

RISKALERT

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IN THIS EDITION

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**LEGAL
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SOUTH AFRICA

RISK MANAGEMENT COLUMN

RECENT CASES

Khakhala Traditional Community and Others v Shiviti and Others (HCAA 10/2022) [2026] ZALMP-PHC 88 (3 September 2026)

The underlying appeal had been enrolled for hearing on 12 May 2023. Before the hearing, the appellants delivered a notice withdrawing the appeal. In October 2025, the appellants launched an application, relying on rule 49(6)(b), to reinstate the appeal. In seeking condonation, the appellants laid the blame on three successive law firms that had represent-



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ed them (the firm representing the appellants in this application was the

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fourth instructed in this matter). They alleged that the first firm of attorneys had obtained leave to appeal and represented them until the appeal was struck from the roll on 14 October 2022. A second firm prosecuted the appeal until it was withdrawn ahead of the hearing on 12 May 2023. The allegations against the third set of attorneys was that they failed over several months to provide adequate reports or to take sufficient steps to advance the matter. The appellants described the conduct of their erstwhile attorneys as “negligent, dilatory and, in certain respects, deliberately misleading” (para 20).

The court, having considered *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) and *Ferris and Another v Firstrand Bank Limited and Another* 2014 (3) SA 39 (CC), held that legal representation did not absolve a litigant of all responsibility for a case (paras 21-23), the explanations for the delay lacked specifics regarding the events that occurred and highlighted what prudent litigants in the position of

the appellants should have done in the circumstances. The applications for condonation and reinstatement of the appeal were dismissed.

In so far a litigant’s duty to independently monitor their case is concerned, see also *Van Den Heever and Another v Roos and Others* (A305/2025) [2026] ZAW-CHC 113 (11 March 2026).

Ramballi v RK Nathallal and Company (13011/2010) [2026] ZAKZDHC 46 (18 August 2026)

The plaintiff was injured in a motor vehicle collision on 18 March 1995. He was a minor at the time. His father mandated the defendant in 1996 to pursue a claim on his behalf against the Road Accident Fund (RAF). The plaintiff had sustained a fractured skull and severe brain injury but the defendant failed to obtain the necessary medico-legal reports. The plaintiff attained the age of majority on 18 March 2003 and instituted action against the defendant on 4 November 2010. The defendant denied liability and pleaded that the claim against it had pre-

scribed. Summons had been issued against the RAF in the Magistrate’s Court, but the defendant did not take any further action resulting in that summons lapsing in terms of the then Magistrate’s Court rule 10. The court highlighted that the defendant had led the plaintiff to believe that the litigation in the Magistrate’s Court was ongoing, when it was not. The defendant has also maintained this stance in response to a co complaint laid with the then Law Society. On the prescription point, the court considered *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC), *Truter and Another v Deysel* 2006 (4) SA 168 (SCA), *Le Roux and Another v Johannes G Coetzee and Seuns and Another* 2024 (4) SA 1 (CC) and *Gunase v Anirudh* 2012 (2) SA 398 (SCA). The defendant’s concealing of the true state of affairs was one of the factors that led to its special plea of prescription being dismissed. The court, referring to *Ramonyai v L P Molohe Attorneys* (2010/29310) [2014] ZAGPJHC 65 (27 February 2014), also found the defendant liable to compensate the plaintiff for his proven damages.

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Metcalf & Co v Cradock Portfolio Investments CC (Appeal) (CA98/2025) [2026] ZAECKMHC 81 (18 August 2026)

The appellant, a law firm, had been instructed by the respondent to transfer certain erven in a development. The appellant attended to the transfers in two batches. The delays in the transfers had caused the respondent a financial loss. The respondent instituted action against the appellant to recover its loss. The appellant had conceded the alleged negligence and causation. It had raised a special plea of prescription. The trial court had dismissed the special plea. The appellant took that decision on appeal. The full court, following the Constitutional Court's decision in *Le Roux*, found that the prescription question turned on knowledge of the facts and the legal conclusion. When dealing with professional negligence claims against attorneys, the exception in *Le Roux* permitted the legal conclusion to form part of the requisite knowledge.

The creditor was entitled to rely on the attorney's assurances while the mandate was incomplete. The appellant was found to have failed to prove when a reasonable enquiry should have commenced or concluded. The full court found that the court *a quo* had correctly dismissed the special plea of prescription.

