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THE ROAD ACCIDENT FUND'S 'WITHOUT PREJUDICE' SETTLEMENT OFFERS ON GENERAL DAMAGES: ADMISSIBLE ADMISSIONS OR INADMISSIBLE NEGOTIATION STATEMENTS?

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Under s 17(1), read with s 17(1A) of the Road Accident Fund Act 56 of 1996 and its Regulations, the Road Accident Fund ('RAF') is liable for general damages only if the RAF is satisfied that a medical practitioner has correctly assessed the injuries of a motor-accident victim as serious. The RAF's satisfaction with the serious-injury assessment is a jurisdictional fact that must be alleged and proved if a court assumes jurisdiction to make a general-damages (non-pecuniary) award. One way to prove that the RAF has accepted the victim's injuries as serious is by presenting evidence of the RAF's admissions contained in extra-curial statements. However, such extra-curial statements are generally inadmissible when they are made during bona fide settlement negotiations. This article considers the without-prejudice settlement negotiation inadmissibility rule and its exceptions. It critically considers the recent judgments of Keagan, Ntsembi *and* Paulsen*, on the one hand, where the courts held that the RAF's settlement offers on general damages made during bona fide settlement negotiations were inadmissible evidence, and the judgments of* Olivier *and* Van Tonder*, on the other hand, where the courts held that the RAF's settlement offer was admissible evidence. It is argued the RAF's offer to settle general damages was correctly held in* Olivier *and* Van Tonder *to be a tacit acceptance by the RAF that the victim's injuries were serious and that such offers are admissible evidence as an exception to the without-prejudice inadmissibility rule, thereby obviating the need to establish the required jurisdictional fact into evidence.*

Without prejudice – privilege – settlement negotiations – serious injuries – Road Accident Fund

I INTRODUCTION

Under s 17(1), read with s 17(1A) of the Road Accident Fund Act 56 of 1996 ('RAF Act') and its Regulations,[1] the Road Accident Fund ('RAF') is liable for general (non-pecuniary) damages if the RAF is satisfied that the victim's injuries were correctly assessed as 'serious'[2] by a medical

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[1] Published in GN 770 *GG* 31249 of 21 July 2008, as amended by the Road Accident Fund Amended Regulation, published in GN 9956 *GG* 36452 of 15 May 2013.

[2] Section 17(1)*(b)* of the RAF Act. The victim must be compensated for all the injuries sustained. See *Mathamelo v RAF* [2023] ZAGPPHC 1150 para 17.

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practitioner.[3] The RAF's satisfaction that the injuries were correctly assessed as serious is a jurisdictional fact that must be alleged and proved for the court to adjudicate a general-damages claim.[4] The RAF often makes written settlement offers to settle a claim comprising various heads of damages, including general damages. The question is whether the RAF's general-damages offer is admissible evidence of its satisfaction that the injuries are serious.

In the ordinary course, facts might generally be proved by extra-curial statements containing admissions.[5] However, if such admissions are made during settlement negotiations, they would ordinarily be inadmissible owing to the operation of the without-prejudice inadmissibility negotiation rule, which is fully discussed in part III below.

This article considers the without-prejudice inadmissibility negotiation rule and the exceptions to the rule. It critically considers the recent cases of *Keagan*,[6] *Ntsembi*[7] and *Paulsen*.[8] In these cases, the claimants tried to establish the admissibility of a bona fide settlement offer on general damages into evidence in support of the proposition that the RAF was satisfied that the injuries were correctly assessed as serious. The courts ruled that the evidence should not be admitted, owing to the 'settlement negotiation' inadmissibility rule.[9] This article also considers the decisions of *Olivier*[10] and *Van Tonder*,[11] where the courts came to the opposite conclusion.[12]

I argue that the RAF's offer to settle general damages in *Olivier*[13] and *Van Tonder*[14] was correctly admitted into evidence to prove that the RAF was satisfied that the injuries were correctly assessed as serious and that the RAF was liable for general damages. In both decisions, the court admitted

[3] The Road Accident Fund Amendment Act 19 of 2005 amended s 17(1) of the RAF Act, read with reg 3(3)*(c)*.

[4] *RAF v Duma, RAF v Kubeka, RAF v Meyer, RAF v Mokoena* 2013 (6) SA 9 (SCA) para 19; *RAF v Faria* 2014 (6) SA 19 (SCA) para 36; *RAF v Lebeko* 2012 JDR 2176 (SCA) para 27; *Akaai v RAF* 2011 JDR 1408 (GSJ) para 5. The court may also make an award if the HPCSA Appeal Tribunal accepts the serious-injury assessment report: see reg 3(11)*(i)*.

[5] *S v Molimi* 2008 (2) SACR 76 (CC) para 28. Also see *S v Lekhwareni* [2016] ZAGPJHC 155 para 7; D T Zeffertt & A P Paizes *The South African Law of Evidence* 3 ed (2017) 507.

[6] *Keagan v RAF* [2024] ZAGPJHC 85.

[7] *Ntsembi v RAF* [2024] ZAGPJHC 251.

[8] *Paulsen v RAF* [2024] ZAGPPHC 145.

[9] *Keagan* supra note 6 paras 41–4; *Paulsen* ibid paras 13–26; *Ntsembi* supra note 7 paras 20–30.

[10] *Olivier v RAF* (ZAGPPHC) unreported case no 74533/2015 of 21 February 2022.

[11] *Van Tonder v RAF* [2024] ZAGPJHC 1009.

[12] *Olivier* supra note 10 paras 25–8; *Van Tonder* ibid paras 42–77.

[13] *Olivier* ibid.

[14] *Van Tonder* supra note 11 paras 42–77.

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the without-prejudice settlement offer. Because the courts accepted this evidence, they had the jurisdiction to make a general-damages award, obviating the need for other evidence to establish this prerequisite jurisdictional fact.

II THE ROAD ACCIDENT FUND LEGISLATIVE SCHEME

Under the common law, an injured road-accident victim could claim personal injury damages, including general damages,[15] from the negligent driver.[16] The RAF Act[17] changed this regime. The RAF Act abolishes the common-law delictual claim against a negligent driver.[18] In its stead, the RAF, a juristic person,[19] steps into the shoes of the wrongdoer as a statutory insurer and compensates the injured victim.[20] Despite the RAF Act being social legislation that arose from the social responsibility of the state,[21] a claim against the RAF remains a delictual claim.[22]

Before 1 August 2008, road accident victims could claim general damages from the RAF for all injuries.[23] At that point, the Road Accident Fund Amendment Act[24] took effect, and the RAF is now liable to pay compensation only in respect of general damages for 'serious' injuries.[25] The determination and assessment of the seriousness of an injury is premised on the 'prescribed method'.[26]

[15] F H H Kehrhahn 'RS v Road Accident Fund (49899/17) [2020] ZAGPPHC (21 January 2020): Third party claim — Eleventh hour rejection of seriousness of injury — Not to follow the appeal process in terms of Regulation 3' (2020) 53 *De Jure* 188 at 188 described general damages as follows: '[I]nterests include a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy and loss of life amenities, and because of the personal, non-pecuniary and subjective nature of these interests, [they are] difficult to quantify, yet [they] remain recoverable [*Hendricks v President Insurance* 1993 (3) SA 158 (C); Visser & Potgieter *Skadevergoedingsreg* (2003) 101–105]'.

[16] *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) para 26.

[17] As amended by the Road Accident Fund Act 15 of 2001, the Road Accident Fund Act 43 of 2002 and the Road Accident Fund Act 19 of 2005.

[18] Section 21 of the Act.

[19] Section 2 of the Act.

[20] *Law Society* supra note 16 para 26; s 17 of the RAF Act. The object of this Act is 'the payment of compensation by the driving of motor vehicles': see s 3.

[21] *Law Society* ibid para 17; *Mvumvu v Minister of Transport* 2011 (2) SA 473 (CC) para 44; *Pithey v RAF* 2014 (4) SA 112 (SCA) para 18; *Eksteen v RAF* [2021] 3 All SA 46 (SCA) para 14; *Gabuza v RAF* 2020 (2) SA 228 (GP) para 17.

[22] *RAF v Abrahams* 2018 (5) SA 169 (SCA) para 13.

[23] *Duma* supra note 4 para 3.

[24] Act 19 of 2005, amending s 17(1) of the RAF Act.

[25] Section 17(1)*(b)* of the RAF Act.

[26] Ibid. The seriousness of an injury should be determined based on an assessment conducted using a 'prescribed method': see s 17(1A). The method of such an assessment was to be established by the Minister of Transport (s 1 of the RAF Act) by regulations (see s 26(1A) read with reg 3 of the RAF Regulations).

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The RAF's decision on the seriousness of the injury is an administrative decision as contemplated in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').[27] The RAF is notorious for failing to make decisions[28] on the seriousness of a claimant's injuries, which frustrates legitimate general-damages claims.[29] In the circumstances, a frustrated claimant must seek a remedy in terms of a PAJA review application.[30]

Before I consider whether the RAF's settlement offers on general damages ought to be recognised as an exception to the rule that statements made during bona fide without-prejudice settlement negotiations are generally inadmissible, it is important to deal with the nuances of the without-prejudice inadmissibility rule and with the exceptions to the rule, including what informed these exceptions over time.

