaintiff had previously achieved success in the motor vehicle industry and had also operated a tow truck business, which he closed after deciding to pursue his new calling.
30. Although the centre was not operated with a profit motive, the plaintiff was able to withdraw R25,000 per month for personal expenses. According to expert opinion, had the plaintiff not been injured, he would likely have expanded the rehabilitation centre, increasing his personal income to a peak of R40,000 per month. It is further suggested that he would have continued running the centre until retirement, with an expected retirement age of 68, or possibly extending to 70, as he was self-employed and had no mandatory retirement age.

Post-Accident Scenario

31. Experts have concluded that the plaintiff will no longer be able to reach his pre-accident earning potential. His psychological, physical, and cognitive impairments render him unfit to continue as the centre's owner and manager. It is further opined that his continued involvement may lead to the facility's closure, leaving him unemployable with little chance of securing alternative employment.

32. Based on all available information, the expert concludes that the plaintiff is no longer capable of resuming his pre-accident career or achieving his prior level of income, and that the wellness centre may be forced to close in the foreseeable future.

33. Mr Vlamingh provided oral evidence, which can be summarised as follows:-

33.1. The expert witness's evidence in this matter focused on the plaintiff's pre- and post-accident earning capacity and the impact of the accident on his ability to continue managing his business. The expert interviewed the plaintiff and his wife and reviewed relevant medico-legal reports and other documents, including the plaintiff's work history.

33.2. Before the accident, the plaintiff had worked in various roles, including as a sales dealer principal and a driver in the towing industry. He had also demonstrated managerial skills, eventually starting his own towing business. In 2018, he founded the Cornerstone Wellness Centre, a rehabilitation facility, following a personal calling to do so. His business, though small, provided him with a monthly income of R25,000, which was drawn as salary for personal expenses.

33.3. The expert postulated that the plaintiff, as a self-employed individual, would have continued to draw this salary, and his income could have increased had the wellness centre expanded as planned. The expert estimated the plaintiff's job grading at a B5/C1 level using the Paterson grading system, reflecting his skills and responsibilities. This was considered a conservative estimate, and the expert opined that his income would have likely increased had the plaintiff not been injured.

33.4. Following the accident, however, the plaintiff's capacity to manage the wellness centre was severely compromised. The expert described the plaintiff's post-accident ability as "extremely compromised," with him relying heavily on others to perform tasks he previously handled. The expert recommended that the plaintiff consider surrendering the management of the wellness centre to a church or similar organisation and secure a modest monthly income for himself through less demanding work. The expert further noted that the plaintiff's ability to handle complex interpersonal and behavioural issues had been significantly diminished, casting doubt on his continued involvement in the centre's operations.

33.5. Regarding retirement age, the expert suggested that pre-accident, the plaintiff could have worked until age 68 to 70, given his self-employed status. However, post-accident, the expert proposed a more conservative retirement age of 60, reflecting the plaintiff's diminished capacity.

33.6. During cross-examination, it was confirmed that the expert did not have access to all pre-accident financial records or collateral sources when compiling the report. However, the expert relied on available medico-legal reports, the plaintiff's curriculum vitae, and interviews with the plaintiff and his wife to form his conclusions.

