IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

In the matter between: **Case No.: 18239/ 2020**

DIALE MOGASHOA INCORPORATED **APPLICANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

APPLICANT'S HEADS OF ARGUMENT

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1 INTRODUCTION

1.1 The applicant seeks an order, amongst others, in the following terms:

1.1.1 That the applicant is granted leave to execute the order granted by this Court on 1 June 2020 as amended on 9 June 2020 pending the final determination of the Fund's application for leave to appeal and any appeals if leave to appeal is granted.

1.1.2 The Fund be interdicted and restrained from appointing and instructing other attorneys to render the services which are the subject

of tender RAF/2018/00054 ("**the tender**") pending the final determination of its application for leave to appeal and any appeals if leave to appeal is granted.

1.1.3 In the alternative to the above, declaring that the order granted by this Court on 1 June 2020 and amended on 9 June 2020 has not been suspended by the Fund's application for leave to appeal.

1.1.4 In the event that the aforesaid relief is granted, then in that event, and in order to give effect thereto, directing the Fund to:

1.1.4.1 adjudicate the tender and announce the results thereof within 30 calendar days from the date on which this order is granted;

1.1.4.2 withdraw its letter dated 5 June 2020 to the applicant in which it withdrew its instructions for the applicant to represent it in litigation matters in which the applicant is its attorneys of record.

1.2 The Fund delivered its application for leave to appeal to the Supreme Court of Appeal after the applicant delivered its replying affidavit. This, however, does not change any of the basis on which the applicant seeks the relief which it seeks.

2 THE JUDGMENT

2.1 The judgment sought to be executed pending the final determination of the Fund's application for leave to appeal and appeals was granted in a review application in terms of which the Court reviewed and set aside certain decisions of the Fund.

2.2 The Court justified the orders which it granted on the basis, amongst others, that they were intended to preserve the status *quo* prevailing at the time and that the Court had to intervene to avoid a looming constitutional crisis.

2.3 In addition, the Court considered that the parties had to be given an opportunity to find an amicable just and equitable remedy to resolve the matter. The Fund continues to resist engaging with the applicant and the panel attorneys to find ways of resolving the dispute in an amicable manner.

2.4 The Court granted an order, amongst others, in the following terms:

2.4.1 That the decision to cancel the tender is reviewed and set aside.

2.4.2 That the Fund shall fulfil its obligations in terms of the service level agreement between it and the panel attorneys.

2.4.3 That the panel attorneys shall continue to serve the Fund.

2.4.4 The order shall operate for a period of six months.

2.5 The reason[1] why the Court directed that the order shall operate for a period of six months is to enable the Fund to "*reconsider its position for the sake of the general public of South Africa*" and "*to allow all parties to reach an amical just and equitable solution to protect the rights of the South African public*."

2.6 The Fund has not reconsidered its position. Instead, the Fund continues to send confusing messages as to how it intends to continue operating. These confusing messages justify the relief which the applicant seeks so as to ensure that the general public is protected as the Court intended.

3 THE BASIS OF THE RELIEF

The Court's jurisdiction

3.1 The Court's power to grant the relief which the applicant seeks is found in section 18(3) of the Superior Courts Act 10 of 2013 ("**the Act**"). Section 18(3) must, however, be read with section 18(1) and (2).

3.2 Section 18(1) of the Act provides that the operation and execution of a decision which is the subject of an application for leave to appeal or of an

[1] See paragraphs 84 and 85 of the judgment.

appeal is suspended pending the decision of the application or appeal, unless the Court orders otherwise under exceptional circumstances.

3.3 Section 18(2) of the Act provides that unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order is not suspended pending the decision of an application for leave to appeal or appeal.

3.4 Section 18(3) of the Act empowers a Court to grant an order that the operation and execution of a decision which is the subject of an application for leave to appeal or an appeal not be suspended under exceptional circumstances and if the applicant will suffer irreparable harm if such an order is not granted and if the opponent will not suffer irreparable harm if such an order is granted.

