IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

Case No: 32492/12

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
8/5/15
DATE
SIGNATURE

8/5/2015

SANDI WELCOME KETSEKELE **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

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1. The plaintiff is Mr Sandi Welcome Ketsekele, a truck driver aged 54 years at the time of the accident that lead to the present litigation, currently residing at 265 Mofokeng Section, Katlehong, Gauteng.
2. The defendant is the Road Accident Fund, a juristic person established by the Road Accident Fund Act 56 of 1996, as amended, ("the Act"), with principal place of business at 38 Ida Street, Menlo Park, Pretoria. The defendant is responsible for and obliged to compensate victims of motor vehicle accidents for damages suffered as a result of the negligence of drivers other than themselves.
3. The plaintiff was involved in a collision with his employer's truck on the 28th January 2009 on the R 21 highway near the Pomona off ramp in Kempton Park. He suffered an injury that was described in the RAF 4 form completed

by dr. Elmo van Wyk almost five years later as a fracture of the 4th and 5th metacarpals of the right hand. (The orthopaedic surgeon instructed by the plaintiff's attorneys to provide a medico-legal report on the 3rd September 2014 described the injury as a fragmented fracture of the little finger only). The fifth metacarpal required a surgical insertion of a prothesis of the fifth carpa-phangal joint, in other words a replacement of the joint of the right little finger to the hand. The little finger was left deformed at a 20 degree deviation from the hand. Mr Ketsekele returned to work within three months of the accident, obviously capable of driving a truck as efficiently as before.

4. There is no indication in the papers that he suffered any other consequences of this injury since the accident. He has had to give up his profession for reasons unrelated to the accident some three years ago. As was patently obvious, and as was confirmed by dr Van Wyk in the RAF 4 form, the injury suffered by the plaintiff - for such Mr Ketsekele was destined to become - could by no stretch of the imagination be described as serious as defined by the Road Accident Fund Act and regulations. Common sense dictates that a stabilized fracture of the little finger that healed without significant complications is a minor mishap. There never existed any prospect of instituting a successful claim for general damages in terms of the AMA Guides or any narrative test, the yardsticks prescribed by the regulations to the Road Accident Fund Act 56 of 1996.

5. Nonetheless action was instituted against the defendant ("the Fund") during June 2012, some three years after the accident, after the plaintiff's condition had indisputably stabilized. The first version of the particulars of claim alleged

that a serious injury was suffered by the plaintiff, such injury being described as a '*compound fracture of the right hand.*'

6. This was an overstatement. The fracture was restricted to one or two fingers, as set out above.

7. The consequences of the injury were described in the particulars of claim as follows:

   '*.1 The Plaintiff was hospitalized and underwent physiotherapy as well as medical treatment;*

   .2 The Plaintiff will have to be hospitalized and undergo physiotherapy as well as medical treatment in the future;

   .3 The Plaintiff has in the past and will continue in the future to suffer a loss of income ALTERNATIVELY the Plaintiff suffered from a loss of ability to earn and will in the future suffer from a loss of ability to earn.

   .4 The Plaintiff experienced pain, discomfort and suffering and will in the future also experience pain, discomfort and suffering.

   .5 The Plaintiff suffered from emotional shock and trauma and will in the future also suffer from emotional shock and trauma.

   .6 The Plaintiff suffered from a loss of the joy and enjoyment of life and will in the future suffer from a loss of the joy and enjoyment of life.'

8. It should be underlined immediately that there is no suggestion of any hospitalisation or physiotherapy having been required since the injury to the little finger healed; and no evidence of a future loss of income or a loss of the ability to earn that could be ascribed to the consequences of the accident.

9. Continuing the somewhat fanciful saga of a major injury, the particulars of claim assert that the plaintiff suffered past medical and hospital expenses in

the sum of R 100 000, 00, coupled with a cautionary statement that this figure is a mere estimate of the expenses the plaintiff incurred to date, '*... regard being had to the tariff as contemplated in sections 17(4)(a) and 17(4B) of the Act and the regulations referred to therein.*' Future medical and hospital expenses were estimated subject to the same cautionary remark at R 150 000, 00; future loss of earnings were said to run to R 250 000, 00, similarly made subject to the cautionary statement, and past loss of earnings to R 50 000, 00. These sums added up to R 550 000, 00.

10. The manner in which the compensation payable by the defendant is calculated was changed in important respects by the amendment of the Road Accident Fund Act through the substitution of section 17 thereof, which amendment came into effect in 2008. The section now reads:

> '***17.*** *(1) The Fund or an agent shall–*
> *(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*
> *(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,*
> *be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.*
> *(1A) (a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.*
> *(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974).*
> *(2) ...*
> *(3) (a) No interest calculated on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1) shall be payable unless 14 days have elapsed from the date of the court's relevant order.*
> *(b) In issuing any order as to costs on making such award, the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served.*
> *(4) Where a claim for compensation under subsection (1)–*

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate–
(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
(ii) the provider of such service or treatment directly, notwithstanding section 19(c) or (d),in accordance with the tariff contemplated in subsection (4B);
(b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon;
(c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding–
(i) R160 000 per year in the case of a claim for loss of income; and
(ii) R160 000 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.
(4A) (a) The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4)(c) quarterly, in order to counter the effect of inflation.
(b) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.
(4B) (a) The liability of the Fund or an agent regarding any tariff contemplated in subsections (4)(a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act No. 61 of 2003), and shall be prescribed after consultation with the Minister of Health.
(b) The tariff for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003–
(i) shall be negotiated between the Fund and such health care providers; and
(ii) shall be reasonable taking into account factors such as the cost of such treatment and the ability of the Fund to pay.
(c) In the absence of a tariff for emergency medical treatment the tariffs contemplated in paragraph (a) shall apply.
(5) Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19(c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.
(6) The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in respect of medical costs, in accordance with the tariff contemplated in subsection (4B), loss of income and loss of support: Provided that the Fund or such agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered.'