A medical practitioner, a person registered under the Health Professions Act 56 of 1974 (reg 1*(viii)*), must assess an injured victim (reg 3(1)*(a)*) and complete a serious-injury assessment (or RAF 4) form: see reg 3(3)*(a)* and 1*(x)*. There are two avenues to qualify for general damages (*Mngomezulu v RAF* [2011] ZAGPJHC 107 para 28). First, an injury should meet the 30 per cent whole person impairment ('WPI') set out in the American Medical Association guides: see reg 3(1)*(b)(ii)*. Alternatively, reg 3(1)*(b)*(iii)*(aa)–(dd)* provides that the injuries, based on the narrative test, must result in either: a serious long-term impairment or loss of a body function; a permanent serious disfigurement; a severe long-term mental or behavioural disturbance; or a loss of a foetus. For an in-depth discussion as to how the narrative test works, see H J Edeling et al 'HPCSA serious injury narrative test guideline' (2013) 103 *SA Medical Journal* 766; M Slabbert & H J Edeling 'The road accident fund and serious injuries: The narrative test' (2012) 15 *PER/PELJ* 1; L Steynberg & R Ahmed 'The interpretation of the amended RAF Act 56 of 1996 and the regulations thereto by the courts with regard to "serious injury" claims' (2012) 15 *PER/PELJ* 244; H B Klopper 'Determining "serious injury"' 2011 (November) *De Rebus* 29; H B Klopper 'The nature and content of "serious injury"' 2011 (October) *De Rebus* 32; R J Koch 'How to qualify for general damages under the RAF Amendment Act' 2010 (October) *De Rebus* 32; D M Matlala 'Problems with serious injury assessment' (2016) 30 *Speculum Juris* 44.

[27] *Duma* supra note 4 para 19; *Faria* supra note 4 para 34.

[28] If the RAF does nothing and the 90 days in which to make a decision lapses (see reg 3(3)*(dA)*), the RAF is not deemed to have accepted the injuries as serious. See *Mpahla v RAF* 2019 JDR 1669 (SCA) para 14.

[29] *Duma* supra note 4 para 20; *Knoetze obo Malinga v RAF* [2023] 1 All SA 708 (GP) paras 1, 3 and 62–4.

[30] Section 6(2)*(g)* and 6(3)*(a)* of PAJA; *Mpahla* supra note 28 para 17. Recourse lies in PAJA even if the RAF is in default (see *Maqhutyana v RAF* [2021] ZAECMHC 30 paras 88–9, even if its defence is struck out: see *Makuapane v RAF* 2023 JDR 0163 (GP) para 5), notwithstanding that claimants may be indigent and will have to incur further costs (see *Duma* supra note 4 paras 19 and 21).

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III NEGOTIATION 'PRIVILEGE' IN THE SOUTH AFRICAN LAW

(a) The ambit of the rule

In terms of the Civil Proceedings Evidence Act 25 of 1965, the law of evidence that was in force on 30 May 1961 will apply to civil matters where there is no other governing provision.[31] This provision cemented the English-derived negotiation 'privilege' into South African law.[32] The without-prejudice inadmissibility rule reminds one of privilege, attracting the label of 'negotiation privilege', but the rule is not accurately one of privilege.[33]

The rule provides that unless both parties consent,[34] any oral or written statement or admission made during bona fide[35] settlement

[31] Section 42; *Naidoo v Marine & Trade* 1978 (3) SA 666 (A) at 677; *KLD Residential CC v Empire Earth Investments* 2016 (5) SA 485 (WCC) para 30 ('*KLD* (WCC)'); *KLD Residential CC v Empire Earth Investments* 2017 (6) SA 55 (SCA) paras 8 and 60–1 ('*KLD* (SCA)'); *Gentiruco AG v Firestone SA* 1972 (1) SA 589 (A) at 617–18.

[32] *AD v MEC of Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) para 47. In *In re River Steamer Co: Mitchell's Claim* (1871) LR 6 Ch App 822 at 831–2, the court held that one litigant makes an offer to the next and say: 'I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all.'

[33] *Naidoo v Marine & Trade* supra note 31 at 677 regarded the label 'privilege' as inaccurate but convenient. D T Zeffertt 'The rules of evidence: Without prejudice statements' 1995 *Annual Survey of South African Law* 673 at 674 objected to this label and preferred the following: 'Without-prejudice statements are an exclusion to the rule that admissions are generally admissible against the person making them.' Also see *Jili v South African Eagle Insurance* 1995 (3) SA 269 (N) at 275; *Waste-Tech v Van Zyl and Glanville* 2002 (1) SA 841 (E) at 846; *Kotzé v Suid-Westelike Transvaalse Landbou Koöperasie* 2005 (2) SA 295 (SCA) paras 20–1; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) para 22; *Dexgroup v Trustco* 2013 (6) SA 520 (SCA) para 18; *ABSA Bank v Hammerle Group* 2015 (5) SA 215 (SCA) para 13; *One Stop Financial Services v Neffensaan Ontwikkelings* 2015 (4) SA 623 (WCC) para 16; *BDS South Africa v Continental Outdoor Media* 2015 (1) SA 462 (GJ) at 471; Zeffertt & Paizes op cit note 5 at 769–72. Cf C H W Schmidt *Bewysreg* 4 ed (2000) 567n93; S E van der Merwe 'Die skikkings-verklaringsprivilegie' 1982 (December) *De Rebus* 473, 539 and 590; S J van Niekerk et al *Privilegies in die Bewysreg* (1984) chs 16–17; C Tapper *Cross & Tapper on Evidence* 9 ed (1999) 467.

[34] *De Beers Consolidated Mines v Ettling* (1906) TS 418 at 420; *Walker v Wilsher* (1889) LR 23 QBD 335 at 338.

[35] *Chocoladefabriken Lindt & Sprungli AG v Nestle Co* [1978] RPC 287 at 288. Innocent misrepresentations made during settlement negotiations are protected by the rule: see *Naidoo v Marine & Trade* supra note 31 at 681; *Merry v Machin* 1926 NPD 236 at 237. A fraudulent (*Coetzee v Union Government* 1941 TPD 1 at 3) or criminal (*Brauer v Markow* 1946 TPD 344 at 350–5) statement would only be admissible if the making of such a statement is an element to be proven — a crime cannot be committed without prejudice: see Zeffertt & Paizes op cit note 5 at 773; *Unilever plc v Proctor & Gamble* [2001] 1 All ER 783. Once further additional evidence is required to prove the crime, the without-prejudice statements may

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negotiations[36] is inadmissible evidence when it is expressly or impliedly made 'without prejudice'.[37] The protection of the rule may be waived, just like evidential privilege.[38] Using the words 'without prejudice' is not decisive in determining whether the negotiation rule applies.[39] The rule does not find application if an unequivocal acknowledgement of liability is made.[40] The same applies if the acknowledgement of liability does not form an integral part of the settlement negotiations and stands separate, distinct and independent from the settlement negotiations, such as where the merits had been conceded, and the negotiations went only to the issue of quantum.[41] A statement made during settlement negotiations

not be employed to impeach the credibility of its maker. See *Brauer v Markow* at 350–5 as discussed in C H W Schmidt & H Rademeyer *Law of Evidence* (2023) 20–1.

[36] *Polverini v General Accident Insurance Co South Africa* 1998 (3) SA 546 (W) at 550–1. Mediation proceedings are akin to settlement negotiations: see *Waste-Tech* supra note 33 at 846.

[37] Zeffertt & Paizes op cit note 5 at 769; W A Joubert (ed) *The Law of South Africa* 3 ed vol 18 (2012) para 181; *Pillay v New Zealand Insurance* 1957 (1) SA 17 (N) at 19; *Naidoo v Marine & Trade* supra note 31 at 677; *Kapeller v Rondalia Versekerings-Korporasie van Suid-Afrika* 1964 (4) SA 722 (T) at 728; *De Beers* supra note 34; *KLD* (SCA) supra note 31 para 8; *Rush & Tompkins v Greater London Council* [1989] AC 1280 at 1295; *Cuts v Head* [1984] CH 290 at 306; *Scott Paper Co v Drayton Paper Works* (1927) 44 RPC 151 at 156.

[38] *SOS Kinderdorf Int v Effie Lentin Architects* 1993 (2) SA 481 (NM) at 490; *KLD* (SCA) ibid para 39.

[39] *In re Daintrey: Ex parte Holt* 1893 (2) QB 116 at 191; *Ullman Bros v Kroonstad Produce* 1923 AD 449 at 454; *Merry* supra note 35; *Brauer* supra note 35; *Millward v Glaser* 1950 (3) SA 547 (W) at 554; *Mole v Mole* [1950] 2 All ER 328 (CA) at 329; *Henley v Henley* [1955] 1 All ER 590 (Div) at 591–2; *Makoti v Jesuit Refugee Service SA* (2012) 33 *ILJ* 1706 (LC) para 20.

