THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 372/2025

In the matter between:

DISCOVERY HEALTH (PTY) LTD **APPELLANT**

and

ROAD ACCIDENT FUND **FIRST RESPONDENT**

CHIEF EXECUTIVE OFFICER:

THE ROAD ACCIDENT FUND

COLLINS PHUTJANE LETSOALO **SECOND RESPONDENT**

Neutral Citation: *Discovery Health (Pty) Ltd v Road Accident Fund and Another* (372/2025) [2026] ZASCA 140 (16 October 2026)

Coram: MAKGOKA, NICHOLLS AND COPPIN JJA and STEYN AND DIPPENAAR AJJA

Heard: 16 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for hand-down of the judgment is deemed to be on 16 October 2026 at 11h00.

Summary: *Res judicata* – court order declaring first directive unlawful – subsequent directives countering operation of court order – conduct unlawful and circumvention of court order.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mlambo JP and Bam and Opperman JJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel, to be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved.

2 The order of the Full Court is set aside and replaced with the following:

'1 It is declared that the first and second respondents are in breach of this Court's order and judgment dated 27 October 2022 and of their constitutional duty to obey and implement the judgment.

2 The first and second respondents are interdicted, with immediate effect, from giving effect to the directives they issued on 13 April 2023 and 2 November 2023, respectively.

3 The first and second respondents are interdicted, with immediate effect, from making any deductions from compensation paid to claimants under the Road Accident Fund Act on the basis that their medical expenses have been or will be paid by their medical aid schemes.

4 The first and second respondents are directed, within 14 days of this order, to take all steps necessary to give effect to this judgment and to report in writing to the Registrar of this court and the applicant's attorneys of record their compliance with the order and their duty to take all steps necessary to give effect to the judgment.

5 The first and second respondents are ordered to pay the applicant's costs, including the costs of two counsel on scale C.'

JUDGMENT

Makgoka JA (Nicholls and Coppin JJA and Steyn and Dippenaar AJJA concurring):

[1] The appellant, Discovery Health (Pty) Ltd (Discovery), appeals against an order of the Full Court of the Gauteng Division of the High Court, Pretoria (the Full Court). The majority (Mlambo JP and Bam J) dismissed Discovery's application for a mandatory interdict. Discovery sought to compel the first respondent, the Road Accident Fund (the RAF), and the second respondent, its then Chief Executive Officer (the CEO), to comply with an order of the same division dated 27 October 2022 (the High Court order). That order interdicted the RAF from implementing its directive to reject claims for past medical expenses from road accident claimants where the claimants' medical aid schemes had paid those expenses. The minority (Opperman J) would have granted Discovery's application. The appeal is with the leave of the Full Court.

Factual background

[2] Discovery is a medical scheme administrator. It administers 18 restricted medical schemes, including the Discovery Health Medical Scheme. The Discovery Health Medical Scheme's Rules expressly require members to reimburse the scheme for payments made to recover past medical expenses from the RAF. This is a standard requirement in medical schemes' rules, which derive statutory force from s 32 of the Medical Schemes Act 131 of 1998 (Medical Schemes Act) and bind both the schemes and their members.

[3] Historically, the RAF paid out claims for past medical expenses regardless of whether a claimant was covered by a medical aid scheme.[1] This changed on 12 August 2022, when the RAF's Acting CEO issued a directive instructing its claims officers to 'reject medical expenses claims if the medical aid has already paid for the medical expenses.' I refer to this as 'the first directive'. The first directive states:

'All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. The regions must use the prepared template rejection letter (see attached) to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred any expenses relating to the past medical expenses claimed. Therefore, there is no duty on the RAF to reimburse the claimant . . .'.

Required outcome: immediate implementation of the process and 100% compliance to the process.'

[4] Discovery challenged the first directive in the Gauteng Division of the High Court, Pretoria (the High Court). Discovery sought an order reviewing and setting aside the first directive. In its judgment, the High Court set out the general principles governing compensation for delictual damages. Among these, it noted that, when determining a claimant's patrimony following the delict, one must consider advantageous consequences, subject to certain exceptions.[2] Drawing on settled principles, the High Court stated that a claimant's benefits from a third party's benevolence or a private insurance policy are not taken into account when determining the quantum of damages against a wrongdoer.

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[1] The RAF is a juristic person established under the Road Accident Fund Act 96 of 1996 (the RAF Act). At the relevant time, the second respondent was the RAF's CEO. The RAF provides compulsory cover to all users of South African roads for injuries sustained or deaths arising from motor vehicle accidents. This cover is, in essence, indemnity insurance for those who cause accidents, as well as personal injury and death insurance for accident victims and their families.

[2] Section 18 of the RAF Act excludes benefits received under the Compensation for Occupational Injuries and Diseases Act 103 of 1993 or the Defence Act 42 of 2002 from the calculation of the claimant's damages. This applies where a claimant is also entitled to compensation under COIDA or the Defence Act, respectively.