Lay Witnesses

Ms Van Tonder – The Plaintiff's Wife

34. Ms Van Tonder gave evidence that the plaintiff was involved in a serious motor vehicle accident on 9 March 2020 while returning home after purchasing food for the wellness centre he managed. The collision was head-on, and both the plaintiff and the other passenger were trapped in the vehicle for approximately three hours before being airlifted to Milpark Hospital. Upon admission, it was determined that the plaintiff had sustained multiple fractures, including broken ribs, a crushed pelvis and hip, as well as leg and head injuries. He underwent two surgeries for hip replacement and was discharged after a month, although he continued to rely on crutches and faced significant difficulty in walking.
35. Post-accident, the plaintiff suffered from convulsions during sleep, leading to a diagnosis of brain damage, which impaired his speech and cognitive abilities. His wife testified that prior to the accident, the plaintiff was actively involved in managing the Cornerstone Wellness Centre, which he had founded in 2017. His daily responsibilities included preparing meals, organising physical activities, providing spiritual guidance, and handling the centre's day-to-day operations. Since the accident, he has been unable to perform these duties, repeating himself frequently and displaying cognitive deficits. His wife, who handled the administrative aspects of the centre, stated that they have had to hire additional staff to perform tasks that the plaintiff previously managed, including gardening and domestic help.
36. Before establishing the wellness centre, the plaintiff worked in car sales and towing, earning more than he did as the centre's manager. At the time of the accident, the plaintiff drew R25,000 per month for personal expenses from the centre's income. However, due to the financial impact of the accident, no salary is currently being drawn, and the centre is struggling to cover its operational costs. Efforts to secure additional funding, including attempts to open a non-profit company and attract donations, have been unsuccessful.
37. During cross-examination, the plaintiff's wife confirmed that although she was not at the accident scene, she obtained information from traffic officers and medical personnel. She could not confirm the plaintiff's Glasgow Coma Scale (GCS) score upon admission but noted that he had sustained gashes on his head. The defendant argued that no head injuries were recorded on admission.
38. The wellness centre's financial struggles were also discussed in detail. The plaintiff's wife, who is a bookkeeper, stated that the centre's income has diminished significantly since the accident, and it is now operating at a loss. Although the plaintiff initially drew R25,000 monthly, he no longer receives a salary, and the centre's financial records reflect a worsening situation. Attempts to reduce expenses, including adjusting the menu for the residents, have not been sufficient to prevent the financial decline.

M Glantz – the plaintiff's accountant.

39. The plaintiff's accountant, responsible for managing the financial records since 2018, provided detailed testimony regarding the financial status of the plaintiff's business. The accountant confirmed that the plaintiff had no income in 2018, and financial records prior to 2021 were not readily available during testimony. However, from 2021 onwards, the

accountant confirmed that the plaintiff drew a R25,000 monthly salary. This amount included medical aid, rent, and other living expenses. The accountant also testified that the plaintiff's wife earned R18,396 monthly after deductions.

40. The financial records revealed that in 2021, the plaintiff's company generated R355,838 in income, with a net profit after expenses. By 2022, the income had increased slightly to R370,990. However, the company experienced financial difficulties, as reflected by the profit and loss statements showing a decline in overall profits and an eventual loss of R221,000 in the 2022–2023 financial period. The accountant further provided the tax assessments for 2022 and 2023, which indicated that the plaintiff owed no taxes to SARS and had complied with all tax obligations.
41. Cross-examination revealed that the plaintiff's business, classified as a non-profit organisation assisting with rehabilitation, had only two temporary employees at the time. It was confirmed that the plaintiff and his wife used drawings from the business for personal expenses. Although the business maintained separate books for individual and company finances, the company struggled to remain financially viable due to declining income and increasing operational costs.

General Damages

42. In the case of *Knoetze obo Malinga and Another v Road Accident Fund* (77573/2018 & 54997/2020) [2022] ZAGPPHC 819 (2 November 2022), the court reaffirmed the principle that it does not have jurisdiction to determine whether injuries qualify as serious for purposes of general damages unless such injuries have been classified as serious in accordance with the process prescribed in the regulations. It is common cause that the defendant has not formally reacted to the plaintiff's serious injury assessment form, neither having expressly accepted nor rejected it.
43. In the present matter, it is common cause that on 2 May 2024, the defendant made a "without prejudice" offer, which included compensation for general damages and loss of earnings, as well as an undertaking for future medical expenses in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996. The plaintiff, however, did not accept this offer.
44. The plaintiff contends that the "without prejudice" offer constitutes a tacit acceptance by the defendant that the plaintiff's

injuries meet the statutory threshold of seriousness. Such a tacit acceptance, it is argued, vests this Court with the necessary

jurisdiction to adjudicate the quantum of general damages. In support of this argument, the plaintiff relies on the cases of *Mertz v Road Accident Fund*[3] and *Chetty v Road Accident Fund*[4].

45. Conversely, the defendant asserts that the “without prejudice” nature of the offer shields it from being admitted into evidence, citing *Berning Keagan v Road Accident Fund*[5]. The defendant argues that the Court is precluded from considering the offer due to the privilege attached to settlement negotiations.

46. The Court now turns to address the relevant law.

Without Prejudice Privilege and Exceptions

47. The “without prejudice” rule serves as a cornerstone of dispute resolution by encouraging parties to settle their disputes amicably without the need for protracted litigation. The principle is well-established in South African law, as explained in *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) (“Naidoo”). At its core, the rule allows parties to engage in settlement negotiations without fear that statements made in the course of such

discussions will be used against them should the negotiations fail. This protection fosters an environment of candour, allowing parties to explore potential compromises and make concessions in the pursuit of a settlement, knowing that such concessions cannot later be treated as admissions in subsequent litigation.