[40] *Ward v Steenberg* 1951 (1) SA 395 (T) 401; *Hammerle* supra note 33 paras 14–15; *Kapeller* supra note 37 at 728; *Naidoo v Marine & Trade* supra note 31 at 670; *Watson-Towers v McPhail* [1986] SLT 617 at 618–19; *Daks Simpson Group plc v Kuiper* [1994] SLT 689 at 692; *Kirschbaum v Our Voices Publishing* [1971] 1 OR 737; *Turner v Railton* (1796) 2 Esp 474, where the insurance company admitted liability for the damages, placing in issue only that the applicant was underinsured and in writing admitted liability and offered to pay a portion of the damages. See *Polverini* supra note 36 at 550: 'I do not know of any provision of law which entitles a party who has made an unqualified and unconditional admission of liability … to claim … . [T]he admission cannot be used … .'

[41] *Kapeller* ibid at 728–9; *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 para 75, per Lord Brown. The court in *KLD* (SCA) supra note 31 paras 25–6 referred with approval to this judgment. In the Australian case of *Field v Commissioner of Railways (NSW)* [1957] HCA 92, approved in *Naidoo v Marine & Trade* supra note 31 at 669–70, a personal injury action was instituted against the defendant who disputed liability but was prepared to be examined by a doctor of the defendant's choice and to engage in a settlement discussion. The defendant made an adverse admission on how the accident occurred during the defendant's medical examination. The court held, in paras 7–8, that the doctor's consultation was not 'reasonably incidental' to the settlement negotiations and that it was

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may also be admitted for wholly extraneous purposes, such as evidence of the author's handwriting[42] or a defamatory statement made in a without-prejudice letter.[43]

Even though without-prejudice statements or admissions may be reliable and relevant evidence,[44] they are inadmissible evidence because public policy and the agreement between the parties[45] dictate that litigants who are embroiled in litigation should speak freely to avoid litigation, its animosity, expenses, inconveniences and delays, and be entitled to proceed with the claim or defence without the fear that their statements will be adversely used against them.[46] A without-prejudice statement may not be tendered into evidence by non-litigants who overheard it.[47]

The rule protects the disclosure of *all* statements made during settlement negotiations. This is consistent with the free-speech rationale.[48] All subsequent and additional statements and correspondence that are related

'without any proper connexion with any purpose connected with the settlement of the action'. In the Scottish case of *Watson-Towers* ibid (approved in *Daks* ibid) a without-prejudice offer of settlement was made by the defendant, which attached a list of goods in its possession. The attached list was held to be admissible because it was not a 'hypothetical admission or concession for the purposes of securing a settlement' but a statement of fact. Also see the Canadian case of *Kirschbaum* ibid and *Turner* ibid. In *Surrendra Overseas v Government of Sri Lanka* [1977] 1 WLR 565 at 575, the court held that the debtor could only acknowledge the claim when the debtor admitted a legal liability to pay the plaintiff, but this acknowledgment need not identify the amount to be paid. In *Dungate v Dungate* [1965] 1 WLR 1477 at 1487, the court held that an acknowledgment would be enough if the amount for which legal liability was accepted could be ascertained by extrinsic evidence.

[42] *Waldridge v Kennison* (1794) 1 Esp 142 at 143. The court in *Rush v Tompkins* supra note 37 at 1300 held that the case of *Waldridge* is exceptional and should not whittle down the protection of without-prejudice discussion on factual and legal issues. Schmidt & Rademeyer op cit note 35 at 20 criticise this judgment, arguing that the approach in *Patlansky v Patlansky* (2) 1917 WLD 10 is more correct. The court in *Patlansky* held that admission would be protected even if 'not unconnected with negotiations … but irrelevant to the case then proceeding'. Schmidt & Rademeyer state that 'a statement must have some connection to the settlement of the dispute before the court, but it need not be technically relevant to the issue or issues before the court'.

[43] Which is actionable: see Zeffertt & Paizes op cit note 5 at 774.

[44] *Bradford* supra note 41 at 709.

[45] *Unilever* supra note 35 at 789–90; *Ofulue v Bossert* [2009] 1 AC 990 (HL) para 89; *Kapeller* supra note 37 at 728; *Naidoo v Marine & Trade* supra note 31 at 677; *Tshabalala v President Versekeringmaatskappy* 1987 (4) SA 73 (T) at 75; *Muller v Linsley & Mortimer* [1994] EWCA Civ 39.

[46] *Unilever* supra note 35 at 796; *Van der Westhuizen v Akarana Homeowners Association* 2024 (1) SA 301 (WCC) para 25.

[47] *Theodoropoulas v Theodoropoulas* [1963] 2 All ER 772 (A) at 774–5; *McTaggart v McTaggart* (1948) 2 All ER 754 at 755; *Mole* supra note 39; *Pais v Pais* (1970) 3 All ER 491 at 491–3; *Henley* supra note 39.

[48] *Unilever* supra note 35 at 796; *Ofulue* supra note 45 para 89.

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to the initial statement are subject to the same inadmissibility rule.[49] If a statement is made about one dispute but also contains statements relating to a separate dispute involving the same parties, both statements will be inadmissible under the rule.[50] The rule thus extends to different disputes between the parties which are 'not wholly unconnected with' the dispute in question but which are also not irrelevant to the existing dispute,[51] unless the communication was clearly intended to raise 'something quite different'.[52] This approach is quite liberal when compared to other jurisdictions,[53] where a statement or admission must be reasonably incidental to pending settlement negotiations.[54]

Statements and admissions unrelated to the settlement negotiations are admissible as evidence.[55] Whether an admission is unrelated to the settlement negotiations is a question of fact, and the objectively manifested intention of the party making the admission is important.[56]

(b) Exceptions to the rule

The without-prejudice inadmissibility rule is not absolute, and exceptions may apply.[57] The mere fact that an exception to the rule was not recognised on 30 May 1961, or thereafter, is not material because the exceptions are not a numerus clausus and are informed by public policy, which is not immutable.[58] The facts of each matter are directive in determining whether an exception finds application.[59] The exceptions aim to avoid the abuse of the without-prejudice rule and the protection of creditors.[60] What follows are some[61] of the main exceptions and their rationales, which may be of value if a further exception to the rule is considered.

[49] *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 108; *Wemyss v Stuart* 1961 (3) SA 889 (N) at 891.

[50] *Wemyss* ibid at 891.

[51] *Patlansky* supra note 42.

[52] *Wemyss* supra note 49.

[53] Such as in Australia: see *Field* supra note 41.

[54] Harms in *LAWSA* op cit note 37 para 181.

[55] *Kapeller* supra note 37 at 728–9; *Naidoo v Marine & Trade* supra note 31 at 678; *Erasmus v Pienaar* 1984 (4) SA 9 (T) at 30; *Wemyss* supra note 49 at 890–1; *Waldridge* supra note 42.

[56] *Naidoo v Marine & Trade* ibid at 678; *Erasmus* ibid at 30. Cf *Ward v Steenbereg* supra note 40 at 401; *Cramer v Tothill* 1945 TPD 365 at 368; *Botha v Van Niekerk* 1947 (1) SA 699 (T) at 702–3.

[57] *Hammerle* supra note 33 para 13. Also see *Hollard Life Assurance Company Ltd t/a Hollard Life v Chetty* [2017] ZAKZDHC 8 paras 26–7.

[58] *KLD* (WCC) supra note 31 paras 30 and 60; *KLD* (SCA) supra note 31 paras 19 and 35; *AD v MEC* supra note 32 para 47; *Naidoo v Marine & Trade* supra note 31 at 674; *Kapeller* supra note 37 at 728.

[59] *KLD* (SCA) ibid para 39.

[60] Ibid.

[61] Walker LJ points to eight exceptions in *Unilever* supra note 35, adding to the list: (i) estoppel; (ii) proof that an agreement is void due to fraud or

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(i) *Insolvency and liquidation proceedings*

In sequestration and winding-up proceedings, an admission of a creditor's deed of insolvency that was made during settlement negotiations becomes admissible evidence because the parties engage in more than private litigation, given that the insolvency deed initiates a legal process with potential extensive and far-reaching consequences for other creditors.[62] A concursus creditorum is created, and the public is protected from dealing with an insolvent entity.[63] All that is admissible is the act of insolvency and not the tacit or express admission of liability.[64] The public interest is thus a relevant factor that the court may consider when it is confronted with recognising a novel exception, a factor that featured prominently in *Van Tonder*.[65] This judgment, in which the court admitted the RAF's offer on general damages into evidence, is discussed fully in part IV below. As in the case of the insolvency exception, the court in *Van Tonder* limited the ambit of the admissibility of the settlement negotiations to the fact that the RAF had made an offer and excluded any admissions about the merits and quantum.[66]

(ii) *Prescription*

Section 14(1) of the Prescription Act 68 of 1969 dictates that 'the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor'. A tacit or express acknowledgement of debt, made during without-prejudice negotiations, may be admissible as evidence to prove that the running of prescription had been interrupted,[67] but not to prove anything else, such as liability.[68]

misrepresentation; (iii) to reveal perjury or blackmail; (iv) to explain a delay; or (v) to prove mitigation of damages. Zeffertt & Paizes op cit note 5 at 774 add defamation to this list on the same basis that without-prejudice statements would be admissible to prove the commission of a crime. Also see Calderbank offers: *AD v MEC of Health* supra note 32.