[5] After setting out the statutory exclusions under the Road Accident Fund Act 56 of 1996 (the RAF Act), the High Court noted that the RAF Act does not exclude benefits the victim of a motor vehicle accident has received from a private medical scheme for past medical expenses. The court said this is because a benefit that accrues or is received under a private insurance policy arises from a contract between the insured and the insurer, intended for the claimant's explicit benefit. It does not exonerate the wrongdoer from liability to discharge its obligation. The essence of this principle is that payment of a claimant's past medical expenses by their medical aid scheme does not relieve the RAF of its obligation to compensate the claimant for those expenses.

[6] The High Court recognised that the RAF Act's social security protection is not intended to impoverish medical schemes. Further, the High Court held that implementing the RAF's policy would prejudice medical scheme members, as they would contribute to the RAF fuel levy yet would not receive full compensation from the RAF if they sustained injuries caused by a negligent driver. For these reasons, the High Court declared the first directive unlawful. It set it aside and interdicted the RAF from implementing it.

[7] The High Court subsequently dismissed the RAF's application for leave to appeal. This Court likewise dismissed the RAF's application for leave to appeal on 31 March 2023. Shortly thereafter, on 13 April 2023, unbeknown to Discovery and the public, the RAF's CEO issued a second directive, instructing RAF claims officers not to pay claims for past medical expenses where a claimant's medical aid scheme had already paid for them, except in limited circumstances. On 18 October 2023, the Constitutional Court dismissed the RAF's application for leave to appeal on the ground that it did not engage its jurisdiction. Shortly thereafter, on 2 November 2023, the RAF's CEO issued a third directive informing its claims officers that the RAF was not obliged to compensate any claimant who entered

into agreements that conflict with s 19(*d*)(*i*).

[8] Despite the Constitutional Court's dismissal of its application, the RAF continued to deny claimants' claims for past medical expenses paid by their medical aid schemes. At that stage, the public did not know the basis for the RAF's continued rejection of these claims, as the RAF had not disclosed it. Discovery assumed the RAF was acting in defiance of the High Court order. However, correspondence with the RAF revealed that it was acting pursuant to the second directive. Despite Discovery's request for a copy of the second directive and the RAF's undertaking to provide it, the RAF failed to do so.

Before the Full Court

[9] On 9 November 2023, Discovery launched an urgent application in the High Court seeking to hold the RAF and its CEO in contempt of the High Court's order. Discovery alleged that the RAF had continued to reject claims where the claimants' medical scheme had already paid for their medical expenses. By doing so, the RAF circumvented the High Court order. Discovery also sought an order directing the RAF to take all steps necessary to give effect to the order, together with further ancillary relief.

[10] The RAF opposed the application. In its answering affidavit, the RAF denied implementing the unlawful August 2022 order. Instead, it stated that it acted under the second and third directives, which it attached to the answering affidavit. It contended that the new directives differed from the first directive. I pause here to note that this was the first time Discovery had sight of the second and third directives. The RAF also stated that it had not refused any claims under the first directive since the Constitutional Court dismissed its application for leave to appeal.

[11] The application came before the Full Court, sitting as a court of first instance and specially constituted for the matter. The Full Court was not unanimous. The majority held that the issues in the interdictory application differed from those in the second and third directives.

The majority judgment

[12] The majority held that the High Court did not address the second and third directives because new directives 'carry substantial policy and legal issues.' Regarding the *res inter alios acta* principle, the majority framed the question for determination as follows:

'Whether there are policy considerations of equity, fairness and reasonableness that militate in favour of this Court concluding that payment made by a medical scheme in discharge of its statutory obligation under the MSA should be recovered from the RAF on the basis of the res inter alios acta principle.'

[13] On these grounds, the majority concluded that the issues in the second and third directives were not *res judicata* as against the RAF, and that the RAF was entitled to implement them until a court set them aside. The majority then addressed the substance of those directives and considered several policy considerations raised by the RAF. Among these, the majority considered whether the principles of *res inter alios acta* and subrogation must continue to apply against a social security fund like the RAF in favour of a privately funded medical scheme in a constitutional society.

[14] The majority held that Discovery's published rules apply only to its members and the scheme, not to third parties such as the RAF. The rule governing recovery from the RAF of amounts the scheme has paid in discharge of its contractual and statutory obligations is Discovery Medical Scheme's own rule. It cannot bind third parties, including the RAF. The majority also noted that the

third-largest scheme in the country, the Government Employees Medical Scheme (GEMS), does not, in its rules, oblige members to claim any past medical expenses from the RAF. Conceivably, the majority said, GEMS accepts that it cannot recover from the RAF what it is statutorily required to pay as prescribed medical benefits (PMBs) and emergency medical conditions (EMCs).