In Wragg NO v Tim Du Toit & Co Incorporated and Others (047696/2024) [2026] ZAGP-PHC 880 (7 August 2026) it was held that rule 35(6) conferred a right to inspect documents, not to demand electronic copies.

Legal practitioners are also encouraged to have regard to the following prescription related judgments delivered in recent months:

- *High Yield Traders (Pty) Ltd v Andre Sport and Mining Suppliers (Pty) Ltd and Another* (728/2025) [2026] ZANWHC 236 (17 September 2026)
- *Riga v Voltex (Pty) Ltd* (2023/049662) [2026] ZAGP-JHC 994 (8 September 2026)

- *Mathiso v Road Accident Fund* (8808/2023) [2026] ZAWCHC 488 (8 September 2026)

- *Hlekani v Road Accident Fund* (3538/2024) [2026] ZAMPMBHC 76 (11 August 2026)

- *D.E.M obo K.M v Member of Executive Council for Health, Gauteng Province* (2020/05850) [2026] ZAGP-JHC 874 (31 July 2026)

- *Janse van Vuuren v WJB Stieger Konstruksie (Pty) Ltd* (1459/2024) [2026] ZASCA 102; [2026] 3 All SA 525 (SCA) (24 July 2026)

- *Moola N.O v Road Accident Fund* (8742/2014) [2026] ZAKZPHC 73 (7 July 2026)

- *Superstrike Investments (Pty) Ltd v Van Der Merwe (Appeal)* (A305/2024) [2026] ZAWCHC 160 (7 April 2026)

Past Medical Expenses

The Forgotten Claim

written by Gavin Roberts

Medical scheme payments, under settlement and the professional risk for RAF practitioners

Past hospital and medical expenses can constitute a substantial component of a claim against the Road Accident Fund (RAF). Yet, where those expenses have already been paid by a claimant's medical scheme, they are sometimes approached on the assumption that the claimant has suffered no recoverable loss. That assumption carries significant risk and is patently incorrect.

For RAF legal practitioners, the issue extends beyond the recoverability of a particular head of damages. Where potentially recoverable past medical expenses are omitted and the claim is thereafter compromised through full and final settlement, the enquiry may move from personal injury law into the realm of professional negligence.

The Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) has previously highlighted the issue in its Risk Alert Bulletin, September 2024, No 4/2024, under the heading "Claims for past medical expenses". The developing jurisprudence since then reinforces the need for practitioners to treat medical scheme funded expenses as an issue requiring investigation and advice before settlement.

Three relationships but only one claim

Where a medical scheme has funded accident-related treatment, three separate legal relationships may arise:

1. the statutory relationship between the claimant and the RAF under Section 17 of the Road Accident Fund Act 56 of 1996;
2. the contractual relationship between the claimant and the medical scheme; and
3. the relationship between the medical scheme and the

healthcare providers whose accounts it has paid.

These relationships should not be conflated.

A medical scheme ordinarily pays because of its pre-existing relationship with its member. The fact that the scheme has paid the healthcare provider's account does not discount whether the corresponding accident-related expense remains recoverable from the RAF or not.

The collateral-benefit principle and *res inter alios acta* have long informed this enquiry. In *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA), the Supreme Court of Appeal confirmed that the Medical Schemes Act 131 of 1998 did not deprive an injured plaintiff of a delictual claim for hospital and medical expenses merely because medical aid benefits had been received.

The controversy intensified in 2022 when the RAF directed its officials to reject past medical expenses already

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paid by medical schemes. In *Discovery Health (Pty) Ltd v Road Accident Fund and Another* [2022] ZAGPPHC 768 (26 October 2022) Mbongwe J reviewed and set aside the directive. The RAF's subsequent applications for leave to appeal were unsuccessful, leaving the substantive order undisturbed.

Practitioners should be forewarned against the erroneous assumption that a medical scheme can simply pursue the RAF independently for amounts it has paid. It is common cause that only one claims exists against the RAF per cause of action. The medical scheme, not being a medical supplier, has no *locus standi* to institute a subrogated claim against the RAF *in lieu* of past medical expenses. This position has led to the contractual obligation between the scheme and member to incorporate the past medical expenses in the damages claim *ab initio* under the same cause of action. The safest approach is to determine the scheme's rights by reference to its rules, its contractual relationship with the member, the Medical Schemes Act and current jurisprudence.