[62] *ABSA v Chopdat* 2000 (2) SA 1088 (W) at 1092–4; *Hammerle* supra note 33 paras 13–15; *One Stop Financial Services v Neffensaan Ontwikkelings* supra note 33 at 629; *Lynn & Main Inc* supra note 33; *In re Daintrey* supra note 39; *Coetzee* supra note 35.

[63] *Hammerle* ibid para 13.

[64] *One Stop Financial Services* supra note 33.

[65] *Van Tonder* supra note 11 para 48.

[66] Ibid para 75.

[67] *Hammerle* supra note 33 paras 14–15. Also see *Santam v Sayed* [1998] 4 All SA 564 (A) para 34; *Jili* supra note 33 at 275.

[68] *KLD* (SCA) supra note 31 para 40. The SCA overturned the judgment of the court a quo (*KLD* (WCC) supra note 31 para 36). The lower court relied on *Naidoo v Marine & Trade* supra note 31 at 681 and found that an acknowledgment of debt made during settlement negotiations is inadmissible evidence. In *Naidoo v Marine & Trade* at 677–9 the appellate court rejected the proposition that a without-prejudice communication should be admitted merely as evidence that

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This exception was recognised in South African law for the first time by the Supreme Court of Appeal in *KLD* (SCA), where the court held that the principal reason for extinctive prescription is to bring certainty to people's affairs and to avoid delays because unreasonable lapses of time erode certainty.[69] Section 14 of the Prescription Act protects the creditor by not making the prescription immutable and allowing the running of the prescription to be interrupted when it may be difficult or undesirable to claim performance immediately or to take legal action.[70]

The court in *KLD* (SCA), in considering prescription as an exception to the without-prejudice inadmissibility rule, had regard to two competing policy factors,[71] both of which must be properly served.[72] The first is the underlying protection of a creditor when an acknowledgement of debt interrupts the running of prescription. The second is that statements or admissions made in without-prejudice settlement negotiations should not be admissible evidence in proceedings between them.[73]

The court in *KLD* (SCA) seems to have departed from the English position, where an acknowledgement of debt is inadmissible if it is made during without-prejudice negotiations.[74] The leading English case on the matter is *Bradford & Bingley plc v Rashid*,[75] in which each of the five judges, in separate opinions, advanced different reasons for admitting

certain representations had been made for purposes of establishing a case based on estoppel and not as evidence that such representation was true. The court in *KLD* (SCA) para 21 held that the question before it was one of prescription and was distinguishable from *Naidoo v Marine and Trade*, where the court was not seized with competing policy considerations that underscored the Prescription Act and instead was seized with the simple without-prejudice rule.

[69] *KLD* (SCA) ibid para 13 with reference to *Murray & Roberts Construction v Upington Municipality* 1984 (1) SA 571 (A) at 578; *RAF v Mdeyide* 2011 (2) SA 26 (CC) para 8; G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) 561; M M Loubser 'Towards a theory of extinctive prescription' (1988) 105 *SALJ* 34; M M Loubser *Extinctive Prescription* (1996) 22–4. *KLD* (SCA) was followed in *Public Investment Corporation v Madibeng Local Municipality* 2019 JDR 1171 (GP) para 26.

[70] *Murray & Roberts* ibid at 578–9.

[71] The tension had been comprehensively dealt with by the House of Lords in *Bradford* supra note 41, where the court allowed negotiations to be admitted to prove the interruption of prescription as an exception to the rule. Also see *Unilever* supra note 35. Before *Bradford*, the English position was not to admit without-prejudice statements as evidence that the running of prescription had been interrupted. See *Ofulue* supra note 45; *River* supra note 32 at 831.

[72] *KLD* (SCA) supra note 31 paras 22 and 39.

[73] Ibid paras 18–25.

[74] The English position had been succinctly set out in *KLD* (SCA) supra note 31 at 43–60 with reference to *Ofulue* supra note 45; *Bradford* supra note 41 paras 16–18; *River* supra note 32 at 831–2.

[75] Supra note 41 paras 16–18. Also see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.

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an acknowledgement of debt made during settlement negotiations as evidence that the running of prescription was interrupted. Individually, the majority accepted that the acknowledgement of debt was not made during without-prejudice negotiations, but the court in *KLD* (SCA) adopted the minority view, which Lord Hoffmann articulated in the following terms:

> 'The solution … is that the without prejudice rule, so far as it is based upon general public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgement for the purposes of section 29(5). That, I would infer, is what everyone thought in *Spencer v Hemmerde* [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that the party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgement for the purposes of section 29(5), it is not being used as evidence of anything. The statement is not evidence of an acknowledgement. It is the acknowledgement. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but for the purposes of section 29(5) it is not being used as such. All that an acknowledgement does under section 29(5) is to allow the creditor to proceed with his case.'[76]

From this exception, it is apparent that a court may be required to balance competing policies. In part V below, the policy considerations in favour of admitting the RAF's offer on general damages into evidence will be considered. In considering novel exceptions to the inadmissibility rule, a court may also take away from the prescription exception the value of bringing certainty to people's affairs and avoiding delays. Like the insolvency and liquidation exceptions, where public policy was the foundational consideration, the prescription exception permits evidence of the actual offer being made (since it is 'part of the legal mechanism')[77] but not the contents of the offer.[78] It is not evidence of anything admitted, expressly or by implication. Instead, it is admissible because it is the acknowledgement of debt itself.

Drawing from the reasoning in *KLD* (SCA), it may be argued that the RAF's offer on general damages is a manifestation of the RAF's administrative decision on the seriousness of the injuries and ought to be admissible for that purpose — but that it cannot be 'used as evidence of anything'.

[76] *KLD* (SCA) supra note 31 para 16. Note that in *Ofulue* supra note 45 para 95, the court held that the distinction drawn by Lord Hoffmann was 'too subtle to apply in practice' and considered only public policy and not the inter partes agreement. It noted that this proposition was a minority opinion.

[77] *Van Tonder* supra note 11 para 55 read with paras 75–7.

[78] *Jili* supra note 33 at 275; *Van Tonder* ibid paras 50–3.

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(iii) *The making of a threat*

In *Hoffend v Elgeti*,[79] the appellate court held that a threat made in a without-prejudice letter would be admissible to prove the threat[80] relevant to the proceedings.[81] This exception can be traced back to the English Patents, Designs and Trademarks Act, 1883,[82] which entitled a person against whom the threat was made to institute an action to restrain the continuance of an infringement of rights. This remedy is also found in s 70 of the South African Patents Act 57 of 1978.

Similar to this exception, where a threat relevant to the proceedings must be factually made before the remedy in the Patents Act may be applied,[83] the RAF's decision on general damages is a jurisdictional fact relevant to the proceedings that must be established before the court may make an award of general damages.

IV THE RAF MAKING A SETTLEMENT OFFER ON GENERAL DAMAGES: A FURTHER EXCEPTION?

In the full-bench appeal in *Chetty v RAF*,[84] the plaintiff's counsel argued that the RAF had made an offer on general damages and that the RAF was consequently satisfied that the plaintiff's injuries were correctly assessed as serious.[85] Without explaining the reasons, the full court held that the settlement offer on general damages allowed the court to assume jurisdiction and to make a general damages award.[86] In *Van Tonder*, the court interpreted *Chetty* to be authority for the following proposition: the RAF's offer of settlement could be interpreted as a tacit acceptance that the injuries are serious.[87] The full court in *Chetty* did not consider the general rule that without-prejudice statements made during settlement negotiations are generally inadmissible and did not provide 'a comprehensive explanation for the legal basis upon which it took the settlement offer into account, particularly in light of the principle that

[79] Supra note 49. Also see *In re Daintrey* supra note 39; *Kurtz v Spence* 58 LT 438.

[80] Ibid at 108–9. Also see *Kurtz* ibid. A threat that litigation will follow should the offer not be accepted is no threat at all but the natural sequel to failed negotiations. See *Davenport v Davenport* 1930 WLD 202; *Brauer* supra note 35 at 350.

[81] *KLD* (SCA) supra note 31 para 32; *Naidoo v Marine & Trade* supra note 31 at 681; *Waldridge* supra note 42. Also see *Shorie's Investments CC v TGR Construction CC* [2008] ZAKZHC 90 paras 6 and 19.

[82] Section 32 of the Act. See *Unilever* supra note 35.

[83] *Continental Linen v Kenpet Agency* 1986 (4) SA 703 (T) at 706.

[84] *Chetty v RAF* [2021] ZAGPPHC 848.

[85] Ibid para 19.

[86] Ibid para 20.

[87] *Van Tonder* supra note 11 para 62.

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such offers of settlement are typically shielded by privilege'.[88] The court in *Van Tonder* held as follows:

> 'Despite the absence of detailed reasoning in the *Chetty* judgment regarding the role of privilege, the precedent set by the Full Bench requires this court to recognise that an offer of settlement — even if marked "without prejudice" — may, under certain circumstances, be interpreted as an acknowledgement of serious injury sufficient to engage the Court's jurisdiction to assess the quantum of damages.'[89]

In *Olivier*,[90] the appeal court held that the court a quo had erred when it refused to assume jurisdiction to make a general-damages award owing to the RAF's without-prejudice offer of settlement,[91] which had the effect that the RAF did not reject the general damages but accepted the serious injury report, citing with approval the dicta in *Santam v Sayed*.[92] The court in *Olivier*, by referring to *Santam v Sayed*, clearly applied its mind to the exceptions to the without-prejudice inadmissibility rule, but this was an exception of a different species, specifically prescription as discussed in part III(b)(ii) above, and is not authority for the proposition that an administrative decision by an organ of state, the RAF, is admissible as an existing exception to the without-prejudice inadmissibility rule.