[15] Furthermore, the majority held that it was 'undisputed' that medical schemes were financially viable without any possible recovery from the RAF. On that basis, the majority posed the following questions:

'Should the financially ailing RAF be concerned with funding the medical contributions paid by the small fraction of privileged citizens who have access to private healthcare as opposed to funding the competing needs of claimants who are victims of motor accidents, the majority of whom are indigent.'

. . .

'[Are] there any policy considerations in favour of excluding collateral benefits received by a claimant from a medical scheme by way of payment of PMB's and EMC's, on the basis of *res inter alios acta*.'

[16] Although the majority said it raised these 'without necessarily answering the question[s]', it did provide answers. It noted that the RAF is 'struggling financially and is not adequately funded.' In this regard, the majority referred to *Road Accident Fund v Auditor-General of South Africa*,[3] in which the RAF's financial woes and dysfunction were laid bare. The majority further noted that, unlike insurers, the RAF does not underwrite risk or charge a premium commensurate with the risk it assumes. Except for limited statutory exclusions, the RAF is not entitled to exclude any person from cover.

[17] The majority alluded to 'the widening of the gap' between citizens who can afford private health care and those who cannot, as a possible obstacle to the RAF

[3] *Road Accident Fund v Auditor-General of South Africa (AGSA) and Others* [2024] 3 All SA 914 (GP).

if it is compelled to continue funding the disputed medical expenses. After taking judicial notice of the inequality in our country, the majority held:

'Given the myriad of social challenges facing this developing country, is there justification based on policy considerations, fairness and reasonableness, for the government to concern itself with protecting the interests of medical schemes? The contestation before us is simply about whether the RAF's funds should continue being used to replenish the coffers of medical schemes. The subrogation principle perpetuates the lie that a road accident victim actually has a claim against the RAF when in truth and in fact, that claim was satisfied by the medical scheme.'

[18] The majority turned to the second and third directives. It held that they constituted administrative action, which could be set aside only by review proceedings. Because Discovery did not apply to review and set aside those directives, there was no basis to interdict the RAF from implementing them. Thus, relying on this Court's judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town* (*Oudekraal*),[4] the majority held that directives remained operative until set aside by a court.

[19] In addition, the majority held that the RAF was entitled to issue directives from time to time to aid the administration of claims. It further held that the RAF lawfully issued the second and third directives in discharge of its statutory function and in accordance with the RAF Act. Accordingly, the directives were valid. Consequently, the majority dismissed Discovery's case with costs.

The minority judgment

[20] In contrast, the minority held that the second and third directives fell within the scope of the interdictory order and were therefore *res judicata* in relation to the RAF. The minority reasoned as follows. The RAF used the subsequent

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[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA).

directives as a stratagem to subvert the High Court order. The RAF could not insulate itself from that order by adopting a policy of non-compliance. An organ of state whose conduct the courts have found unlawful cannot repeat that conduct in smaller parts by conjuring up a new justification. If this were condoned, organs of state could evade compliance with court orders by repeatedly reasserting unlawful decisions and generating new justifications. It would undermine the effectiveness of our judicial system and turn the rule of law into a meaningless farce, as an applicant would have to bring fresh review and interdictory proceedings again and again, thereby permitting such organs of state to evade compliance with the law in perpetuity.

[21] Regarding the majority's reliance on *Oudekraal*, the minority concluded that the principle established in that case cannot be used to subvert a court order. For these reasons, the minority would have found that the RAF breached the High Court order and ordered the RAF to take all necessary steps to give effect to it.

In this Court

[22] Discovery relied on the minority judgment. It contended that: (a) the issues in the second and third directives were *res judicata* by virtue of the High Court order; (b) the new justifications in the directives lacked legal foundation; (c) the majority's approach to *res inter alios acta* was mistaken; and (d) the principle of subrogation applies to claims under the RAF Act in the context of medical aid schemes' payment of past medical expenses.

[23] The RAF relied on the majority judgment and made the following submissions. Because the second and third directives did not exist when the High Court delivered its judgment, the judgment could not apply to them. The High Court judgment did not extend to all future directives, nor did it prevent the RAF from exercising its statutory duties, including issuing directives on how it carries

out those duties. The principles of *res inter alios acta* and subrogation do not apply to claims brought under the RAF Act, as neither medical aid schemes nor the RAF are insurers.

The issues

[24] I first delineate the scope and ambit of the High Court's judgment. Thereafter, I consider whether:

(a) the substance of the second and third directives is *res judicata* in light of the High Court's judgment;

(b) *Oudekraal* insulates the second and third directives until judicially set aside;

(c) the majority's approach to the principles of *res inter alios acta* and subrogation was correct.

The scope and ambit of the High Court's judgment

[25] The High Court identified the issue for determination as the RAF's refusal to pay past medical expenses where a claimant's medical aid scheme had paid them, as set out in the first directive. The High Court held that the RAF's directive was unlawful. The High Court reasoned that benefits a claimant receives from a private insurance policy or a third party are not taken into account when determining the quantum of a claimant's claim against the RAF. This is because the benefit arises from a contract between the claimant and the insurer for the claimant's exclusive benefit. Receiving such a benefit did not absolve the RAF of its obligation under the RAF Act.