48. The public policy rationale underpinning this rule was eloquently described by Trollip JA in *Naidoo*, where he cited Lord Mansfield’s 19th-century statement that parties must be allowed “to buy their peace” without prejudice if the negotiations are unsuccessful. The rule thus ensures that offers made during settlement talks cannot later be construed as admissions of liability. By shielding parties from the potential negative consequences of failed negotiations, the law seeks to incentivise settlement and reduce the burden on courts and the litigation system. This principle remains vital in contemporary legal practice, as litigation is often costly, time-consuming, and fraught with hostility.

49. The scope of the “without prejudice” rule has been further clarified in subsequent cases, reinforcing its broad applicability in the context of settlement negotiations. However, it is essential to recognise that the protection afforded by the rule is not absolute. Various exceptions exist where public policy or other considerations dictate that communications marked as “without prejudice” may be admissible in evidence. By way of example, “without prejudice” correspondence may be used to prove an act of insolvency,[6] to prove an acknowledgement of liability to interrupt prescription.[7]

50. The decision of *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) (“Jili case”) is instructive. In this case, the plaintiff argued that the defendant’s “without prejudice” settlement offer should be inadmissible in court based on the privilege ordinarily attached to such communications. The court, however, found that this

correspondence could be admitted into evidence.

51. The plaintiff's argument rested on the premise that since the offer was marked "without prejudice," it constituted a privileged communication and thus could not be used to establish an "offer of settlement" under Section 14(2)(b) of the Motor Vehicle Accidents Act 84 of 1986. According to the plaintiff, this would mean that the offer could not trigger the 90-day suspension of prescription under the Act, and thus, her claim had not prescribed.
52. Judge Combrink, however, dismissed this argument. He held that the phrase "without prejudice" does not automatically confer upon a communication immunity from disclosure. The judge made it clear that the mere fact that a communication bears the phrase "without prejudice" does not necessarily shield it from being admitted in evidence. The key consideration is the purpose of the communication. If the communication forms part of bona fide settlement negotiations, it may be protected from disclosure to prevent admissions made during those negotiations from prejudicing

the party in subsequent litigation. However, if the purpose of admitting the communication is merely to prove the existence of an offer rather than to rely on the admissions contained within it, the privilege does not apply.

53. In the Jili case, the defendant's offer was made with the intention of settling the matter, and it was not tendered as evidence of any admission of liability. As such, it was admissible for the limited purpose of proving that an offer of settlement was made, which triggered the 90-day suspension of prescription under Section 14(2)(b) of the Act. The court noted that acceptance of the offer would have resulted in a binding settlement of the dispute, and whether the offer was marked "without prejudice" or not was irrelevant to its effect in this regard.
54. The judgment also emphasised that the "without prejudice" privilege does not attach to communications that are not part of genuine settlement negotiations or are being tendered to prove facts that are not reliant on any admissions made during the negotiations. In this instance, the defendant did not seek to rely on any admissions but merely the fact that an offer of settlement was made.
55. In summary, the court's decision highlights that the "without prejudice" rule is not absolute. While it generally protects parties from using admissions made during settlement negotiations, this protection does not extend to the mere fact of an offer being made, especially when such an offer is relevant to the legal mechanism—such as the suspension of prescription—without

relying on any admissions within the communication.

Conflicting Case Law dealing with the admission of offers of settlement to prove tacit admission of the Road Accident Fund's acceptance of an injury as serious.

56. In the matter of Chetty v Road Accident Fund[8], the Full Bench found that an offer of settlement pertaining to compensation for general damages was sufficient to demonstrate that the defendant had accepted the plaintiff's injuries as serious, thereby triggering the

Court's jurisdiction to determine the quantum of damages under this head. The Court, however, did not provide a comprehensive explanation of the legal basis upon which it took the settlement offer into account, particularly in light of the principle that such offers of settlement are typically shielded by privilege.