11. Apparently mindful of this amendment in the Act, the plaintiff's legal advisors decided to amend the particulars of claim to keep up the assertion that a serious injury had been suffered. This amendment was served upon the

defendant's attorneys on the 27th January 2014. It amended the reference to the identity of the doctor who had examined the plaintiff and had prepared the medical report included in the RAF 1 form when the claim was delivered to the defendant.

12. The damages claimed were amended by the inclusion of a further assertion that the plaintiff was entitled to general damages, which were pegged at R 350 000, 00. This additional sum was also pleaded to be an estimate and was accompanied by the allegation that Dr Elmo van Wyk had completed an RAF 4 form and had therein estimated the plaintiff's whole person impairment to be at " *...1% or more.*' This form was signed on the 5th December 2013. (It should be noted in passing that these allegations are *prima facie* excipiable, but the Fund's legal representatives did not challenge the assertion that a serious injury was constituted by a whole person impairment assessment far below the statutory threshold.)

13. In *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA); (4 All SA 148 (SCA)) Willis JA writing for an unanimous court described the test that has to be met since the Road Accident Fund Act and its regulations were amended as follows:

'[26] In terms of s 17(1) of the Act, after its amendment, a third party (ie person in the position of the plaintiff) is entitled to compensation for a non-pecuniary loss only for 'a serious injury as contemplated in subsection (1A)'. Subsection 17(1A), in turn, stipulates that the assessment of a 'serious injury' must be undertaken by a medical practitioner by way of methods prescribed by the regulations.

[27] Subregulation 3(3)(c) provides that:

'The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided for 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 for in these Regulations.'

[28] Subregulations 3(1) and 3(a) to (c) require a third party who wishes to claim general damages to submit an SIA report in the prescribed form to the RAF. The SIA report must be made by a medical practitioner who must assess whether the third party's injury is 'serious' in accordance with certain criteria:

> *(i) in terms of subreg 3(1)(b)(ii) the third party's injury shall be assessed as serious if it resulted in 30% or more WPI as provided for in the AMA guidelines;*
>
> *(ii) a 'narrative test' as provided for in terms of subreg 3(1)(b)(i1).*

[29] A 'narrative test' is used where the conclusion is reached, in terms of subregulation 3(1)(b)(iii), that the claimant has less than a 30% WPI, but the injury nevertheless:

> *'(aa) resulted in a serious long-term impairment or loss of a bodily function;*
>
> *(bb) constitutes permanent serious disfigurement;*
>
> *(cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or*
>
> *(dd) resulted in loss of a foetus.'*

[30] Subregulation 3(3)(d) provides that:

'If the Fund [RAF] or an agent is not satisfied that the injury has been correctly assessed, the Fund or agent must:

> *(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or*
> *(ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a medical practitioner or an agent.'*

.....

'The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided for in these Regulations.'

The fact that this provision is preceded by subregulation 3(3)(d)(ii) which provides that the further assessment is to be undertaken 'by a medical practitioner designated by the fund' can only mean, as Mr Zidel was bound to concede, that the RAF not only has a right, in terms of the Regulations, to dispute the assessment of its own medical practitioner (expert) but also has a right to refer the dispute to the Appeals Tribunal provided for in the Regulations.

[32] The dispute resolution procedure is provided for in subregulation 3(4), read together with subregulations 3(5), 3(7), 3(8), 3(10) 3(11), 3(12) and 3(13). There is no other. The dispute resolution procedure in the Regulations culminates in a determination by an Appeal Tribunal consisting of three medical practitioners appointed by the Registrar of the Health Professions Council. In terms of subregulation 3(13), the determination of the Appeal Tribunal 'shall be final and binding'. The dispute resolution procedure, travelling all the way to the Appeal Tribunal, is not provided purely for the benefit of a dissatisfied claimant. It avails to the advantage of the RAF as well.

[33] In Road Accident Fund v Lebeko[1] this Court held that, in the absence of the prescribed assessment having been made in terms of the Regulations, the high court could not make an order for the payment of general damages.[2] It was held that the high court ought to have postponed the hearing in regard to the claim for general damages so that the procedures for which legislative provision had been made in this regard could be completed.[3] In similar vein, Mr Budlender has correctly contended that this is what the high court ought to have done in the present case. In view of the mootness of the issues between the parties themselves, however, he has sought no order to this effect in substitution of the high court's order. He has asked simply that the high court's order relating to the award for general damages be set aside.