[26] For these reasons, in accordance with the principle of *res inter alios acta*, the High Court held that past medical expenses paid by medical aid schemes form part of the damages payable to claimants under the RAF Act. Accordingly, the first directive and the policy consideration underpinning it, namely the exclusion of past medical expenses paid by the claimants' medical aid schemes, were

inconsistent with s 17 of the RAF Act, which requires the RAF to compensate claimants for all proven damages.

[27] The above makes it clear that the High Court did not purport to prohibit the RAF from issuing any future directives which it could legitimately issue under the RAF Act, as the RAF suggested. Nor was it Discovery's case. Its case was that the second and third directives were unlawful to the extent they contradicted the High Court order. To be clear, the RAF may issue directives it is entitled to under the RAF Act. However, such directives may not contradict the RAF Act's provisions or circumvent a court order.

Whether the issues in the second and third directives are res judicata

[28] A matter is *res judicata* if, in the previous proceedings, the same cause was adjudicated, between the same parties, and the same thing was demanded.[5] The principle is foundational to the rule of law. As the Constitutional Court emphasised in *Molaudzi v S*,[6] the rule of law and legal certainty will be compromised if a court order's finality is in doubt and it can be revisited substantively. The administration of justice will also be adversely affected if parties can approach courts repeatedly on the same matter.

[29] To determine whether this threshold was met in the present case, it is necessary to consider the essence of the High Court's judgment against the substance of the second and third directives. The High Court found that, considered with the common law, the RAF Act must be read to mean that medical scheme members have a right to full compensation from the RAF for past medical expenses, regardless of whether their medical scheme has already paid for those expenses or whether they constitute a prescribed minimum benefit under the

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[5] *Smith v Porritt and Others* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) para 10.
[6] *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC).

Medical Schemes Act. It is immaterial whether the medical scheme's obligation to pay for medical expenses is contractual, statutory, or both.

[30] Having set out the principles, the High Court concluded:

'It is apparent from the above statements of the legal position that the first respondent is not entitled to seek to free itself of the obligation to pay full compensation to victims of motor vehicle accidents. Thus the directive challenged in the present proceedings is outside the authority given by the enabling statute. More specifically, the directive is inconsistent with the express provisions of section 17 and is, consequently, unlawful.'

[31] The High Court's judgment rests on the premise that the RAF may not reject a claim for past medical expenses on the ground that a medical scheme has already paid them. Against this ratio, the import of the second and third directives should be considered to determine whether they address the same subject matter as determined by the High Court.

[32] The second directive, in relevant parts, reads:

'2. <u>DISCUSSION</u>

2.1. The object of RAF is to pay for loss or damage wrongfully caused by the driving of a motor vehicle.

2.2. A Medical Scheme is neither a third party nor a supplier of services as contemplated by the RAF Act.

2.3. Where a medical scheme has paid in full for the prescribed minimum benefit conditions, diagnosis, treatment, and care costs, it does so to fulfil its statutory obligations in terms of Regulation 8 of the MSA Regulations.

2.4. It should also be apparent that the medical scheme has no reimbursement rights after honouring its statutory obligation, arising out of MSA and its regulations.

2.5. The medical scheme has no authority to contract out of its statutory obligations/liability and cannot coerce its members to claim from RAF what is not a loss or damage suffered by its members.

2.6. *A clear indication that a claimant has suffered no loss or damage is where a medical scheme expects the members "to pay the compensation to the medical scheme once paid by the*

RAF".

3. <u>REQUIRED ACTIONS</u>

3.1. When assessing past medical costs claim[s] ensure that you separate what is paid by the claimant/third party and what is paid by the medical scheme.

3.2. If the claim has been paid by a medical scheme, then ascertain if that is an emergency medical condition (EMC) or prescribed minimum benefit condition as listed in Annexure A of the MSA Regulations, as amended.

3.3. It should be noted that if a claimant has suffered loss or damage that has not been paid by a medical scheme or is not part of EMC or PMB, then the claimant should be compensated as per the RAF Act and RAF Regulations. Such costs should have already been incurred by the claimant and any such loss should have already been suffered the claimant.

. . .

3.5. Kindly be vigilant and be aware of the irregular practice of Medical Schemes or their administrators appointing attorneys on behalf of claimants who masquerade as third-party representatives whilst acting on behalf of Medical Schemes and their administrators.' (Emphasis added.)