57. In *Mertz v Road Accident Fund*[9], the Court was confronted with a situation in which the Road Accident Fund was requested during pre-trial proceedings to admit the plaintiff's expert reports, including, by inference, the serious injury assessment report. The Road Accident Fund undertook to provide a formal response by a specific date, failing which it would be deemed to have admitted the findings contained in the plaintiff's reports. The issue before the Court was whether this constituted an acceptance of the serious injury assessment report, thereby invoking the Court's jurisdiction to determine the quantum of general damages.
58. The Court reaffirmed the principles established in *Chetty v Road Accident Fund*, reiterating that when the Road Accident Fund ("RAF") offers compensation for general damages without explicitly advising

the claimant that the injuries are classified as serious, such conduct can be interpreted as an implied acceptance of the seriousness of the injuries. The Court held that, in the present case, the RAF's failure to provide a timely response as promised during the pre-trial proceedings amounted to a deemed admission. This tacit admission was considered sufficient to constitute an acceptance of the serious injury assessment report, thereby triggering the Court's jurisdiction to assess the quantum of general damages.

59. In *Keagan v Road Accident Fund*[10], the Court was presented with a situation that mirrors the one in the present matter. Coincidentally, the plaintiff in the Keagan matter was the passenger involved in the collision to which this case relates. The plaintiff sought to rely on a "without prejudice" offer of settlement to argue that the defendant had tacitly accepted the plaintiff's injuries as serious, thereby triggering the Court's jurisdiction to determine general damages. The issue before the Court was whether it could admit the "without prejudice" offer as evidence of such acceptance.
60. The Court firmly held that it could not pierce the privilege attached to the "without prejudice" correspondence. It emphasised that the very purpose of the "without prejudice" rule is to protect parties engaged in settlement negotiations from having their offers used against them in litigation unless there has been an express waiver of privilege. The Court made it clear that in the absence of such a waiver, the offer remained privileged and could not be used as evidence to establish liability or admission of serious injury.
61. In distinguishing the case from the decisions in *Mertz v Road Accident Fund* and *Chetty v Road Accident Fund*, the Court explained that those cases involved factual circumstances where privilege had been expressly waived or pre-trial admissions had been made. In *Mertz*, the Road Accident Fund had conceded liability for general damages during a pre-trial conference. At the same time, in *Chetty*, the waiver of privilege was crucial in allowing the

Court to consider the offer. In *Keagan*, however, there was no such waiver of privilege, and the case did not deal with any pre-trial admissions by the defendant.

62. While the Court in *Keagan* sought to differentiate its reasoning from *Chetty* on the basis of privilege, I find this approach problematic. The *Chetty* judgment did not explicitly base its finding on the waiver of privilege, nor did it delve into the waiver issue at all. Instead,

the Court in *Chetty* expressed the principle that an offer of compensation for general damages could, in general, be interpreted as a tacit acceptance of the serious injury assessment report. Any reference to the necessity of a waiver of privilege did not qualify this broad proposition.

63. As a result, I am bound by the general principle established in *Chetty* under the doctrine of stare decisis. Despite the absence of detailed reasoning in the *Chetty* judgment regarding the role of privilege, the precedent set by the Full Bench requires this Court to recognise that an offer of

settlement—even if marked “without prejudice”—may, under certain circumstances, be interpreted as an acknowledgement of serious injury sufficient to engage the Court’s jurisdiction to assess the quantum of damages.

64. In *Paulson v The Road Accident Fund*[11], the Court followed the reasoning set out in *Keagan* and found that an offer of settlement was inadmissible.

Legislative Framework and the Road Accident Fund’s Role and Decision-Making Obligations

65. The RAF, as a statutory body entrusted with administering compensation to victims of road accidents, carries significant administrative

responsibilities. Section 17(1) of the Road Accident Fund Act sets out that compensation for general damages is only payable if the injury is deemed “serious” in accordance with the

statutory and regulatory framework. The serious injury assessment process, as prescribed in Regulation 3 of the Road Accident Fund

Regulations[12], requires the RAF to assess whether an injury qualifies as serious, based on objective medical evidence, primarily the serious injury assessment report submitted by the claimant.

66. Regulation 3(c) of the Road Accident Fund Regulations, stipulates that “The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations.”
67. As the Regulations do not expressly provide that the RAF must accept the serious assessment report in writing, it is now settled law that this communication may be explicit or tacit based on the defendant’s action.