[34] The amendment Act, read together with the Regulations, has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms thereof and (ii) the assessment of injuries as 'serious' has been made an administrative rather than a judicial decision. In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts. For the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious.'

14. This judgment fleshed out in some detail what had been stated in *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 3 (SCA) previously:

> *'The decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not the court. That much appears from the*

[1] *Road Accident Fund v Lebeko* (802/2011) [2012] ZASCA 159 (15 November 2012).
[2] Para 27.
[3] Para 28.

> *stipulation in reg 3(3)(c) that the Fund is only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has been correctly assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund.'*

(See further: *Mahano and Others v Road Accident Fund* [2015] ZASCA 23)

15. The amendment to the Act and regulations was introduced in 2008. The new regime was applicable to the plaintiff's action. There is no allegation in the pleadings that the Fund was called upon to consider, by the submission of the prescribed information in the prescribed form, whether the plaintiff had suffered a whole person impairment of 30% or more. Given dr Van Wyk's findings – quite apart from the indisputable objective fact that the injury was a minor one to a little finger – and absent any suggestions that a narrative medical assessment of plaintiff's condition could change the picture, it must have been clear to the plaintiff's attorneys from the outset that the Fund could, at the very best, be held liable for the plaintiff's actual loss of income and a possible undertaking in respect of future medical expenses and hospital treatment fees in terms of section 17(4)(a) of the Act.

16. In addition, and to put matters beyond any doubt had there been any room left for any suggestion of uncertainty, Regulation 3(1)(b)(i)(ee) was amended on the 15th May 2013 by publication in the Government Gazette No 36452, to expressly exclude the amputation of a little finger of either hand from the catalogue of serious injuries. It goes without saying that an amputation of the little finger constitutes a worse impairment than a stiff little finger standing at a slight angle to the rest of the hand.

17. Yet the attorneys persisted in the pretence that a serious injury had been suffered. A neuro-clinical psychologist was appointed to prepare a medico-legal report on the 29th October 2013; an occupational therapist on the same date; a general practitioner on the 30th October 2013; an orthopaedic surgeon on the 19th November 2013, an industrial psychologist at the end of 2014 and a general practitioner at the beginning of 2015. It should be underlined that the two last-mentioned reports were obtained at

the instance of Ms Van Niekerk, who replaced the plaintiff's initial legal representative at the beginning of 2014.

18. None of these expert reports were necessary or even required for the purposes of a claim that could never render more than compensation for actual loss of earnings, the sum total of which would never exceed the jurisdictional limit of the Magistrate's Court; irrespective of whether an undertaking for future medical treatment were to be given or not. The reports could never tell the plaintiff's attorneys – or the court – anything that was not patently obvious prior to the institution of the action in 2012. The situation was perhaps best summed up in the words of the orthopaedic surgeon at the conclusion of his report: '*...Eiser het die funksie van die pinkie verloor....'n amputasie kan gedoen word as die pinkie in sy pad is, maar hy het geleer om met die pinkie so stokstyf en skeef oor die weg te kom. Hy kon selfs vragmotor bestuur....Eiser het nierversaking....(dit) maak operasies aan die pinkie riskant...(d)ie skewe pinkie is lastig, maar het nie 'n groot nadelige effek op sy lewensgenietinge nie....*' The occupational therapist concurred with the orthopaedic surgeon. The general practitioner opined a month before the trial date that; '*In view of the RAF4 and the Medico-legal* (sic) *examination and substantiated by radiological investigation, the writer is of the opinion that Mr SW Ketsekele has not been left with serious long-term impairment.*' This medical practitioner prepared another RAF 4 form which again underlined that the plaintiff's whole person impairment did not exceed 1%. The industrial psychologist concluded that plaintiff's injury would not ' ... *have precluded Mr Ketsekele from continuing to work as a driver.*' Finally the neuropsychologist pegged the plaintiff's whole person impairment at 5%.

19. It is therefore clear that the only purpose these reports could ever serve was to churn the money machine for the attorneys and the experts whose reports were obtained at an average cost – so the court was informed during the postponed argument on the order the court should make in regard to costs - of R 20 000, 00 each. Their contents unanimously supported the defendant's case.

20. At the beginning of March 2014 the present attorney of record was appointed, plaintiff's previous attorney having been struck off the roll. Ms A F van Niekerk filed an explanatory affidavit after the court invited further argument on the question of an appropriate costs order. She states that when she examined the plaintiff's file she received when she accepted the mandate, the RAF form revealed ' *... inter alia ...*' that plaintiff's right hand had been injured. She does not expand upon any other information that might be relevant to the question of damages the plaintiff allegedly suffered.

21. During a subsequent consultation the plaintiff allegedly informed her that he experienced problems with his neck and his back and had some pain in his right hand while the little finger was obviously deformed. The plaintiff further told her that he was depressed and was troubled by fear as a result of the accident. She therefore concluded that the previous attorney of record had acted appropriately when he instructed the medical experts whose reports have been referred to above. She went further and instructed the general practitioner and the industrial psychologist to prepare additional reports.

22. The orthopaedic surgeon's report was received on 3rd December 2014, the occupational therapist's report on the 7th January 2015; the industrial psychologist's report a little later during the same month and the neuro-clinical psychologist's and the occupational psychologist's reports on the 2nd February 2015. An actuary thereafter calculated the loss of income at R 27 713, 00.