[33] The third directive is styled as an 'internal directive clarification of the implementation of s 19 of the RAF Act.' Similar to the second directive, it states that the directive is an 'internal memorandum/document for internal purposes only, administration of claims, and management of claims risk' and 'not to be distributed to external stakeholders.' It notes that s 19 of the RAF Act excludes the RAF's liability in specific circumstances. The directive requires RAF's claim officers to request from claimants or their representatives any agreements entered into between claimants and third parties to assess and make a determination whether s 19 of the RAF Act applies. The directive further states that the RAF is not obliged to compensate any claimant who entered into agreements that fall foul of s 19*(d)*(i).

[34] The first directive's underlying and express policy decision was that the RAF was not obliged to pay claimants for past medical expenses where their

medical aid schemes had already paid for them. The High Court rejected that basis in its 27 October 2022 judgment, holding that the RAF's stance was unlawful for the reasons I have already canvassed.

[35] The second directive, on its express terms, provided that the RAF was not obliged to pay past medical expenses where claimants' medical aid schemes had already paid them. The only difference between the first and second directives is that the latter offers more reasons for the RAF's stance. The third directive sought the same result, albeit under a different provision of the RAF Act, namely s 19(1)*(d)*(i). That provision excludes RAF's obligation to pay where a claimant had entered into an agreement under which a person, other than an authorised legal representative, assists the claimant with a claim or finances it in return for a share of the compensation.

[36] A fair and objective consideration of the second and third directives reveals that, in each case, the RAF's overriding purpose is to provide a basis for rejecting claims for past medical expenses already paid by the medical aid scheme. The only difference between them is the reasoning underpinning each. Thus, properly viewed, both the second and third directives seek to achieve what the High Court has held unlawful: refusing to pay past medical expenses because the claimant's medical aid scheme has already paid them.

[37] I therefore conclude that the second and third directives raise the same issue the High Court determined. After the Constitutional Court dismissed the RAF's application for leave to appeal against the High Court's judgment, the judgment became final. It is immaterial that the RAF considers it to be wrong. As pointed out in *Mkhize NO v Premier of the Province of KwaZulu-Natal*,[7] the enquiry in

[7] *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) para 36.

respect of *res judicata* is not whether the judgment is correct, but simply whether there is a judgment.

[38] Three insurmountable difficulties arise for the RAF from applying the *res judicata* principle. The first and obvious one is that the RAF cannot, in another guise, raise the issue the High Court finally determined once leave to appeal that judgment has been refused. The second is that the RAF cannot alter the true nature of what was in issue in that application by attaching a new label to the second and third directives or by advancing reasons different from those it advanced in the original interdictory application. As this Court held in *African Farms & Townships v Cape Town Municipality*,[8] different reasons leading to a different conclusion cannot affect the identity of the question to be decided. This is precisely what the RAF sought to do by issuing the second and third directives. It had the same objective as those directives, ie to reject claims for past medical expenses because medical aid schemes paid them. But it sought to use different justifications.

[39] Third, closely allied to the doctrine of *res judicata*, is the 'once and for all' rule. Our law requires that a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon that cause.[9] The purpose of the rule is to 'prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.'[10] In other words, all claims generated by the same cause of action should be instituted in one action.[11] In *Janse van Rensburg NO v Steenkamp*[12] this Court accepted the

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[8] *African Farms & Townships v Cape Town Municipality* 1963 (2) SA 555 (A) at 563C-E.
[9] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E.
[10] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835E.
[11] *National Sorghum Breweries Ltd (t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 241D-E.
[12] *Janse van Rensburg NO and Others v Steenkamp and Another, Janse van Rensburg NO and Others v Myburgh and Others* [2008] ZASCA 154; 2010 (1) SA 649 (SCA); [2009] 1 All SA 539 (SCA) paras 27-29.

following dictum in the English decision of *Henderson v Henderson*:[13]

'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

[40] The principle derived from the above authorities is this: if a cause of action has previously been finally litigated between parties, a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by a defence of *res judicata*. Needless to say, these principles apply with equal force to defences: if a defence has been finally litigated between the parties, a subsequent attempt to rely on essentially the same defence against the other party can be met with a plea of *res judicata*.

[41] In the present case, the additional reasons set out in the second and third directives were available to the RAF when it opposed the interdictory relief that led to the 27 October 2022 judgment and order. Exercising reasonable diligence, the RAF could and should have brought them forward for adjudication with the issue raised in the first directive. The second and third directives are therefore hit by the 'once and for all rule' and the *Henderson* principle. The RAF cannot therefore rely on one directive in litigation and, when that directive is declared unlawful, conjure up another directive with a similar purpose. It follows that the

[13] *Henderson v Henderson* (1843) 3 Hare 100 at 114-115; [1843-1860] All ER Rep 378 at 381-2.

issue raised in the second and third directives is *res judicata*, as the High Court already determined it by declaring the first directive unlawful to the extent that it prohibited the payment of past medical expenses to claimants on the ground that their medical aid schemes had already paid those expenses.