68. The decision the RAF makes in this regard constitutes an administrative decision, and as such, it must adhere to the well-established principles of rationality, fairness, and legality. Specifically, any decision made by the RAF must not be arbitrary, capricious, or irrational. It must align with the purpose for which the empowering legislation was enacted—the equitable compensation of victims of road accidents who have sustained serious injuries. A failure to adhere to these principles would result in a decision that lacks the necessary legal grounding and would likely be subject to review.
69. In making its decision regarding the seriousness of the injury, the RAF is obliged to consider all relevant information placed before it, including the medical reports and supporting evidence. Furthermore, the decision must be made with reference to the purpose of the statutory provisions it operates under. Critically, the RAF must ensure that its decision is based on objective evidence and that it communicates this decision clearly and transparently to the claimant.
70. In terms of Regulation 3(c) and (d) of the Road Accident Fund Regulations, the RAF is presented with three distinct options: it may accept the injury as serious, reject the injury as serious, or direct the claimant to undergo a further serious injury assessment at the RAF's expense.
71. It is crucial to distinguish between the administrative duties of the RAF and its role in settlement negotiations. While a settlement offer generally pertains to financial negotiations regarding quantum and merits, the administrative task of assessing whether an injury is serious is distinct and precedes any financial discussions. A financial offer to settle does not in itself constitute an administrative decision, but it may be indicative of the RAF's broader conduct regarding the case.
72. The RAF cannot act arbitrarily by linking its decision on the seriousness of the injury to financial settlement discussions or by leveraging the assessment of the seriousness of the injury to force claimants into unfavourable quantum negotiations. Such practices would not only undermine the fairness required in administrative decision-making but would also distort the statutory framework, which mandates clear, evidence-based determinations on the serious injury assessment. This is said, as if it is found that a conditional decision in this vain is allowed, it would imply either the acceptance of a serious injury report for an undeserving claimant or it would hold a deserving claimant's legitimate entitlement to general damages hostage to the acceptance of a settlement figure. Both scenarios would defeat the fundamental objectives of the Act and the enabling provisions.
73. The RAF cannot weaponise its administrative authority in this manner, as this would amount to an abuse of power. Administrative decisions must be exercised within the bounds of fairness, and holding a claimant's rights hostage to quantum negotiations violates these principles.

74. Once the RAF has made its statutory decision to accept a claimant's injury as serious, such a decision is *functus officio*[13] and cannot be varied as the empowering provisions of the relevant legislation do not permit it to do so.
75. In light of the principles of administrative law governing the RAF and considering the exceptions to the "without prejudice" rule, I find that the offer of settlement made by the RAF on 2 May 2024 is admissible for the limited purpose of exposing the RAF's tacit admission that it has accepted the plaintiff's injury as serious. The communication serves to demonstrate the RAF's administrative decision, rather than to disclose any negotiation on liability or quantum.
76. The remaining details of the offer, such as the quantum of compensation tendered, remain privileged and inadmissible. However, for the limited purpose of determining that the RAF has made an election regarding the seriousness of the injury, the "without prejudice" correspondence may be considered.
77. Accordingly, I conclude that the RAF has tacitly accepted the plaintiff's injuries as serious, and I now move to consider the quantum of general damages to be awarded.

Quantum of General Damages

78. In assessing a claim for general or non-patrimonial damages, the Court is tasked with the complex and inherently discretionary exercise of attaching a monetary value to the plaintiff's pain and suffering, disfigurement, permanent disability, and loss of amenities of life. This process is particularly challenging, as each case presents unique facts and circumstances, and there is seldom a perfect comparator from precedent.
79. In *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A), the Supreme Court of Appeal acknowledged the difficulty courts face in devising rigid rules for quantifying general damages. Instead, the Court adopted a "flexible approach," emphasising that the amount awarded can only be determined through broad, general considerations. The award, as expressed in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194, "depends upon the Judge's view of what is fair in all the circumstances of the case."
80. While it is accepted that no two cases will ever align precisely, the use of comparable cases can provide valuable guidance to the Court. When examining previous awards in analogous situations, the Court is able to align its assessment with prior decisions, ensuring consistency and fairness. As noted in *SA Eagle Insurance Co v Hartley* [1990] ZASCA 106; 1990 (4) SA 833 (A) at 841 D, comparative case law assists in reaching a decision that is not "substantially out of general accord" with earlier awards, provided that the Court accounts for the inflationary erosion in the value of money.
81. In *Protea Assurance Co Ltd v Lamb* 1971 SA 530 at 536 A-B, the Supreme Court of Appeal emphasised the importance of comparable cases, stating:

“Comparable cases when available should rather be used to afford some guidance in a general way towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases. At the same time, it may be permissible in an appropriate case to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

82. In other words, while the Court may rely on previous awards to guide its judgment, each case must ultimately be determined on its own merits, with the Court exercising its discretion in light of all relevant factors, including the severity of the injuries and their impact on the plaintiff's quality of life.
83. In the present matter, the plaintiff has sustained significant injuries as a result of a motor vehicle accident. The injuries have severely impacted the plaintiff's quality of life and compromised his ability to work, as evidenced by the various expert reports submitted.