23. Ms van Niekerk does not explain how she came to the conclusion that any of these reports could advance the plaintiff's case. Notwithstanding this fact she did not withdraw the notices already filed by the previous attorney that plaintiff intended to call expert witnesses, but added similar notices in respect of the reports she had obtained and filed copies of all reports with the Registrar and served copies thereof upon the defendant's attorneys.

24. Given the content of these reports – quite apart from the fact that the plaintiff could never prove a serious injury – Ms van Niekerk and her counsel could never seriously have intended to call any of the experts to the witness stand unless the actuary's report were disputed, which it never was. This much was indeed common cause. Mr De Vries, who appeared *pro amico* on behalf of Ms Van Niekerk at the postponed date to present her argument on the costs order, conceded that the plaintiff's legal representatives never intended to call any of the experts. But, he stated, notice had to be given of a purported intention to call the experts, and copies of the reports had to be filed and served, in order to ensure that a costs order could be obtained against the Fund for the payment of the experts and the fees incurred in of perusing the reports and preparing copies for service and filing. If no notice was given, no taxing master would allow these fees and disbursements. It was solely for this purpose that the expert reports were submitted to the court and the defendant.

25. After a perfunctory pre-trial conference which did not advance the progress of the trial or limit any disputes the matter was called on the 18th February 2015. A draft order, presumably prepared by plaintiff's attorneys, reflects the intention to present a settlement to the Hon Deputy Judge President at the calling of the civil trial roll that morning. The settlement was not concluded before the matter was called and it was allocated for trial to this Court. The parties' legal representatives called upon the judge in chambers and informed him that a settlement appeared to be imminent and requested the matter to be stood down for a while.

26. Shortly thereafter the Court was informed that the matter had indeed been settled and it was requested that the settlement should be made an order of court. The draft order presented to the Court records that the Fund would pay the sum of R 24 941, 70 in respect of lost income to the plaintiff; representing 90% of his actual loss under this head. It provides further for an undertaking in terms of section 17(4)(a) of the Act for the payment of 90% any future medical or hospital treatment in respect if the ' ... *injuries sustained* ...' in the accident.

27. Clause 4 thereof reads:

'*The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, ...*

such costs shall include:

*4.2.1 the costs incurred in obtaining payment (*of the agreed damages and any medical expenses*);*

4.2.2. the costs of counsel, including counsel's charges in respect of her full day fee for 18 FEBRUA|RY 2015, as well as reasonable preparation;

4.2.3. the costs to date of this order, which costs shall further include the cost of the attorney and the correspondent attorney which include necessary travel costs and expenses (time and kilometres), preparation for trial and attendance at Court which shall include all costs previously reserved, the reasonable cost of consulting with the Plaintiff to consider the offer, the cost incurred to accept the offer and make the offer an order of court;

*4.2.4. the costs of all medico-legal, radiological, actuarial, addendum and joint reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or to the knowledge of the Defendant and/or its attorneys, (*sic) *as well as all reports in their possession and all reports contained in the Plaintiff's bundles, irrespective of the time elapsed between the reports by an expert;*

4.2.5. the reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount allowed by the Taxing Master, of the experts as in 4.2.4 above;

4.2.6. the reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to (sic) *attending the medico-legal examinations of both parties.*

4.2.7. the costs consequent to (sic) *the Plaintiff's trial bundles, including the costs of 5 (five) copies thereof;*

4.2.8. the costs of holding all pre-trial conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials;

4.2.9. the costs of and consequent to compiling all minutes in respect of pre-trial conferences, including counsel's charges;

4.2.10. the costs of holding all inspections in loco, *including counsel's charges in respect thereof, if any,*

4.2.11. the costs of and consequent to the parties of both parties attending joint meetings, as well as costs of and consequent to compiling minutes of joint meetings between the experts, irrespective of the time elapsed between joint minutes and/or addendum joint minutes;

4.2.12. the costs of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff;

4.2.13. the reasonable travelling costs of the Plaintiff, who is hereby declared a necessary witness.'

27. It is a matter for comment that the draft order's provisions relating to the compensation the plaintiff will receive, comprise three paragraphs covering fifteen typed lines whereas the provisions relating to the costs that lawyers and medico-legal experts will be entitled to recover, run to no less than thirteen sub-paragraphs comprised of 62 typed lines. Provision is made for the payment of costs that could never have been reasonably incurred in this case as some items relate to issues that do not form part of the dispute at all.

28. When the draft order was presented to the Court counsel were requested to explain why the claim had not been instituted in the Magistrate's Court in the first instance, and on what basis the agreement to charge costs and fees on the High Court scale was justifiable. Counsel for both parties appeared to be taken completely by surprise

by these questions. Arguments were advanced that plaintiff was entitled to institute action in the High Court and was therefore entitled to his costs on the High Court scale. The question why the experts were consulted was not fully addressed at this stage.

29. The Court advised the parties that it regarded the manner in which this matter had been handled *prima facie* as an abuse of the Court and its process and that the Court was minded to disallow all fees of the legal representatives and experts, and to report the matter to the Law Society and the Bar Council for investigation of the probity of the lawyers' actions. The matter was postponed to allow the parties to prepare submissions why such orders should not be made.