[42] Before concluding on this aspect, I reflect on the RAF's conduct in relation to these directives. The timing of both directives is telling. As noted, this Court dismissed the RAF's application for leave to appeal on 31 March 2023. The order was communicated to the parties on 11 April 2023. Two days later, on 13 April 2023, the RAF issued the second directive. On 24 April 2023, the RAF applied to the Constitutional Court for leave to appeal. The Constitutional Court dismissed that application on 18 October 2023. Less than two weeks later, on 2 November 2023, the RAF issued the third directive.

[43] I make two observations about the RAF's conduct regarding the second directive. First, when it applied to the Constitutional Court on 24 April 2023, the RAF failed to disclose to the Court that it had issued the second directive on 13 April 2023. Second, the RAF disclosed the directive only after exhausting the appeal process before the Constitutional Court. The irresistible inference is that the RAF anticipated it might be unsuccessful in its application for leave to appeal to the Constitutional Court.

[44] The RAF then surreptitiously issued the second directive to provide a basis for rejecting claims for past medical expenses previously paid by medical aid schemes. The aim was to preserve the unlawful outcomes of the first directive by asserting that, from April 2023, it could continue to reject such claims on the ground that the claimants' medical aid schemes had paid them. The second and third directives were clearly contrived to circumvent the High Court's judgment.

[45] This implicates s 165 of the Constitution, which entrenches judicial authority. Section 165(4) enjoins organs of state to assist and protect the courts to ensure their independence and effectiveness, among other things.[14] Court judgments and orders bind all persons and organs of state to whom they apply, and no person, organ of state, or public official may interfere with the functioning of the courts in any manner. The RAF's conduct in this matter has the potential to undermine judicial authority. In *Matjhabeng Local Municipality v Eskom Holdings*,[15] the Constitutional Court cautioned that non-compliance with court orders imperils judicial authority.

[46] For these reasons, the majority of the Full Court should have seen through the RAF's contrived stratagem of implementing the first, unlawful directive under the guise of the second and third directives. It erred in holding that the RAF issued the second and third directives in the lawful discharge of its statutory function. It did not. I have demonstrated that the RAF did not issue those directives *bona fide*. As mentioned, it aimed to circumvent the High Court judgment and order through those directives. An act done to circumvent a court order can hardly be a lawful discharge of statutory functions.

Whether the second and third directives are insulated by Oudekraal

[47] The majority held that the second and third directives constitute administrative action and remain valid until a court sets them aside. As

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[14] Section 165 of the Constitution of the Republic of South Africa, 1996, reads:
'165. Judicial authority
1. The judicial authority of the Republic is vested in the courts.
2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
3. No person or organ of state may interfere with the functioning of the courts.
4. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'

[15] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 48.

mentioned, the majority relied on the first principle of *Oudekraal*[16] – ie that an unlawful act may have legal effect for so long as it has not been set aside. The parties accepted that the directives constitute administrative action. For present purposes, I accept that premise without deciding the issue. Accordingly, the first principle of *Oudekraal* would ordinarily be an obstacle in Discovery's way. But that principle is not immutable. In *Merafong City Local Municipality v Anglo Gold Ashanti* (*Merafong*),[17] the Constitutional Court formulated an exception to the rule as follows:

'*Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid . . . It all depends on the circumstances.'[18]

[48] In my judgment, this case falls squarely within the narrow *Merafong* exception. As already found, the RAF issued the second and third directives solely to circumvent a court order. It is difficult to imagine more reprehensible conduct by an organ of state. Those directives must therefore be treated as invalid, even though a court has not set them aside.

The majority's approach to the principles of res inter alios acta and subrogation

[49] The findings on the second and third directives should end the matter. However, it is necessary to briefly comment on the majority's treatment of the

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[16] There is no single '*Oudekraal* principle.' *Oudekraal* established four broad principles. First, that an unlawful act may have legal effect for so long as it has not been set aside; second, that the legal effect depends on whether the validity of an originating act is a precondition for the validity of the subsequent act; third, that an unlawful act which compels a person to do or not to do something must be valid, and a person affected by it is entitled to challenge its invalidity collaterally; and fourth, that the court reviewing an unlawful act has discretion to refuse the remedy of setting aside even if a ground of review has been established.

[17] *Merafong City Local Municipality v Anglo Gold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC); BCLR 182 (CC).

[18] Ibid para 44.

substantive issues arising from those directives. Although we uphold the appeal and set aside the majority's order, the majority's pronouncements may be treated as altering the common law or as having precedential weight unless this Court clarifies the legal position. I therefore consider how the majority approached the application of the *res inter alios acta* and the subrogation principles in the context of delictual claims under the RAF Act. Lastly, I consider the application of s 19(1)*(d)*(i) of the RAF Act. The majority departed from well-settled common law principles on both issues.