Plaintiff's Submission on General Damages

84. The plaintiff's counsel submitted that an appropriate amount for general damages would be R2,500,000, citing several cases to substantiate this quantum. Among these cases, reliance was placed on the following authorities:-

84.1. *M v Road Accident Fund* (12601/2017) [2018] ZAGPJHC 438 In this case, the plaintiff, a 27-year-old passenger, suffered severe traumatic brain injuries resulting in right-sided hemiplegia, severe mobility difficulties, and a heightened risk of epilepsy. Following medical treatment, the plaintiff was wheelchair-bound and unable to mobilise independently. General damages were awarded at R1,900,000, which, adjusted for inflation, equates to R2,679,000 in 2024.

84.2. *Zarrabi v Road Accident Fund* 2006 (5B4) QOD 231 (T) The plaintiff, a 30-year-old trainee medical specialist, sustained a diffuse axonal brain injury along with significant neuro-cognitive and neuro-psychiatric consequences. The plaintiff was unable to resume her professional duties and suffered lasting impairments in memory, speech, and emotional regulation. The Court awarded R800,000 in 2006, which, when adjusted, amounts to R2,197,000 in 2024.

84.3. *Segole v Road Accident Fund* (10078/2019) [2023] ZAGPJHC 1288 This case involved a moderate traumatic brain injury with multiple fractures and permanent cognitive impairment, affecting the plaintiff's ability to perform physical activities. The general damages awarded in 2023 amounted to R1,500,000, equivalent to R1,515,750 in 2024.

84.4. *Nando v Road Accident Fund* 2015 JDR 1193 (GP) The plaintiff suffered a moderately severe brain injury with cognitive and neurobehavioral impairments, including memory issues and a long-term risk of epilepsy. General damages were awarded at R850,000 in 2015, which adjusts to R1,343,000 for 2024.

84.5. Mpondo v Road Accident Fund (CA283/2011) [2011] ZAECGHC 24 The plaintiff sustained fractures that required multiple surgeries, including a total hip replacement, leading to chronic pain and difficulty walking. General damages were awarded at R550,000 in 2011 and adjusted to R1,072,500 in 2024.

84.6. Olivier v Road Accident Fund 2013 (6A4) QOD 216 (GNP) The plaintiff sustained a severe brain injury resulting in epileptic seizures, memory loss, and physical impairment. General damages of R700,000 were awarded in 2013, now equating to R1,225,000 for 2024.

84.7. M M v Road Accident Fund (4119/2015) [2019] ZAFSHC 5 The plaintiff suffered traumatic brain injuries and multiple fractures leading to severe cognitive and emotional impairments. General damages of R850,000 were awarded in 2019, adjusting to R1,105,000 in 2024.

Defendant's Submissions on General Damages

85. The defendant did not present any submissions or counterarguments regarding the quantum of general damages.

Court's Consideration

86. In assessing general damages, the Court is mindful that the award must be fair and equitable, considering both the severity of the injuries and the impact on the plaintiff's life. While the injuries, in this case, are severe and life-altering, they do not rise to the same level of gravity as some of the more extreme cases cited, such as M v Road Accident Fund or Zarrabi v Road Accident Fund, where plaintiffs were left with catastrophic physical and cognitive disabilities. In light of this, the amount sought by the plaintiff—R2,500,000—appears disproportionate compared to the cited case authorities.

87. Furthermore, reliance is also placed on the decision in Kruger v Road Accident Fund (27383/2009) [2022] ZAGPPHC 73, where the plaintiff's impairment was similar to Mr. Van Tonder, especially given that both plaintiffs developed epilepsy sometime after the accident and both appeared to have worsening of cognitive and neurological symptoms over time. This case provides a helpful comparator for the present matter. The plaintiff in the Kruger matter was awarded R 1 400 000, 00 in 2022, adjusted to R 1 561 785. 00 in today's terms.