Apart from its reliance on *Sayed*, the court in *Olivier* did not embark on a comprehensive enquiry into the without-prejudice inadmissibility rule, the existing exceptions, and the possibility of introducing a novel exception, as the court did in *Van Tonder*.[93] The court in *Olivier* held that the RAF's offer on general damages is admissible evidence of the RAF's decision that the plaintiff's injuries are serious despite the existence of the general inadmissibility rule relating to without-prejudice settlement statements.

In the full-bench appeal judgment in *Mertz v RAF*,[94] in the course of a pre-trial conference, the RAF undertook to revert on the admissibility of the plaintiff's experts by a set date, which the court held to include the serious-injury assessments, failing which the plaintiff's expert reports would be deemed admitted.[95]

The court held that 'there is no doubt that in general where the RAF had offered an amount as compensation for general damages, without expressly informing the third party that the injury was serious, an implied

[88] Ibid para 56.
[89] Ibid para 63.
[90] Supra note 10.
[91] Ibid para 25 read with para 3.
[92] Ibid paras 27–8. The reference in the original to 'Sanlam' should be to *Santam v Sayed* supra note 67, a case that dealt specifically with prescription.
[93] Supra note 11 paras 49 and 65–77.
[94] [2022] ZAGPPHC 961.
[95] Ibid paras 25 and 27.

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acceptance constitutes that the injury was serious'.[96] The court held that admitting expert reports in a pre-trial minute amounts to a tacit acceptance of the seriousness of the injuries, and this is the same as making a settlement offer that included general damages (as had been done in *Chetty*).[97] In making this finding, the court did not embark on an independent enquiry as to the admissibility of without-prejudice settlement offers. The court in *Van Tonder* held that the full court in *Mertz* had effectively ruled that the RAF's settlement offer was a tacit admission that the injuries were serious, which was sufficient to trigger the court's jurisdiction.[98] The full court in *Mertz*[99] held that, 'more importantly', the RAF's claims handler,

> 'had no objection to the amounts claimed and that she had recommended that these figures be paid to the appellant … . It was placed on record that all the issues were canvassed in the appellant's heads of argument had to be adjudicated on by the court a quo. The general damages was [sic] part and parcel of those issues, which was a concession that the injuries were accepted as being serious.'[100]

Referring to *Mertz*, the court in *Van Tonder* held as follows:

> 'The court reaffirmed the principles established in *Chetty v Road Accident Fund*, reiterating that when the Road Accident Fund ("RAF") offer[s] compensation for general damages without explicitly advising the claimant that the injuries are classified as serious, such conduct can be interpreted as an implied acceptance of the seriousness of the injuries.'[101]

In *Keagan v RAF*,[102] the plaintiff placed reliance on *Chetty*[103] and *Mertz*[104] in arguing that the RAF's offer on general damages was evidence that the RAF had made an administrative decision that the injuries were serious and that the plaintiff qualified for a general-damages award.[105] Cajee AJ considered the dicta in *Chetty*[106] and concluded that the RAF's offer on general damages in *Chetty* was admissible only because the RAF had waived the 'privilege' that had attached to the offer.[107] Lipshitz AJ in *Van Tonder*[108] found this approach 'problematic' because the dicta in *Chetty* were

[96] Ibid para 29.
[97] Ibid para 29 read with note 4, where the court relied on *Chetty* supra note 84.
[98] Ibid para 58.
[99] Supra note 94.
[100] Ibid para 30.
[101] Supra note 11 para 57.
[102] Supra note 6.
[103] Supra note 84.
[104] Supra note 94.
[105] Ibid para 41.
[106] Supra note 84.
[107] Ibid para 42.
[108] Supra note 11.

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not explicitly based on the waiver of privilege.[109] Lipshitz AJ in *Van Tonder* held that instead, 'the court in Chetty expressed the principle that an offer of compensation for general damages could, in general, be interpreted as a tacit acceptance of the serious-injury assessment report. Any reference to a waiver of privilege did not qualify this broad proposition.'[110]

Cajee AJ similarly held in *Keagan*[111] that the facts in *Mertz* were distinguishable because, in that case, the RAF had conceded liability for general damages at a pre-trial conference.[112] This reasoning cannot be faulted, but Cajee AJ may not have been aware of the following binding dicta of the full court in *Olivier v RAF*:

> 'In this matter, the RAF did not reject the serious injury assessment report … . On the contrary, the RAF accepted the report by making a settlement offer in … general damages. … [I]t is clear that the latter made a without prejudice offer, which the Court below was obliged to consider (*Sanlam Ltd v Sayed* 1998 (4) All SA 564 (A) at 569D). Accordingly, the Court below erred in finding that it did not have jurisdiction to award non-pecuniary general damages … .'[113]

Cajee AJ in *Keagan*[114] refused to admit the offer on general damages as admissible evidence of the RAF's administrative decision because '[i]t would indeed hamper the process of litigation and settlement negotiations if without prejudice offers could be used against parties where privilege in respect of such tenders are [sic] not waived'.[115]

The court in *Keagan* seemingly did not consider the existing exceptions to the without-prejudice inadmissibility rule that were set out by the full court and binding judgment of *Olivier*.[116] Nor did it investigate whether the known exceptions should be expanded to include an offer on general damages. It also did not consider the public policy considerations that may inform such a further exception to the rule, as Lipshitz AJ did in *Van Tonder*.[117]

[109] Ibid paras 61–2.

[110] Ibid para 62.

[111] Supra note 6.

[112] *Mertz* supra note 94 para 44. Facts that have been admitted at the pre-trial or in the pleadings do not require proof. See *Filta-Matix v Freudenberg* 1998 (1) SA 606 (SCA) at 614; *MEC for Economic Affairs, Environment & Tourism, EC v Kruizenga* 2010 (4) SA 122 (SCA) para 6; *Price v Allied-JBS Building Society* 1980 (3) SA 874 (A) at 882. These admitted facts cannot be contradicted: see *Dinath v Breedt* 1966 (3) SA 712 (T) at 716–17; *Minister of Higher Education & Training v Hospital Association of SA* [2016] 5 BLLR 443 (LAC) para 22; *Knox D'arcy v Land & Agricultural Development Bank of SA* [2013] ZASCA 93; *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 48.

[113] Supra note 10 paras 27–8. This is consistent with the dicta of *Maqhutyana v RAF* supra note 30 paras 122–3.

[114] Supra note 6.

[115] Ibid para 43.

[116] Supra note 10 paras 25–8.

[117] *Van Tonder* supra note 11 paras 49 and 65–77.

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Weideman AJ, in *Ntsembi*,[118] and Ranchod J, in *Paulsen*,[119] similarly did not consider the exceptions to the inadmissibility rule nor public policy considerations that may inform the recognition of a further exception. Instead, they both relied uncritically and with approval on *Keagan*.[120]

In *Van Tonder*,[121] the RAF did not formally react to the serious-injury assessment form and did not expressly accept or reject it.[122] However, the RAF made a without-prejudice offer on the general damages, which the plaintiff rejected.[123] The court interrogated the admissibility of the without-prejudice offer[124] as a tacit acceptance that the injuries were serious[125] after the plaintiff's counsel relied on *Chetty*[126] and *Mertz*[127] in support of the admissibility of the settlement offer,[128] whilst the RAF conversely placed reliance on *Keagan*,[129] where the court had held that the settlement offer was privileged and amounted to inadmissible evidence.[130] The court in *Van Tonder* held that *Chetty*[131] and *Mertz*[132] (as full-bench judgments) were binding authority for the proposition that when the RAF makes an offer on general damages, it tacitly accepts the injuries to be serious.[133]

The court held, 'considering the exceptions to the "without prejudice" rule', that the settlement offer was admissible for the confined purpose of the RAF's tacit acceptance of the seriousness of the injuries (that is, the administrative decision taken) but not admissible to disclose any content relating to the liability or quantum, which remained 'privileged and inadmissible'.[134]

In part V, I canvass some pertinent policy considerations for determining whether the RAF's offer on general damages should be recognised as an exception to the without-prejudice inadmissibility rule.

[118] Supra note 7 para 27.
[119] Supra note 8 paras 16–24.
[120] Supra note 6.
[121] Supra note 11.
[122] Ibid para 42.
[123] Ibid para 43.
[124] Ibid paras 47–64.
[125] Ibid para 44.
[126] Supra note 84.
[127] Supra note 94.
[128] *Van Tonder* supra note 11 para 44.
[129] Supra note 6.
[130] Ibid para 45.
[131] Supra note 84.
[132] Supra note 94.
[133] *Van Tonder* supra note 11 paras 62–3.
[134] Ibid paras 75–6.