30. At the resumed hearing Mr De Vries, a senior attorney with extensive experience of RAF matters, appeared *pro amico* for Ms Van Niekerk. The court is indebted to him for his assistance and the heads of argument he favoured the court with. In his address he confirmed the factual history of the matter and the course the litigation took as set out above. He then argued that the injury the plaintiff suffered could be compared with an amputation of the little finger, which has been excluded from the catalogue of serious injury by the Regulation referred to above. Had it not been for this regulatory exclusion the plaintiff's injury could be categorised as serious, so he submitted.

31. This argument cannot be accepted. Nothing that is contained in the papers or the expert reports allows that conclusion to be drawn. The experts' assessment of the whole person impairment at between 1% to 5% is proof positive of the minor nature of the mishap the plaintiff had to suffer. This assessment is so self-evident that the plaintiff's legal advisers cannot hide behind the fact that the Regulation was published only after summons had been issued for the fact that they approached the matter in the fashion in which they did. It is in any event clear that they did

consciously decide not to amend the plaintiff's particulars of claim after the publication date of the Regulation.

32. The same holds good for the certificate the parties eventually agreed the Fund should provide to the plaintiff. Mr De Vries relied upon the decision of *Motswai v Road Accident Fund* 2014 (6) SA 360 (SCA) for the submission that '..*The effect of the undertaking is that the Plaintiff is entitled to 80% of whatever he may pay for treatment he may receive, ...put at its lowest, it is potentially of some value to the Plaintiff* ...'. The present plaintiff's situation must be seen in a different light. Long before summons was issued the plaintiff's condition had stabilized to the extent that there was no reasonable risk that future medical treatment would be required. None was sought or administered during the six years that followed the plaintiff's discharge from hospital after treatment of his finger. By the time the trial date loomed large, the medico-legal reports confirmed that future treatment was not only unlikely, but might be positively dangerous to the plaintiff because of the kidney condition that forced him into early retirement. At worst some palliative medication might be required, certainly no future medical treatment the cost of which would approximate the limit of the Magistrate's Court's jurisdiction.

33. Whatever the situation regarding the certificate in terms of section 17(4)(a) of the Act may have been, it was clear that no medico-legal report was required and no expert could advance the plaintiff's case. Mr De Vries conceded that the plaintiff's legal advisers never intended to call any one of them. Nonetheless notice of the intention to present the experts' evidence was given as recorded above. The reports were formally filed in the court file and copies were served on the Fund's attorneys. Costs of making copies, filing and perusing the reports were incurred. When confronted with this entirely unwarranted course of conduct Mr De Vries candidly admitted, as stated above, that the only reason for presenting the charade of intending to call expert witnesses was to ensure that their fees and the costs associated with

producing their reports could be included in the costs order that would be sought against the Fund. If no notice were given and no reports were filed the plaintiff's attorneys would have to foot the bill of the expert witnesses. These facts need only be recorded to establish a lack of bona fides and probity on the part of the legal representatives: The only object of this exercise was to plunder the resources of the – allegedly insolvent – Fund.

34. The Fund's legal representatives were as complicit in operating this scam as were those of the plaintiff. They readily conceded that they should never have agreed to pay the plaintiff's costs on the High Court scale, but proffered no explanation what motivated them to do so. They did not even attempt to explain why they agreed to burden the Fund with the costs of unnecessary medico-legal reports. The explanation is obvious: If the plaintiff's lawyers were entitled to fees calculated on the High Court scale, the taxing master would be hard pressed to disallow their own fees pegged at the same level.

35. It is patently obvious that the lawyers involved in this matter, counsel and attorneys alike, confidently expected this forensic scam to be implemented without any problem, indicative of a practice that appears to be in vogue in RAF matters. The agreement the parties reached was recorded on a template that had open spaces to record the plaintiff's particulars and the individual details of the proposed settlement the parties intended to finalise at court. The agreement to pay costs on the High Court scale, set out above, is part of the pre-printed portion of the template. The lawyers involved were clearly surprised that what might be described as their cosy arrangement was questioned by the Court. This provides further proof of a system that appears to be evident in dealing with RAF matters.

36. The lawyers' actions are *prima facie* lacking in probity. It would appear that their duty to act honestly toward the court and strictly in the best interests of their clients was

sacrificed on the altar of personal enrichment. It is only proper that all their fess are disallowed to mark the court's disapproval. This judgment will be referred to the Law Society of the Northern Provinces and to the Pretoria Society of Advocates for further investigation and appropriate action, should any be indicated.