Subsequent Western Cape authority has continued to

recognize the recoverability of qualifying medical scheme funded expenses. In *Esack NO v Road Accident Fund* 2025 (4) SA 201 (WCC), the Court held the RAF liable for medical expenses paid by Discovery Health. The Full Court subsequently considered the issue in *Road Accident Fund v Van Wyk* [2026] ZAWCHC 39, and in *Van Wyk NO v Road Accident Fund* [2026] ZAWCHC 210 the RAF was ordered to pay the full past medical expenses claim, expressly including invoices previously paid by Discovery Health.

The above judgments and many others confirm the current jurisprudence regarding the liability of the RAF insofar as past medical expenses is concerned. The issue was settled when the Supreme Court of Appeal refused the RAF leave to appeal the Mbongwe J judgment, a decision subsequently upheld when the apex Court refused leave to appeal based on jurisdictional grounds meaning that the substantive High Court order remained undisturbed.

Many practitioners labour under the false impression that the outcome of the Supreme Court of Appeal leave to appeal in *Discovery*

Health v Road Accident Fund and Another [2024] ZAGPPHC 1303; 2025 (3) SA 225 (GP) ("*Discovery Health 2*") will settle the issue in dispute when in essence, the "*Discovery Health 2*" leave to appeal is merely a determination of whether the RAF is in contempt of the Mbongwe J judgment by not accepting liability for and paying past hospital and medical expenses disbursed by a medical scheme. The RAF have adopted this erroneous approach contra the current jurisprudence and legal practitioners are strongly advised to not follow suit and settle any RAF matters in full and final excluding the past medical expenses head of damages, as this could lead to a deluge of professional negligence claims.

The professional risk question

The attorney sits at the centre of the enquiry. A practitioner handling a RAF claim will ordinarily have access to the hospital records, medical invoices and other material necessary to investigate past medical expenses. Competent practice should therefore include establishing:

- what accident-related expenses were incurred;

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- which expenses were paid personally by the claimant, by a medical scheme or by another third party;
- whether the expenses are causally linked to the accident; and
- what the applicable medical scheme rules provide concerning reimbursement.

This investigation should occur before and not after settlement. Client autonomy remains important. A properly informed client may elect not to pursue a component of the claim but should be informed in clear terms of any contractual obligations such as those with their medical scheme. There is a material distinction between “I received no instructions to claim the past medical expenses” and “I did not claim it because the medical aid had already paid it.”

The former may constitute an uninformed instruction or a lack of taking an instruction as a client informed correctly of their obligations to the scheme will rarely not agree to the inclusion of the past medical expenses. The latter may indicate an incorrect legal assumption or failure to advise the client correctly.

That distinction becomes critical where a claim is settled in full and final and the omitted head of damages can no longer be pursued.

In *Drake Flemmer & Orsmond Inc and Another v Gajjar* NO 2018 (3) SA 353 (SCA), the Supreme Court of Appeal considered the negligent under-settlement of a RAF claim. The judgment illustrates the potential professional consequences where the settlement achieved is less than the underlying claim ought reasonably to have yielded.

Failure to recover past medical expenses will not automatically constitute negligence. Duty, breach, causation and patrimonial loss remain to be established on the facts and professional indemnity cover will not automatically follow. Cover will depend upon the applicable policy terms, conditions and exclusions.

From a risk management perspective, the important point arises much earlier - a potentially substantial professional negligence claim may be prevented by properly identifying, quantifying and advising upon past medical expenses before the RAF claim is compromised.

A practical risk management protocol

Every RAF practice should consider adopting a standard past medical expenses protocol. At a minimum, the practitioner should:

- establish at inception whether the claimant belongs to a medical scheme;
- obtain a schedule and supporting vouchers for accident-related expenses;
- distinguish claimant paid, scheme paid, unpaid and unrelated accounts;
- consider the applicable medical scheme rules and any reimbursement obligation or undertaking the client is bound to;
- ensure that qualifying expenses and supporting vouchers are incorporated into the RAF claim; and
- advise the client expressly and preferably in writing about the past medical expenses component and their contractual agreement before settlement.

These relatively simple steps may prevent a paid medical account from becoming both a forgotten head of damages and subsequently, a professional negligence claim.

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Attorney recovery fees

There is a second professional risk issue which arises once medical scheme funded past medical expenses have successfully been recovered namely: what may the practitioner legitimately charge for that recovery?

Two practices warrant caution. The first is the automatic deduction of an uncapped 10% collection or recovery commission. The second is the mechanical deduction of 25% from the past medical expenses recovery under cover of a contingency fee agreement.