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V RAF OFFERS ON GENERAL DAMAGES: SOME POLICY CONSIDERATIONS

(a) Administrative decisions render the administrator functus officio

The SCA has held that the decision by the RAF (a state organ)[135] on the seriousness of the victim's injuries is an administrative decision by an 'administrator'[136] as contemplated by PAJA.[137] The RAF must consider all relevant and objective information.[138] The RAF's decision can be expressed in writing or tacitly.[139]

Once the RAF makes a decision[140] on the seriousness of the injuries, the RAF, as a state organ, becomes functus officio.[141] An administrative action, once taken, remains valid, even if defective, until it is set aside.[142] The RAF is then restricted from varying and revoking the decision,[143] and

[135] The RAF is an organ of state as contemplated by s 239 of the Constitution. See *Duma* supra note 4 paras 19 and 24; *Discovery Health v RAF* 2023 (2) SA 212 (GP) para 38.

[136] Section 1 of PAJA.

[137] Section 6(2)*(g)* and (3)*(a)* of PAJA; *Mpahla* supra note 28 para 17. Administrative action, as contemplated by PAJA, includes a failure to make a decision: see s 1 and s 6(2)*(g)* of PAJA. If the RAF is dissatisfied with the decision, it must, within 90 court days (reg 1*(iv)*) from the date that the serious-injury assessment (RAF 4 form) is delivered by hand or sent per registered mail (reg 3(3)*(dA)*, reject the RAF 4 form and give reasons (reg 3(3)*(d)*(i)) or direct that the claimant undergo a further assessment (reg 3(3)*(d)*(ii)). The RAF can then accept or dispute the further assessment (reg 3(3)*(e)*). It is open to the RAF to dispute an RAF 4 serious-injury assessment solicited at its own instance: see *Faria* supra note 4 para 31. If the injured victim wishes to dispute the RAF's rejection of a serious-injury assessment or if either party wishes to dispute the medical practitioner's assessment, the relevant party shall, within 90 days of being informed of the rejection or the assessment, notify the Registrar of the Health Professions Council of South Africa that the rejection or the assessment (as the case may be) is disputed by lodging a dispute resolution (RAF 5) form (reg 3(4) and 1*(iii)*). If the Registrar is not notified that the rejection or the assessment is disputed in the manner and time provided, the rejection or assessment shall become final and binding unless an application for condonation is lodged with the Registrar (reg 3(5)).

[138] *Van Tonder* supra note 11 para 69.

[139] Ibid para 67.

[140] A decision is deemed final if it was published or conveyed to the party affected by it. See Cora Hoexter *Administrative Law in South Africa* (2012) 278. Also see *President of RSA v SARFU* 2000 (1) SA 1 (CC) para 44; *SLC Property Group v Minister of Environmental Affairs* [2008] 1 All SA 627 (C) para 29.

[141] *Van Tonder* supra note 11 para 68; *Osterloh v Civil Commissioner of Caledon* (1856) 2 Searle 240.

[142] *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) para 26. *Oudekraal* was affirmed by the majority in *MEC for Health, Eastern Cape v Kirland Investments t/a Eye & Lazer* 2014 (3) SA 481 (CC) paras 68, 87 and 100–2; *Merafong City v Anglo Gold Ashanti* 2017 (2) SA 211 (CC) paras 39–44; and *Department of Transport v Tasima* 2017 (2) SA 622 (CC) paras 87–96.

[143] D M Pretorius 'The origins of the functus officio doctrine with specific reference to its application in administrative law' (2005) 122 *SALJ* 832 at 842–3; Hoexter op cit note 140 at 277.

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any further attempts by the RAF to exercise powers, such as undoing an administrative decision, would offend the maxim of legality[144] and the rule of law.[145] An administrator such as the RAF may undo an administrative decision only if it is authorised to do so by a governing provision, and it may not assume authority unless it is conferred on it by the Constitution.[146] The RAF Act and the regulations promulgated under the Act do not explicitly or by implication[147] permit the revocation of a decision on the seriousness of the injuries.

Under the rule of law, injured victims are entitled to rely on administrative decisions in litigation, and litigants are insulated from the injustice that would follow from the RAF reneging on its administrative action.[148] Under the banner of procedural fairness, finality and lawfulness, the RAF, as an organ of state, similarly may not merely revoke an administrative act,[149] as this will adversely affect the injured victim. Legality and finality are inextricable elements of the rule of law.[150]

Although some authorities permit an administrative decision to be disregarded when it is invalid[151] or where it was made due to fraud,[152] the

[144] Pretorius ibid at 844. Legality and the rule of law are founding values in s 1*(c)* of the Constitution: *Van Tonder* supra note 11 para 68.

[145] For cases dealing with procedural fairness see *Fuel Retailers Association of SA v Director General: Environmental Management* 2007 (6) SA 4 (CC) paras 38, 69 and 112; *Majake v Commission for Gender Equality* 2010 (1) SA 87 (GSJ) para 77; *Mail and Guardian v Judicial Service Commission* 2010 (6) BCLR 615 (GSJ) para 14; *AllPay Consolidated Investment Holdings v CEO of the South African Social Agency* 2014 (1) SA 604 (CC) para 40; *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) para 57; *Mulaudzi v S* 2015 (2) SACR 341 (CC) para 37; J R Maxeiner 'Legal certainty and legal methods: A European alternative to American legal indeterminacy' (2007) 15 *Tulane Journal of International and Comparative Law* 541 at 546.

[146] Section 41(1)*(f)*.

[147] The implied authority must be necessary for the effective operation of the Act. See *Private Security Industry Regulatory Authority v Anglo Platinum Management Services* [2007] 1 All SA 154 (SCA) para 27.

[148] Hoexter op cit note 140 at 277.

[149] Ibid.

[150] R Henrico 'The functus officio doctrine and invalid administrative action in the South African administrative law: A flexible approach' (2020) 34 *Speculum Juris* 115 at 116.

[151] For jurisdiction see *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food* 1961 (4) SA 415 (T) at 423–4; *Metal & Electrical Workers Union of SA v National Panasonic* 1991 (2) SA 527 (C) at 532–3; *In re Klein's Inquest* 1992 (2) SA 658 (C) at 663. For fraud see *Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store* 1950 (3) SA 598 (T) at 601; *Lazarus Estates v Beasley* [1956] 1 All ER 341 (CA) at 345.

[152] There is uncertainty. See Jacques de Ville *Judicial Review of Administrative Law in South Africa* (2005) 77.

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general consensus is that if an administrator (such as the RAF) makes a final decision, it is functus officio, despite a mistake in fact or law.[153]

To date, the legislature has disregarded the judiciary's remarks that it is for the legislature to resolve the tension in the law that is synonymous with the functus officio doctrine.[154] If a decision on the seriousness of injuries remains in place owing to the operation of administrative law and the functus officio doctrine, it ought to follow that evidence of such an administrative decision should be admissible as an exception to the without-prejudice inadmissibility rule. From a policy point of view, should the RAF's settlement offer be refused, the RAF does not have the option of withdrawing its administrative decision and subsequently denying the seriousness of the injuries. In *Van Tonder*,[155] the court held:

> 'The RAF cannot act arbitrarily by linking its decision on the seriousness of the injury to financial settlement discussions or by leveraging the assessment of the seriousness of the injury to force claimants into unfavourable quantum negotiations. Such practices would not only undermine the fairness required in administrative decision-making but would also distort the statutory framework, which mandates clear, evidence-based determinations on the serious injury assessment. This is said, as if it is found that a conditional decision in this vain [sic] is allowed, it would imply either the acceptance of a serious injury report for an undeserving claimant or it would hold a deserving claimant's legitimate entitlement to general damages hostage to the acceptance of a settlement figure. Both scenarios would defeat the fundamental objectives of the Act and the enabling provisions.
>
> The RAF cannot weaponise its administrative authority in this manner, as this would amount to an abuse of power. Administrative decisions must be exercised within the bounds of fairness, and holding a claimant's rights hostage to quantum negotiations violates these principles.
>
> Once the RAF has made its statutory decision to accept a claimant's injury as serious, such a decision is *functus officio* and cannot be varied as the empowering provisions of the relevant legislation do not permit it to do so.'

Unless the RAF intends to bring a substantive application to withdraw its administrative decision, the only conceivable reason for the RAF to object to the court's jurisdiction to award general damages is to delay the inevitable payment of compensation for such damage. The RAF cannot, without more, put the proverbial genie back in the bottle.

[153] Lawrence Baxter *Administrative Law* (1984) 375; *Pering Mine Director General: Mineral and Energy Affairs* [2005] 4 All SA 641 (T) at 645; *Welgemoed v The Master & another* 1976 (1) SA 513 (T) at 520; *Afdelingsraad van Swartland v Administrateur, Kaap* 1983 (3) SA 469 (C) at 478.

[154] *Rayton Bottle Store* supra note 151 at 601; *Thompson Trading as Maharaj & Sons v Chief Constable, Durban* 1965 (4) SA 662 (D) at 668.

[155] Supra note 11 paras 72–4.