37. It is self-evident that this matter should not have appeared on the Court's roll. It could – and should - have been disposed of prior to summons being issued if the Fund had properly fulfilled its function by investigating the merits as soon as the claim was lodged and settling this elementary case there and then. But, as the Full Court was informed some years ago already in *Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP) through a memorandum prepared by the organised profession in respect of RAF matters:

> *The memorandum further states that in the majority of RAF matters the RAF only starts with its preparations a few days (at most a week) prior to the trial date. Attorneys acting for the RAF usually do not get instructions to brief counsel until a day or two (at most) before the trial date. In most cases only the day before the trial, and in some cases even on the morning of the trial. Pre-trial conferences do not serve the intended purpose (to limit issues and costs) as due to lack of preparation and instructions the RAF makes no concessions. Even where their attorneys are prepared to do so they cannot obtain instructions from the RAF. Consequently, even though approximately 90% of all RAF matters are settled out of Court, settlements are not reached prior to the trial date and in many matters not even on the first day. This sometimes led to clashes with other cases already held and unintended double briefing. The increased number of RAF matters on the trial roll resulted in tremendous additional pressure on attorneys which resulted in counsel taking on more matters than would normally have been the case. Attorneys, to alleviate pressure on themselves, were desperate to obtain the services of counsel experienced in RAF matters. The failure of the RAF to give timeous instructions often had the result that the attorneys acting for the RAF had no choice other than to brief the same counsel on short notice to handle more than one matter as they wanted competent counsel knowledgeable in the field.*
>
> *40.The contents of this memorandum is common cause. The evidence is that it sets out the facts correctly. It must be remembered, however, that the respondents were double briefing at least from February 2009 whereas the floodgates were only opened In July. Sanctimonious statements that they were double briefing to help the Court combat the congested trial roll, do not wash.*
>
> *41. Pressured by attorneys who wanted to continue to brief their regular counsel, who were experts, the respondents accepted trial briefs offered*

> *despite having been briefed in another matter for that particular day. In view of the congested roll, and the unpreparedness of the RAF and its attorneys and counsel, a settlement or a postponement was a virtual certainty. Instead of being offered briefs on postponement or on settlement, they accepted multiple briefs on trial. And when the matter was settled they marked a trial fee on the brief. Invariably in these cases the RAF was to pay the costs and paid these fees marked "on trial" despite the fact that it was not intended when the brief was received that the matter should go to trial and the matter did not go to trial.*
> *This could not have happened without the connivance of the briefing attorneys.*

38. Nothing has changed in the Fund's approach to dealing with claims submitted to it by victims injured in motor vehicle accidents since it was confronted with the common cause facts recorded in the judgment of the Full Court. Instead of promptly and properly investigating the merits of these claims, the Fund usually does nothing until the very last moment. Unfortunate sufferers of the consequences of often debilitating injuries are forced to institute action and to wait for many years before their matters are settled at court on terms that could have been negotiated as soon as the victim's condition had stabilised, at a fraction of the costs the Fund routinely agrees or is forced to pay literally at the doors of the court. The court system is overcrowded, not least because hundreds of matters that should never have been allowed by the Fund to proceed to litigation are placed on the court roll, only to be settled in a fashion similar to the one that is evident in this matter – which has the added complication that it could and should have been dealt with in a lower court. Time and again, on a daily basis in more than one court in this Division, counsel for the Fund rises to inform the court that the matter cannot be settled because the Fund's claims handler to whom the matter was allocated is unwilling or refuses to give an instruction to the lawyers representing the Fund. Nor is the Fund in a position to contest the plaintiff's case as the claim

has not been investigated – after it has been pending four or five years and tens of thousands of Rands have been spent on legal fees – and no medical experts have been instructed by the Fund to dispute the opinions provided by plaintiff's experts. The matter then proceeds '*...on the basis of the plaintiff's case...*'. The Fund's lawyers are, in a manner of speaking, sent into battle without guns or ammunition. They are unable to render an optimal service to their client in return for the fees they are entitled to; and the court is denied the full measure of their assistance because they do not have proper instructions.

39. The Fund's approach to litigation constitutes a serious dereliction of its duties to road accident victims, the public and the courts. The fund is an organ of state. As was said in *Daniels and Others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC (28 April 2011):

> *'[14] There can be no doubting therefore that the limitations of common law and constitutional rights arising out of the aforementioned provisions of the Act create an obligation on the Fund to diligently investigate claims submitted to it and to determine, if practically possible within 120 days of receipt of the claim, whether it is liable to compensate the claimant, and, if so, in what amount. The Fund is obliged to conduct itself in this respect with due recognition that its very reason for existence is 'to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle'. In this connection it was observed in the majority judgment of the Constitutional Court in Road Accident Fund and Another v Mdeyide* ***2011 (1) BCLR 1*** *(CC) (at para 78) that the Fund is 'a hugely important public body which renders an indispensible service to vulnerable members of society". The majority judgment in Mdeyide reflected an acknowledgment of the crucial importance of a 'properly administered Fund to the upholding of 'the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms'.*

[15] In my view the constitutionality of at least some of the rights-limiting provisions in the Act mentioned earlier is predicated on the implicit undertaking by the state that the operation of the Act will entail the efficient discharge by the Fund of its functions in respect of the processing and determination of claims. Certainly, the justification for the limitations goes limping when the relevant organ of state fails properly, in faithful compliance with the Act, to render the performance that constitutes the very basis for characterising the limitation as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Recognition of that effect inexorably impels the conclusion that a materially inadequate performance by the Fund of the relevant statutory functions would amount to conduct that would unjustifiably infringe the affected limited rights. At the same time, any such failure by the Fund to fulfil its statutory object would evidence a breach by the state of its obligations in respect of other rights, like equality, human dignity, security of the person, health and social security, which the Act is meant to represent a means of advancing and protecting.