88. In light of the case authorities cited, the Court is of the view that an appropriate award for general damages in this matter would be R1 500 000. 00.

Loss of Earnings

89. As previously stated, I accept the findings of Mr. Vlamingh, whose testimony was both credible and reliable. His assessment that the plaintiff's earning potential at his rehabilitation centre would have grown and reached a peak of R40,000 per month is aligned with the fact that the centre was still in its early stages of development, having only commenced operations in January

2018. I also take into account the plaintiff's diverse work history, which includes experience as a car salesman and as the owner of A & A Cornerstone Towing, where he earned an income of R50,000 per month. Given this background, I am persuaded that if the rehabilitation centre had ultimately failed in the pre-accident postulations, then the plaintiff would have been able to secure alternative employment with an earning capacity likely in the same range.

90. In this context, I find Mr. Vlamingh's projections to be fair and conservative. Furthermore, it appears to be common cause, as reflected in all expert reports, that the plaintiff is no longer employable due to the injuries sustained. While the plaintiff has been able to derive some income from the rehabilitation centre, this situation is no longer sustainable, as the centre is no longer profitable owing to the plaintiff's diminished capacity to manage it effectively. Mr. Vlamingh hypothesised that the plaintiff would retain a slight residual earning capacity, limited to R 5 000, 00 per month with inflationary increases, demonstrating his conservative approach.

91. Mr Whittaker calculated the plaintiff's loss of earnings based on assumptions provided by Mr Vlamingh regarding the plaintiff's

career trajectory before and after the accident. The pre-accident and post-accident earning capacities were carefully considered,

incorporating inflation adjustments and future earning potential.

Pre-Accident Earnings

92. At the time of the accident, the plaintiff was self-employed at the Cornerstone Wellness Centre, earning approximately R25

000. 00 monthly. According to the expert report by Mr. Vlamingh, the plaintiff's earnings would have progressed, reaching a ceiling

of R40 000. 00 per month. From this point, his earnings would have increased annually in line with inflation until his retirement at the age of 68.

Post-Accident Earnings

93. Following the accident, the plaintiff was unable to work for five months, though he continued to draw a salary of R25

000. 00 per month. However, the Cornerstone Wellness Centre operated at a loss, with the business showing a deficit of R24

085. 00 for the tax year ending February 2021.

94. The post-accident earnings calculation assumes that the plaintiff will continue earning R25

000. 00 monthly, adjusted for inflation, until 31 December 2023. Thereafter, based on Mr De Vlamingh's expert opinion, it is expected that the plaintiff will be capable of performing only lighter

janitorial duties at the Centre, earning a significantly reduced salary of R5

000. 00 per month, with further increases aligned with inflation until the age of retirement at 60.

Contingencies

95. Contingency deductions play a critical role in calculating damages, particularly in claims for future loss of earnings and loss of earning capacity. The purpose of these deductions is to account for the uncertainties and vicissitudes of life that may affect a claimant's future financial situation. These deductions ensure that the award reflects not only the known losses but also the potential risks and benefits that may arise in the future. The relevant case law establishes that contingencies allow for both adverse and favourable possibilities that may affect the claimant's life.
96. In *Mngomezulu v Road Accident Fund* (04643/2010) [2011] ZAGPJHC 107 (8 September 2011), the Court held that "Contingency deductions allow for the possibility that the Plaintiff may have less than normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident, or labour unrest, or even general economic conditions." The rationale behind contingencies is that they account for the general hazards of life, such as temporary unemployment, illness, or retrenchment, as well as factors like savings on travel costs if the claimant is no longer able to work.
97. Contingencies, as recognised by the courts, encompass positive and negative possibilities. In *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A), Nicholas JA remarked that not all contingencies are adverse. He noted: "All 'contingencies' are not adverse, and all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune?"
98. The assessment of contingencies is discretionary and varies with the facts of each case. As noted in *Bailey*, while actuarial calculations provide a valuable basis for determining future loss, they are not binding. The trial judge has broad

discretion to adjust these calculations by applying contingencies that reflect the uncertainties of life. The amount deducted as a contingency may vary depending on the circumstances, and, as Nicholas JA stated in *Bailey*, the assessment of contingencies is largely arbitrary, depending on the judge's impression of the case.