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(b) The object of the RAF (no ordinary litigant)

An administrator such as the RAF must make a decision on the seriousness of injuries with reference to the purpose of the RAF Act.[156] The object of the Fund, a Schedule 3A public entity in terms of the Public Finance Management Act 1 of 1999,[157] is to pay compensation to injured victims.[158] The scheme uses public funds to achieve the purposes that the Act assigns to it.[159] The RAF's resources and facilities are to be 'used exclusively to achieve, exercise and perform the object, powers and functions of the Fund, respectively'.[160]

If the evidence of the RAF's administrative decision were inadmissible, the claim for general damages would be postponed, leading to inordinate delays in circumstances where the RAF has already decided that the victim's injuries are serious.[161] Trial dates are allocated far into the future.[162] Dilatory conduct in litigation is frowned upon.[163] Courts ought to display their displeasure at litigators, such as the RAF, when they adopt an unconscionable stance,[164] conduct themselves in an unacceptable manner,[165] or when they make an administrative decision but wish to hide this decision from the court and the injured victims by abusing the protective mantle of the without-prejudice inadmissibility rule. State organs in general, and the RAF in particular, use public money to pay compensation. Hence, they have a duty to 'the members of the public' with whom they engage to deal with them with dignity, honesty, openness and fairness in terms of their statutory and constitutional obligations when conducting litigation.[166]

The RAF Act constitutes social legislation contemplated by s 27(2) of the Constitution,[167] which must afford the injured victim the greatest possible

[156] Ibid para 69.
[157] See generally *Khorommbi Mabuli Inc v RAF* [2021] ZAGPPHC 386 para 1.
[158] Section 3 of the RAF Act.
[159] Section 5 of the RAF Act.
[160] Section 7 of the RAF Act.
[161] *Maqhutyana* supra note 30 para 123.
[162] Paul Hoffman 'Backlog in cases in Gauteng's high courts is justice denied, but there are solutions' *Daily Maverick* 21 August 2024.
[163] *Geerdts v Multichoice Africa* [1998] ZALAC 10 para 48; Uniform Rule 37(9)*(a)*(ii); *Jwili v RAF* 2010 (5) SA 32 (GNP) para 10; *Tshabangu v RAF* [2011] ZAGPJHC 145 para 4; *Duma* supra note 4 para 21.
[164] *Du Toit v Errol Thomas* [2016] JOL 36040 (SCA) para 13.
[165] *Moila v University of the North* (2005) 26 *ILJ* 452 (LAC) para 60; *Maluleke v Johnson Tiles* (2008) 29 *ILJ* 2606 (LC) paras 31–2.
[166] An institution that exercises public power or performs a public function in terms of any legislation: see s 239 of the Constitution; *Mlatsheni v RAF* 2009 (2) SA 401 (E) para 17; *Fourie v RAF* 2014 (2) SA 88 (GNP) para 69.
[167] *Law Society* supra note 16 paras 66–7; *Mdeyide* supra note 69 para 79*; Pithey* supra note 21 para 18; *Eksteen* supra note 21 para 14; *Gabuza* supra note 21 para 17; *Mvumvu* supra note 21 para 44.

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protection.[168] The RAF should be properly administered to uphold the constitutional values of human dignity, equality and the advancement of human rights and freedoms.[169]

In terms of s 7(2) of the Constitution, state organs are under an express duty to respect, protect, promote and fulfil the rights set out in the Bill of Rights. The state implicitly undertakes that the RAF will ensure the efficient discharge of its functions. Where it fails to do so, this would amount to the unjustifiable infringement of a victim's constitutional rights.[170]

The RAF is not only obliged to refrain from interfering with the constitutional rights[171] of injured victims, especially the right to social security; it must also take steps to realize their rights.[172] By frustrating legitimate claims, the RAF fails to 'protect, promote and fulfil' the fundamental rights to human dignity,[173] to freedom and security of the person, and to bodily integrity.[174]

(c) Hiding administrative decisions: abusing the without-prejudice inadmissibility rule

The RAF has a duty to investigate claims.[175] It is fair to assume that such investigations would have been completed when an offer on general damages is made. In *Kapeller*,[176] the court held that an admission of liability by an insurance company (acting as an agent for the RAF)[177] was not an integral part of the settlement and was admissible because the question of the merits was not a card placed on the table by either party.[178]

[168] *RAF v Busuku* 2023 (4) SA 507 (SCA) para 6; *RAF v Masindi* 2018 (6) SA 481 (SCA) para 13; *Aetna Insurance v Minister of Justice* 1960 (3) SA 273 (A) at 286; *POF v Prinsloo* 1999 (3) SA 569 (SCA) at 574; *RAF v Abdool-Carrim* 2008 (3) SA 579 (SCA) para 7; *Engelbrecht v RAF* 2007 (6) SA 96 (CC) para 23; *Law Society* ibid para 40; *Mvumvu* ibid para 20.

[169] *Mdeyide* supra note 69 para 80.

[170] *Daniels v RAF* [2011] ZAWCHC 104 para 15.

[171] In *Law Society* supra note 16, the court held that the RAF Act is an instrument in the arsenal of the state in fulfilling its constitutional duty to protect the security of the person and the public, and particularly the security of victims. The court also held that the RAF is a public body rendering an indispensable service to vulnerable members of society.

[172] *Jafta v Schoeman* 2003 (10) BCLR 1149 (C) para 39; *S v Z* 2004 (2) SACR 410 (E) para 3.

[173] Section 10 of the Constitution.

[174] Section 12 of the Constitution; *Law Society* supra note 16 para 67.

[175] Section 4(1)*(b)* of the RAF Act. Also see *Pithey* supra note 21 para 25; *Madzunye v RAF* 2007 (1) SA 165 (SCA) para 17, referring to *RAF v Roman Klisiewucz* (SCA) unreported case no 192/2010 of 29 May 2002; *Daniels* supra note 170 para 14; *Constantia Insurance v Nohamba* 1986 (3) SA 27 (A) at 39.

[176] Supra note 37.

[177] As contemplated by the now repealed Motor Vehicle Insurance Act 29 of 1942.

[178] *Kapeller* supra note 37 at 728–9.

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The mere fact that the parties had negotiated on a distinct and separate issue (quantum) does not make each and every utterance relating to other points of their dispute inadmissible.[179] The court admitted the evidence about the merits.[180] The seriousness of the injury, an administrative decision that, once made, renders the RAF functus officio, cannot be deemed to be an integral part of the dispute and stands separate and distinct from the merits and quantum issues that fall to be negotiated.

In *Polverini*,[181] a bona fide dispute existed between the parties about whether an insurable interest was under-insured, a dispute that had to be resolved by evidence.[182] The insured argued that correspondence in which the insurance company had accepted liability was privileged because it was transmitted in an attempt at a bona fide settlement.[183] The court held that no existing legal provision prohibits an unconditional acceptance of liability made in a form that was unqualified and unconditional to be inadmissible evidence.[184] An admission outside the negotiation perimeter may be admissible.[185]

The court in *Van Tonder* found that a distinction must be drawn between the decision on the seriousness of injuries, which is an administrative duty of the RAF that 'is distinct and precedes any financial discussion' on the one hand, and its role in settlement negotiations (going to merits and quantum), on the other hand.[186]

Hiding a decision made on the seriousness of the injuries (an administrative decision) behind the without-prejudice inadmissibility rule to achieve a delay in the inevitable obligation to pay general damages is an abuse of process, bearing in mind that the (already overburdened) courts will remain seized with an action that could have been finalised. This forces the courts to spend further resources on the subsequent adjudication of the general-damages claim, and imposes the associated wasted legal costs on the taxpayer. This delay and waste of funds offends the constitutional obligation placed on public administrators to promote and maintain a high standard of professional ethics and to promote the 'efficient, economical and effective use of resources'.[187] This argument is supported by the findings in *Van Tonder*.[188] State organs may not abuse

[179] Ibid at 729.
[180] Ibid.
[181] Supra note 36.
[182] Ibid at 549.
[183] Ibid at 550.
[184] Ibid at 550–1.
[185] Ibid at 551.
[186] *Van Tonder* supra note 11 para 71.
[187] Section 195 of the Constitution; *Mlatsheni* supra note 166 para 15.
[188] Supra note 11 para 72.

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the court process[189] and have regularly been criticised by the courts for unjustifiably and unreasonably dragging matters out, failing to be candid, honest and open,[190] and failing to disclose relevant and material facts.[191] State organs doing so have been held to breach s 195 of the Constitution, which provides for diligent and expeditious conduct.[192] The court in *MEC for Roads & Public Works*[193] criticised state organs and found that 'whilst they were embarking on delaying tactics at the taxpayer's expense, sick and vulnerable citizens were suffering and children were dying … as a direct result of their failure to comply with their constitutional obligations'.[194] State organs cannot litigate as they please.[195] Plasket J in *Mlatsheni* said:

> 'The Constitution has subordinated them to what Cameron J, in *Van Niekerk v Pretoria City Council*, called "a new regimen of openness and fair dealing with the public". The very purpose of their existence is to further the public interest, and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust. … That places the defendant in a position of great responsibility: its control of the purse-strings places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well-known, are poor and "lacking in protective and assertive armour".'[196]

[189] The RAF was found to defend actions belatedly simply to engineer a postponement for itself, which amounts to an abuse of the court process: see *Hugo v RAF* (GPPHC) unreported case no 055136/2022 of 12 August 2024 paras 19ff; *Delport v RAF* (GPJHC) unreported case no 10978/2020 of 8 December 2023 paras 16–28; *Nathram v RAF* (GPPHC) unreported case no 46876/2020 of 26 April 2024 paras 5–27; *Philane v RAF* (GPPHC) unreported case no 11267/2022 of 11 April 2024.