[50] The doctrine of *res inter alios acta* is firmly entrenched in our law. Its import is that benefits collateral to a claimant's right of action are excluded from the calculation of damages.[19] In a long line of cases, our courts have held that the question of which collaterals are deductible must be determined by reference to equity, reasonableness and public policy. This means the issue must be decided on a case-by-case basis.[20] However, with regard to past medical expenses paid by the medical aid scheme on behalf of their members, our courts have long held that they constitute *res inter alios acta* which must be disregarded when awarding damages.[21]

[51] This Court in *Bane and v D'Ambrosi* (*Bane*)[22] confirmed a High Court finding that benefits paid by a medical aid scheme are *res inter alios acta*, so the defendants could not claim them. Accordingly, it rejected the argument that medical aid scheme benefits constitute social insurance capable of reducing delictual damages. Thus, the long-standing common law application of the *res inter alios acta* principle to delictual claims remains in force. The Full Court of

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[19] See, for example, *Erasmus Ferreira & Ackerman v Francis* 2010 (2) SA 228 (SCA) para 15.
[20] *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (SCA) at 41H-J and 42A-C; *Erasmus Ferreira & Ackermann and Others v Francis* 2010 (2) SA 228 (SCA) para 17.
[21] The principle dates back to *McKenzie v SA Taxi Cab* 1910 WLD 232 at 234.
[22] *Bane and Others v D'Ambrosi* [2009] ZASCA 98; 2010 (2) SA 539 (SCA); [2010] 1 All SA 101 (SCA) para 19, referring with approval to *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 920; *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A) at 42.

the Western Cape Division has correctly declined to follow the majority's pronouncements in *Road Accident Fund v Van Wyk*.[23]

[52] Turning to subrogation, the principle allows an insurer, after compensating its insured for a covered loss, to recover the amount paid from the person or entity legally liable for the loss. This prevents the insured from being unjustly enriched and ensures that the financial burden ultimately rests with the wrongdoer.[24] The majority held that, because neither the RAF nor Discovery was an insurer, the subrogation principle did not apply to them as it does in insurance law.

[53] The majority asked and answered the wrong question. The issue is not whether Discovery or the RAF is an insurer. Rather, it is whether payments by medical aid schemes to their members who claim under the RAF Act should be treated the same way as payments by an insurer for the purposes of applying the principles of subrogation and *res inter alios acta*. As mentioned, this Court in *Bane* recognised that medical aid schemes are, in substance, a form of insurance. Although it found it unnecessary to explore the issue of subrogation in greater detail, it remarked:

'. . .[I]t is not for the [defendants] to dictate to the [claimant] as to how he should structure his expenditure, and the fact that he is, for the present at least, a member of a scheme does not mean that that arrangement will continue into the foreseeable future. Moreover, it would be surprising if the scheme to which he belongs does not provide for the principle of subrogation, which will mean that the respondent will ultimately have to transfer any compensation paid to him by the appellants to his medical scheme. . .'[25]

[54] That said, the Court's finding that medical scheme payments are, in

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[23] *Road Accident Fund v Van Wyk* [2026] ZAWCHC 39.
[24] MFB Reinecke, SWJ van der Merwe, JP van Niekerk, PH Havenga and J Church Lawsa (re issue), vol 12, para 373. See also D M Davis Gordon & Getz on The South African Law of Insurance 4 ed (1993) 257. See also *Rand Mutual Assurance Company Ltd v Road Accident Fund* [2008] ZASCA 114; 2008 (6) SA 511 (SCA); [2009] 1 All SA 265 (SCA) para 12.
[25] *Bane* para 19.

substance, a form of insurance and fall under *res inter alios acta* is important. It should extend to subrogation in this case because Discovery's members who claim under the RAF Act are contractually obliged by Discovery's rules to refund Discovery for past medical costs it had paid, once the RAF settles the claim.

[55] The third directive was premised on s 19(1*)(d)*(i) of the Act. The provision excludes the RAF's liability where a claimant has entered into an agreement with any person other than an authorised legal representative, in terms of which the claimant has undertaken to pay that person a portion of the compensation.[26] In this Court, counsel for the RAF relied heavily on this provision. The gravamen of counsel's submission was this: because claimants who are members of medical aid schemes agree to reimburse the scheme for any amounts it pays over to service providers, this amounts to an agreement falling within the exclusionary provision of s 19(1)*(d)*(i).

[56] The provision targets agreements between a claimant and a person who is not their attorney but who assists or finances the prosecution of the claim in exchange for a share of the payment. The purpose of s 19(1)*(d)*(i) was considered

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[26] **19 Liability excluded in certain cases**
'The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage —
(a) . . .
(b) . . .
(c) if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by —
(i) any person entitled to practise as an attorney within the Republic; or
(ii) any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or
(d) where the third party has entered into an agreement with any person other than the one referred to in paragraph (c) (i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim —
(i) a portion of the compensation in respect of the claim; or
(ii) any amount in respect of an investigation or of a service rendered in respect of the handling of the claim otherwise than on instruction from the person contemplated in paragraph (c) (i) or (ii); or
(e) . . .
(f) . . ..'

by this Court in *Road Accident Fund v Abdool-Carrim* (*Abdool-Carrim*),[27] in which it was held that the provision was aimed at protecting claimants, 'many of whom are indigent, from entering into champertous agreements'.