99. In applying contingencies, the courts often employ what is known as a "sliding scale," which varies depending on the age of the claimant. This approach was highlighted in *Goodall v President Insurance* 1978 (1) SA 389 (W), where the court applied a scale of deductions, suggesting a 25% deduction for a child, 20% for youth, and 10% for middle-aged

claimants. In practice, it is common for the Road Accident Fund to agree to standard deductions, typically 5% for past loss and 15% for future loss, reflecting the “normal contingencies.”

100. The plaintiff has submitted that with respect to the pre-accident scenario, there is no basis to deviate from the “normal contingencies” as established in *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W). Given the plaintiff’s age, it has been argued that contingencies of 5% for past loss and 10% for future loss would be appropriate.
101. After considering the evidence, I find that although Dr. Vlamingh’s projections regarding the plaintiff’s future income may have elements of speculation, as is often the case with future earnings assessments, I am satisfied that the plaintiff’s pre-accident earning capacity and prior work experience provide a solid foundation for the conclusion that the plaintiff would likely have reached the projected income level. Even if the rehabilitation centre had not been successful, the plaintiff’s background and proven adaptability suggest he would have secured alternative employment within his field or in another capacity for which he had experience. Upon considering the evidence and the plaintiff’s work history, I am persuaded that this approach is both fair and reasonable.
102. Regarding the post-accident scenario, the plaintiff has advocated for a 30% contingency deduction, which I find to be reasonable and justified. This higher contingency reflects the substantial uncertainties that now exist concerning the plaintiff’s ability to work and earn an income. The injuries sustained have significantly diminished the plaintiff’s earning capacity, leaving only a small residual earning potential, if any. The 30% contingency accounts for the likely challenges the plaintiff will face in securing any form of employment, given his injuries, as well as the possibility of prolonged periods of unemployment or medical incapacity that may further hinder his ability to engage in even menial work.
103. Having carefully considered all of the relevant factors and the arguments presented, I am satisfied that the contingencies proposed by the plaintiff are fair and appropriate in this matter. Accordingly, I award the plaintiff the amount of R 5 432 064. 00 in respect of loss of earnings.

Past Medical Expenses

104. The plaintiff is claiming an amount of R 671 235.02 in respect of past medical expenses, which have been duly itemised in a schedule supported by the requisite invoices. The defendant,

however, repudiated the plaintiff’s claim on 2 May 2024, asserting that it is not liable to reimburse the plaintiff because

the past medical expenses were covered by the plaintiff’s medical insurer, Fedhealth Medical Aid.

105. The issue before this Court is whether the Road Accident Fund (RAF) remains liable to compensate a claimant for medical expenses paid by a medical aid provider. This question has already been addressed in the decision of *Discovery Health (Pty) Ltd v Road Accident Fund and Another*, wherein the Court unequivocally found that benefits received by a claimant from a third party—whether through private insurance

or a medical aid scheme—constitute collateral benefits. Such benefits are not to be deducted from the compensation awarded under the Road Accident Fund Act.

[1] GNR.770 of 21 July 2008 GG 31249, as amended by R.347 of 15 May 2013 GG 36452.

[2] Unreported case no 10928/2020 (8 December 2023) at [18]

[3] *Mertz V Road Accident Fund* (A96/2021) [2022] ZAGPPHC 961 (2 December 2022)

[4] *Chetty V Road Accident Fund* (A91/2021) [2021] ZAGPPHC 848 (7 December 2021)

[5] *Keagan V Road Accident Fund* (15432/2021) [2024] ZAGPJHC 85 (1 February 2024)

[6] *Absa Bank Ltd V Hammerle Group* 2015 (5) SA 215 (SCA)

[7] *KLD Residential CC V Empire Earth Investments 18 (Pty) Ltd* 2017 (6) SA 55 (SCA)

[8] *Chetty V Road Accident Fund* (A91/2021) [2021] ZAGPPHC 848 (7 December 2021) at paragraph 19

[9] *Mertz V Road Accident Fund* (A96/2021) [2022] ZAGPPHC 961 (2 December 2022) at paragraphs 21- 31

[10] *Keagan V Road Accident Fund* (15432/2021) [2024] ZAGPJHC 85 (1 February 2024) at paragraphs 41-44

[11] *Paulsen V Road Accident Fund* (45261/2019) [2024] ZAGPPHC 145 paragraphs 16-24

[12] GNR.770 of 21 July 2008 GG 31249, as amended by R.347 of 15 May 2013 GG 36452.

[13] *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA)

at paragraph 21

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