[16] In Law Society of South Africa and Others v Minister of Transport and Another ***2011 (1) SA 400*** *(CC);* ***2011 (2) BCLR 150****, the Constitutional Court described the Act as an instrument that might 'properly be seen as 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'. Accepting that to be so, the state fails in its identified constitutional duty to the extent that it does not deploy that part of its arsenal efficiently and effectively in furtherance of its dedicated object.*

The history of non-fulfilment by the Fund of its statutory object

[17] That during the last decade the Fund has too often failed to perform in a manner consistent with the realisation of its object of rendering an indispensible service to vulnerable members of society, with resultant prejudice to third party claimants, is evident from the adverse remarks made in a significant number of superior court judgments given during that period. The Fund's management cannot be unaware of this criticism; in some matters the courts concerned directed that copies of the judgment be sent to the Chief Executive Officer or the Chairperson of the Board. The sorry history suggests that the Fund has turned a deaf ear to repeated judicial enjoinders to comply properly with its statutory obligations, alternatively, that it is materially lacking in effective resources, and that insufficient has been done by government to address the underlying cause or reason for such incapacity.

[18] Thus, in Road Accident Fund v Klisiewicz ***[2002] ZASCA 57*** *(29 May 2002), Howie JA, in the course of upholding a cross-appeal by a claimant against the trial court's refusal to make a special costs order against the Fund arising out of the unnecessarily prolonged duration of the damages action that*

had resulted as a consequence of the Fund's evident unpreparedness on account of its failure to properly investigate the claim, stated (at para 42):

> *A special costs order is therefore not only appropriate but necessary. The [Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed.*

[19] In Madzunye and Another v Road Accident Fund ***2007 (1) SA 165*** *(SCA), the Fund was again made the subject of a punitive costs order because of its ill-considered opposition to an appeal in circumstances which evinced a striking failure by it to adhere to its statutory object. At para 17-18 of Madzunye, Maya JA, having quoted Howie JA's remarks in Klisiewicz loc cit supra, stated:*

> *'....the respondent, which relies on the public purse for its existence and does not, therefore, have unlimited financial resources, conducted itself in a manner which cannot be reconciled with the requirements set out in the Klisiewicz case. This is particularly so having regard to the fact that the intention of the Act, in terms of which the respondent functions, is to give the greatest possible protection to victims of negligent driving of motor vehicles.*

[20] In Bovungana v Road Accident Fund ***2009 (4) SA 123*** *(E) at para 3, Froneman J noted an increasing tendency of its officials to disregard the duty imposed on the Fund in respect of the handling of claims of road accident victims. In that matter the learned judge deplored the Fund's failure to investigate the plaintiffs claim and its consequent unmerited defence of the action at trial. An order was made that the responsible employees of the Fund should be liable personally, jointly and severally with the Fund, for the costs of a meritless application for a postponement of the trial. The Fund was, in addition, ordered, punitively, to pay the plaintiff's costs in the action on the scale as between attorney and client.*

[21] The Fund's 'deplorable conduct in failing to conform to its statutory responsibility towards a claimant was also the subject of deprecatory remarks in Road Accident Fund v Delport ***[2006] 1 All SA 468*** *(SCA) at para 26-29. Referring to an apology tendered in that regard to the Appeal Court, Zulman JA remarked 'The hope is expressed that there will not be a recurrence of such conduct on the part of the appellant in similar cases in the future.' A forlorn postscript to the learned judge of appeal's expression of hope is provided in the example described by Moleko J in Razack v Road Accident Fund* ***[2007] ZAKZHC 26*** *(19 October 2007) at para 254-261 of the Fund's failure to pay an agreed amount of compensation to a claimant and its attempt consequent thereupon to seek, in an unpersuasive manner, to distinguish its conduct from that for which it had apologised in Delport.*

[22] Other recent judgments which reflect adversely on the manner in which the Fund has conducted itself in respect of its statutory duty towards third

> *party claimants include Road Accident Fund v Ramalebana [2010] ZAGPJHC 52 (25 June 2010); Jwili v Road Accident Fund* ***2010 (5) SA 32*** *(GNP); Kekana v RAF* ***[2010] JOL 25206*** *(GSJ); Chetty v Road Accident Fund* ***2009 (5) SA 193*** *(N); Mlatsheni v Road Accident Fund* ***2009 (2) SA 401*** *(E); Nonkwali v Road Accident Fund [2009] ZAECMHC 5 (21 May 2009); Shikwambana obo Ngobeni v Road Accident Fund* ***[2007] ZAGPHC 105*** *(19 June 2007) at para 17; Soko v Road Accident Fund* ***[2008] ZAGPHC 257*** *(19 August 2008); Naicker v RAF* ***[2008] JOL 22709*** *(Ck) and Road Accident Fund v Radebe* ***[2010] ZAFSHC 154*** *(2 December 2010). Mention should also be made of the unreported judgment of Satchwell J in Seymour-Smith v Road Accident Fund WLD case no. 12441/03 (26 January 2006) in which the Fund was justly criticised in trenchant terms for being wholly unprepared for trial, having denied liability to compensate the plaintiff notwithstanding that it had no material in its possession to justify that position. Summons instituting action had been issued some two years and eight months before the matter came to trial.*
>
> *[23] A depressing feature of all of the aforementioned judgments is that they instance examples of cases in which the Fund must have incurred substantial legal expenses in taking to trial, or on appeal, claims which it had no basis to responsibly contest. In the context of the evidence before us that legal expenses constitute a very significant component of the Fund's overall expenditure, this is an aspect of the Fund's conduct which is demanding of conscientious attention by the responsible authorities, including the second and third respondents."*