[57] Champerty is an agreement to finance litigation in exchange for a share of the proceeds. In *Price Waterhouse Coopers v National Potato Co-operative* (*Price Waterhouse*),[28] this Court held that such agreements were neither contrary to public policy nor void. Counsel for the RAF contended that the holding in *Abdool-Carrim* was contrary to that in *Price Waterhouse.* I disagree. The fact that a champertous agreement is neither contrary to public policy nor void is irrelevant to the application of s 19(1)*(d)*(i).

[58] Although such agreements may not be objectionable, the Legislature has adopted a policy decision to exclude the RAF's liability where a claimant has entered into one. The true question is therefore not whether the agreements between the medical aid schemes and claimants are champertous. Rather, it is whether such agreements fall within the exclusionary provision of s 19(1)*(d)*(i). Two features of the provision must be satisfied. First, the person entering into an agreement with the claimant must finance the claim or assist in its prosecution. Second, the claimant and the person must agree to share the compensation the claimant receives. Medical aid schemes do neither.

[59] The agreement between medical aid schemes and their members provides that the medical aid scheme pays the claimant's medical expenses and, when the claim is settled, the member reimburses the medical aid scheme. Reimbursement is not the same as sharing proceeds. Accordingly, an agreement between a

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[27] *Road Accident Fund v Abdool-Carrim and Others* [2008] ZASCA 18; [2008] 3 All SA 98 (SCA); 2008 (3) SA 579 (SCA) para 13.

[28] *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another* [2004] ZASCA 64; [2004] 3 All SA 20 (SCA); 2004 (9) BCLR 930 (SCA); 2004 (6) SA 66 (SCA) para 46.

medical aid scheme and a member who claims under the RAF Act to reimburse the medical aid scheme for past medical expenses does not fall within the provision's scope.

[60] Before concluding, it is worth reflecting on the policy considerations the High Court alluded to regarding the application of the doctrine of *res inter alios acta* and the principle of subrogation in the context of claims under the RAF Act. Although the majority did not expressly set out to develop the common law in this regard, its judgment resulted in such development. This is because, by judicial fiat, it changed a century-old common law application of *res inter alios acta* and subrogation to past medical expenses. As the Constitutional Court observed in *Olesitse N O v Minister of Police*,[29] development of the common law can occur unintentionally.

[61] If the common law needs to be developed in a manner suggested in the majority judgment, a proper basis must exist. None existed in the present case because the RAF did not plead for the development of the common law. In *Mighty Solutions v Engen*, the Constitutional Court explained:[30]

'Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.'

None of these requirements was met in this case, and consequently, the majority's judgment cannot be supported.

Conclusion and costs

[29] *Olesitse N.O. v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC) para 49.
[30] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) para 38.

[62] In all the circumstances, the appeal must be allowed. An effective remedy would ensure that the RAF complies with the High Court's order, thereby upholding judicial authority. The declaratory and compliance relief sought by Discovery is appropriate.

[63] Costs should follow the result. Discovery employed four counsel but sought costs for only two. Against the second respondent, Discovery initially sought a personal costs order. However, during argument, Discovery's counsel indicated that it no longer pursued that course.

Order

[64] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel, to be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved.

2 The order of the Full Court is set aside and replaced with the following:

'1 It is declared that the first and second respondents are in breach of this Court's order and judgment dated 27 October 2022 and of their constitutional duty to obey and implement the judgment.

2 The first and second respondents are interdicted, with immediate effect, from giving effect to the directives they issued on 13 April 2023 and 2 November 2023, respectively.

3 The first and second respondents are interdicted, with immediate effect, from making any deductions from compensation paid to claimants under the Road Accident Fund Act on the basis that their medical expenses have been or will be paid by their medical aid schemes.

4 The first and second respondents are directed, within 14 days of this order, to take all steps necessary to give effect to this judgment and to report in writing to the Registrar of this court and the applicant's attorneys of record

their compliance with the order and their duty to take all steps necessary to give effect to the judgment.

5 The first and second respondents are ordered to pay the applicant's costs, including the costs of two counsel on scale C.'

TATI MAKGOKA

JUDGE OF APPEAL

Appearances:

For appellant:	W Trengove SC (with N Ferreira, M Salukazana, D Sive)
Instructed by:	Edward Nathan Sonnenbergs Inc., Cape Town Webbers, Bloemfontein
For first respondent:	C Puckrin SC (with A Ngidi)
Instructed by:	Malatji & Co. Attorneys, Johannesburg Honey Attorneys, Bloemfontein
For second respondent:	J G Cilliers SC (with MT Shepherd)
Instructed by:	Mpoyana Ledwaba Inc., Pretoria Thebe Attorneys Inc., Bloemfontein.