[190] *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA) para 34; *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA) para 4; *Bakamundo v Minister of Home Affairs* (GPJHC) unreported case no 17271/2009 of 12 May 2009, cited in R Amit 'Winning isn't everything: Courts, context, and the barriers to effecting change through public interest litigation' (2011) 27 *SAJHR* 11 at 12.

[191] *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) para 107; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 19; *Gory v Kolver* 2007 (4) SA97 (CC) paras 63–5; *MEC for Roads and Public Works, Eastern Cape v Intertrade* 2006 (5) SA 1 (SCA) paras 20–4.

[192] *Intertrade* ibid paras 20–1.

[193] Ibid.

[194] Ibid para 20.

[195] *Mlatsheni* supra note 166 para 16.

[196] Ibid paras 16–17. Also see *Fourie* supra note 166 para 69; *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) para 83; *Daniels* supra note 170 paras 14–23; *Bovungana v RAF* 2009 (4) SA 123 (E) para 3; *RAF v Delport* 2006 (3) SA 172 (SCA) paras 26–9.

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The court in *Ketsekele v RAF*[197] held that 'the Fund's approach to litigation constitutes a serious dereliction of its duties to road accident victims, the public and the courts'.[198]

(d) The RAF is under a duty to assist the court

A state organ such as the RAF is under a positive obligation to ensure access to courts, respect the courts, be impartial, and contribute to the effective operations of the courts.[199] State organs must not interfere with the functioning of the courts.[200]

(e) Fairness

The Constitution guarantees everyone the right to fair administrative decisions.[201] A person who is adversely affected by an administrative decision is entitled to written reasons.[202] A constitutional duty is imposed on the state to ensure these rights are given effect.[203]

As an administrator under PAJA, the RAF has a constitutional duty to be transparent and to provide injured victims with timely, accessible and accurate information.[204] PAJA requires the RAF to take procedurally fair action when the decision materially affects injured victims' rights and legitimate expectations.[205] To act in a procedurally fair manner, the RAF must give any claimant adequate notice of the proposed administrative action,[206] an opportunity to make representations,[207] and, thereafter, a clear statement of the administrative decision.[208] The regulations promulgated under the RAF Act require the RAF to decide on the seriousness of the injuries within 90 days of receipt of the serious-injury assessment[209] and to give reasons if it rejects the serious-injury assessment.[210]

[197] 2015 (4) SA 178 (GP).
[198] Ibid para 40.
[199] Section 165(4) of the Constitution.
[200] Section 165(3) of the Constitution.
[201] Section 33(1) of the Constitution. The decision must also be rational and not 'arbitrary, capricious or irrational' and must align 'with the empowering legislation': see *Van Tonder* supra note 11 para 68.
[202] Section 33(2). Also see *The Municipal Manager: The City of Johannesburg Metropolitan Municipality v San Ridge Heights Rental Property* [2023] ZASCA 109 paras 13–14.
[203] Section 33(3)*(b)*.
[204] Section 195(1)*(g)* of the Constitution.
[205] Section 3(1) of PAJA.
[206] Section 3(2)*(b)*(i).
[207] Section 3(2)*(b)*(ii).
[208] Section 3(2)*(b)*(iii).
[209] Regulation 3(3)*(d*A*)*.
[210] Regulation 3(3)*(d)*.

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A decision on the seriousness is a sine qua non for a settlement offer on general damages. It is unfair if the RAF decides, in favour of the claimant, that the injuries suffered are patently serious from a written offer to settle general damages, but then keeps the outcome of this administrative decision out of the claimant's reach by insisting that the offer is inadmissible evidence.

In addition, the trial should also be fair. Section 34 of the Constitution guarantees everyone the right to a fair hearing before the court.[211] This right affirms the founding value of the Constitution, the rule of law.[212] Courts must interpret court rules and legislation to render the proceedings fair,[213] including the without-prejudice inadmissibility rule.

The RAF has ample remedies should it wish to take its own decision on seriousness on review, including to stay the proceedings in respect of general damages pending a review outcome,[214] or to bring an application to separate the issue of general damages from the other heads of damages and to apply for a postponement of the general-damages claim pending a review application.[215] The without-prejudice inadmissibility rule cannot be employed instead. Notably, after an exhaustive search, I can find no report of a decision where the RAF reviewed its own decision on the seriousness of injuries.

A postponement of the general-damages claim without an anticipated review application will lead to inordinate delays because trial dates are allocated far into the future.[216] Fairness dictates that a civil hearing must commence and conclude within a reasonable time.[217] The delay in finalising cases is critical in the context of fairness.[218] Fairness requires procedures that will, in any given circumstance, promote a just and fair resolution of the dispute[219] and prevent an arbitrary outcome.[220]

[211] Section 34. This prevents resorting to self-help. See *Bernstein v Bester* 1996 (2) SA 751 (CC) para 105; *De Beer v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 14.

[212] *De Beer* ibid para 11.

[213] Ibid.

[214] In *JPRD v LSD* [2023] ZAWCHC 296, the court stayed the proceedings pending an application to set a subpoena aside.

[215] Under the auspices of rule 33(4).

[216] Hoffman op cit note 162.

[217] For fairness generally see *Stopforth, Swanepoel & Brevis v Royal Athem* 2015 (2) SA 539 (CC) paras 25 and 31; Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2006) ch 31.3.

[218] T Sourdin & N Burstyner 'Justice delayed is justice denied' (2014) 4 *Victoria University Law and Justice Journal* 49 at 51.

[219] *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 304.

[220] *De Lange v Smuts* 1998 (3) SA 785 (CC) para 131.

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VI CONCLUSION

The without-prejudice inadmissibility rule makes any oral or written statements made during settlement negotiations inadmissible, as set out in part III(a) above. Part III(b) sets out numerous exceptions to this rule. These exceptions are not a closed list and are informed by public policy.

I have argued in part IV above that our courts have already recognised a further exception — where the RAF has made an administrative decision on the seriousness of injuries to prove only that such a decision had been taken. There are, however, decisions to the contrary. The court in *Van Tonder*[221] held that although the full courts in *Chetty*[222] and *Mertz*[223] did not engage in an in-depth enquiry into the without-prejudice inadmissibility rule and the exceptions thereto, both judgments are authority for the proposition that an offer is admissible evidence to prove the RAF's tacit acceptance of the seriousness of the plaintiff's injuries.[224] In *Olivier*,[225] the full-bench appeal court held that a general-damages offer is admissible evidence, drawing on the judgment of *Sayed*.[226] My argument is that the courts in *Keagan*,[227] *Paulsen*[228] and *Ntsembi*[229] ought to have considered the binding effect of *Olivier*.[230] The question of the admissibility of the RAF's offer on general damages will hopefully be considered by a higher court, such as the SCA, so that clarity can be provided on the conflicting judgments.

The without-prejudice inadmissibility rule plays an important part in law and allows parties to negotiate freely without the risk that adverse statements may be used against them. This remains a valid policy consideration that underscores the inadmissibility rule. There are, however, competing policies in RAF litigation, which I have fully discussed in part V above, which must equally be served in the public interest. To recognise the exception will bring certainty to the affairs of injured road accident victims, avoid undue delays, and avoid the abuse of a rule of evidence.

When the RAF decides that a victim's injuries have been correctly assessed as serious, the RAF makes an administrative decision and, once it is made, becomes functus officio. The RAF cannot simply recall its decision. Bearing in mind the context of the RAF's statutory and constitutional mandate as a state organ in respect of seriously injured victims, it is not

[221] Supra note 11.
[222] Supra note 84.
[223] Supra note 94.
[224] Supra note 11, with reference to *Chetty* para 56 and *Mertz* para 58.
[225] Supra note 10.
[226] Supra note 67.
[227] Supra note 6.
[228] Supra note 8.
[229] Supra note 7.
[230] Supra note 10.

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surprising that some courts have admitted the RAF's general-damages offers as evidence. The public interest is served by doing so, as it prevents the RAF's abuse in forcing injured victims to settle for an unreasonable amount or to face the risk that the court's jurisdiction on general damages will be ousted. Injured victims contribute to the fuel levy and deserve protection from abuse.

The administrative decision on the seriousness of the injuries is a conditio sine qua non for the RAF to make an offer about general damages. I have argued that because this is an administrative decision, it ought not to be considered as forming an integral part of the settlement negotiations. All that is admissible is that an offer was factually made on general damages, exclusively as evidence to support the allegation that the court has jurisdiction to make a general-damages award. The offer is not evidence that speaks to the merits or the quantum, and it will remain inadmissible for that purpose.

In Australia, the general rule that without-prejudice statements are inadmissible was codified in the Evidence Act of 1995, which provides for numerous general exceptions,[231] including that without-prejudice communication is admissible when it affects the rights of a person.[232] The legislature would do well to follow in Australia's footsteps and to codify the admissibility of RAF offers on general damages in South Africa.

[231] Section 131(2)*(a)–(k)*. Also see s 132(2)–(5).

[232] Section 131(2)*(i)*. Also see in the context of prescription *Liu v Fairfax Media Publications* [2012] NSWSC 1352; *Greenway v Teoh* [2014] ACTSC 224.

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