40. It is clear that all the above comments, criticism and appeals to the Fund to observe its statutory duties and constitutional functions have fallen on deaf ears. The Fund is either incapable of, or disinterested in serving individuals who are often among the most vulnerable members of society. Its failure to do so leads to the waste of huge sums in legal fees and expenses and opens the door to abuse of the system. The full extent of this rather desperate state of affairs is best illustrated by some figures. During the first term of 2015, 5895 (five thousand eight hundred and ninety-five) civil matters were enrolled on this Court's civil trial roll. The vast majority of these cases, more than ninety per cent, were RAF matters. In 3032 (three thousand and thirty-two) matters the parties arrived at the call of the roll with draft settlement agreements, or entered into settlements on that morning, that were duly made orders of court. Many settlements, probably the majority, would relate to the merits only,

which would mean that these matters would re-appear on the roll in future, to be dealt with in similar fashion. There is only one reason that the roll is swamped in this fashion: The failure of the Fund to investigate claims, timeously or at all. There is a strong possibility that many matters are settled on terms the Fund would never have agreed to had the plaintiff's claims been properly scrutinized and that the Fund pays amounts in excess of the true value of the claim. More important, however, is the fact that counsel and attorneys have to be retained by both parties to the matter until it is settled. Settlements are usually reached either on, or only very shortly before the trial date. Junior counsel appearing for the plaintiff would, conservatively speaking, mark a fee of about R 12 000, 00 for their appearance on the first trial day. If this figure is multiplied by 3032 the result is R 36 384 000, 00. In most, if not all, cases there would be two counsel. Junior counsel briefed in terms of the Fund's latest tender agreements would mark, on average, R 7 000, 00 for the first day, increasing the bill for counsel's fees by R 21 224 000, 00 to R 57 080 000, 00. If the attorneys' costs for both parties are added – assuming that they amount to no more than R 12 000, 00, which may be far too low – the costs expended upon these cases spiral to around R 130 000 000, 00. Many attorneys' bills will exceed the sum of R 12 000, 00 by a considerable margin, including in the case of plaintiffs the costs of the experts' reports and reservation fees. On the other hand some counsel may have been briefed on settlement only, resulting in their being entitled to a lower fee. These calculations are obviously neither scientific nor accurate, nor do they necessarily apply to other Divisions of the High Court. Given the above facts it can however be stated with some confidence that in one court term in one

Division of the High Court between R 110 million and R 150 million is needlessly spent on legal fees in Fund matters that could be saved and devoted to the needs of accident victims. Most of these fees have to come out of the Fund's coffers.

41. This state of affairs cannot be allowed to continue. It has been recommended repeatedly in the past that the compensation of road accident victims through a state sponsored agency should abandon the fault principle – namely that a plaintiff victim has to prove negligence on the part of the driver responsible for her or his injuries. Judge Satchwell in her monumental report of the Road Accident Fund Commission commented upon the issue as long ago as 2002. The Minister of Transport has now published the Road Accident Benefit Scheme Bill. If implemented, it will create an agency that will compensate accident victims on a non-fault basis by the provision of medical and other services. It will hopefully provide a solution to the present morass of needless litigation and unacceptable delays. It does contain a worrisome proposal, however, that the new agency will absorb the existing Fund's structures. With such assimilation the new agency will be exposed to the risk of perpetuating the Fund's culture of indifference to human suffering and financial waste. If so, the new agency would be saddled with an *inheritas damnosa,* a cursed inheritance that would doom it to fail virtually immediately. The compensation of road accident victims requires a radical change that should be free of the shackles of an institution that does neither comply with its duty to uphold the fundamental rights enshrined in the Constitution nor with the duties imposed upon it by its statute.

42. The plaintiff is entitled to his proven damages. The lawyers are not entitled to charge any fees for the reasons set out above. It must be recorded that plaintiff's attorney informed the court during argument from the Bar that no fees would be demanded from the plaintiff whatever the court's order might be.

The following order is made:

1. The defendant is ordered to pay the sum of R 24 941, 70 (Twenty-four thousand nine hundred and forty-one Rand and seventy cents);
2. If the said sum is not paid within fourteen days from date of this order, interest at the rate of 9% p.a. will be payable on this sum from the fifteenth day until date of payment;
3. It is declared that neither party's legal representatives are entitled to any fees or disbursements in respect of any work or service performed in respect of this matter;
4. A copy of this judgment is to be sent to the Law Society of the Northern Provinces and the Pretoria Society of Advocates for their consideration of the ethical implications of the legal representatives' conduct in these proceedings.

Signed at Pretoria on this eighth day of May 2015.

E BERTELSMANN

Judge of the High Court.