The historical character of collection commission was examined by Buchner and Hartzenberg in “Cashing in on collections” (2013) *July De Rebus* 30. Their discussion of collection commission and the risk of over recovery remains pertinent. A percentage-based collection fee should not simply be treated as an automatic entitlement whenever money is recovered.

This is particularly relevant where the medical scheme or its administrator has already identified and reconciled the accident-related expenditure

and supplied the attorney with a schedule and specific vouchers substantially ready for incorporation into the RAF claim.

Paragraph 18.7 of the Legal Practice Council’s Code of Conduct is important in this context. It prohibits overreaching and the charging of an unreasonably high fee and requires the practitioner, where called upon to do so, to justify their fee and demonstrate that the work charged for was performed and was reasonably necessary.

A 10% fee on R50 000 is R5 000. On R5 million it is R500 000. The professional work involved does not necessarily increase one hundred fold merely because the underlying medical expenditure does. A percentage that may permissibly be charged does not establish that the resulting fee is reasonable.

Similar caution applies to contingency fees. Section 2(2) of the Contingency Fees Act 66 of 1997 does not create an automatic entitlement to 25% of every amount recovered. The statutory percentage is a ceiling, not a target tariff. The practitioner’s normal fee and permissible success fee remain subject to

the statutory limitations. In support of this premise, the Legal Practice Council promulgated rules in terms of Section 6 of the Contingency Fees Act published in Government Gazette No. 42739 of 04 October 2019. Para 6.11 states that, *“If a client is obliged in terms of the rules of any medical scheme or for any other reason, to refund a portion of the total amount awarded or obtained the cap and limitation referred to in Section 2(2) shall apply to the net amount recovered after the refund is deducted”*. Attorneys alluding to the inclusion of the past medical expenses in the calculation of their contingency fee deduction are at risk of breaching the rules and are advised to be hyper vigilant of the prevailing rules and jurisprudence.

Practitioners should therefore distinguish between the damages recovered for the claimant, amounts funded by a medical scheme and potentially subject to a reimbursement obligation, the practitioner’s ordinary professional fees coupled with any permissible success fee and any separately justifiable collection fee. The fact that all of these amounts may ultimately pass through the attorney’s trust account

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does not make them conceptually interchangeable.

Conclusion

The assumption that “the medical aid paid it, therefore the client has no claim” is neither a factual nor legal basis upon which to conduct a RAF practice. The appropriate enquiry is - what acci-

dent-related medical expenses were incurred, who paid them, what obligations arose from that payment and what is the claimant legally entitled to recover.

Before recommending a full and final settlement, legal practitioners should establish whether they have identified, quantified and prop-

erly advised their client on every potentially recoverable head of damages, including medical expenses funded by somebody else.

A medical scheme’s pecuniary interest should not be regarded as the end of the enquiry but the beginning of it.

Authorities

1. Road Accident Fund Act 56 of 1996, Section 17(1)
2. *Bane v D’Ambrosi* 2010 (2) SA 539 (SCA)
3. *Discovery Health (Pty) Ltd v Road Accident Fund and Another* [2022] ZAGPPHC 768
4. *Discovery Health (Pty) Ltd v Road Accident Fund and Another* [2024] ZAGPPHC 1303; 2025 (3) SA 225 (GP) (“Discovery Health 2”)
5. *Van Heerden v Road Accident Fund* [2022] ZAECQBHC 37
6. *Esack NO v Road Accident Fund* [2025] ZAWCHC 27; 2025 (4) SA 201 (WCC)
7. *Road Accident Fund v Van Wyk* [2026] ZAWCHC 39
8. *Van Wyk NO v Road Accident Fund* [2026] ZAWCHC 210
9. *Drake Flemmer & Orsmond Inc and Another v Gajjar NO* [2017] ZASCA 169; 2018 (3) SA 353 (SCA)
10. Legal Practitioners Indemnity Insurance Fund, Risk Alert Bulletin, September 2024, No 4/2024, “Claims for past medical expenses”
11. Gerhard Buchner and CJ Hartzenberg, “Cashing in on collections” (2013) July De Rebus 30; [2013] DEREBUS 125
12. Contingency Fees Act 66 of 1997, Section 2(2)
13. Legal Practice Council, Code of Conduct, Paragraph 18.7
14. Legal Practice Council Notice 525 of 2019 / GG No. 42739 of 04 October 2019

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This article discusses developing legal principles and professional risk and does not constitute legal advice in respect of any particular matter.