3.5 The law relating to the interpretation and application of section 18(3) of the Act is not in dispute between the parties. It is set out in cases such as Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ); Ntlemeza v Helen Suzman Foundation 2017 (5) SA 402 (SCA); Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality 2017 (4) SA 207 (GJ); Minister of Social Development Western Cape v Justice Alliance South Africa [2016] ZAWCC 34[2]. There is no need to canvass these cases in view of the fact that the applicable law is not in dispute between the parties.

3.6 There is no dispute between the parties that the Court has jurisdiction to grant the relief which the applicant seeks. The dispute between the parties relates to whether the applicant has established the following requirements for the Court to grant that relief:

3.6.1 The existence of exceptional circumstances.

3.6.2 Irreparable harm to the applicant if the relief is not granted.

3.6.3 Absence of irreparable harm to the Fund if the relief is granted.

3.7 The applicant has established all of the abovementioned requirements and it is entitled to the relief which it seeks.

Exceptional circumstances exist

3.8 The starting point on this requirement is what this Court said in paragraph 85 of its judgment when it justified the order which it granted. Therein, the Court said that this "*is an exceptional case and a constitutional crisis looms*" and that such a crisis ought to be averted.

3.9 The orders which this Court granted were intended to avert a looming constitutional crisis. Accordingly, if such orders are not implemented with

[2] See also University of the Free State v Afriforum 2018 (3) SA 428 (SCA).

immediate effect, the constitutional crisis sought to be averted is going to ensue. In fact, it has already started to ensue.

3.10 The Fund is on record as saying that its matters have stagnated and are not proceeding because of the impasse created by this litigation, which is what this Court sought to resolve by the orders granted in its judgment. For this reason, even on the Fund's version, the constitutional crisis and the chaos sought to be averted by the orders granted by this Court is already ensuing.

3.11 The Fund performs a very unique function in the Republic. It was established to compensate victims of road accidents and no one else in the Republic performs this function. The manner in which the Fund performs this function is litigious. For this reason, the Fund's matters occupy not less than 80% of trial rolls in the Republic. No other litigant does this. This is exceptional to the Fund and it constitutes an exceptional circumstance contemplated in section 18(3) of the Act.

3.12 The current litigation has resulted in the Fund not being adequately represented in the Courts. It is important for the Fund to be adequately represented in Court for various reasons:

3.12.1 the amounts claimed from it are always large amounts;

3.12.2 the Courts require the assistance of the Fund in adjudicating its matters;

3.12.3 the Courts do not have the capacity to investigate whether the amounts claimed from the Fund are inflated if the Fund is not present before the Courts;

3.12.4 if inflated amounts are awarded to plaintiffs, there is prejudice not only to the Fund itself, but to the public purse in general;

3.12.5 there is prejudice to plaintiffs if the Fund is not represented as that could easily result in a postponement or a rescission of any orders which may be granted in favour of plaintiffs in the Fund's absence.

3.13 In addition, the following factors constitute exceptional circumstances for purposes of section 18(3) of the Act:

3.13.1 The operations of the Fund have been severely compromised as a result of the Fund creating an impression that it no longer requires the services of attorneys and terminating its mandate to its panel attorneys. This has resulted in the following:

3.13.1.1 trails not proceeding as they should because the Fund is not represented and Court time being wasted as it is evidenced by the judgment of Rogers J;

3.13.1.2 the Courts calling the Fund's officials to appear to explain why the Fund is not represented as that impacts on the management of the trial roll and judicial resources;

3.13.1.3 the order granted by Justice Tlhapi;

3.13.1.4 the judgment of Justice Neukircher;

3.13.1.5 award of damages in amounts which could have been less if the Fund was properly and adequately represented.

3.13.2 The disruption of the management of trial rolls and management of judicial resources does not only affect the Fund and those who have instituted proceedings against it, it also affects all litigants who fight for a spot on the trial roll.

3.13.3 The social benefit scheme which the Fund operates is litigious in nature and the Fund can only operate it through a panel of attorneys. The panel of attorneys currently engaged in this litigation have in their possession a long list of the Fund's litigation files which the Fund says it requires in order to continue to manage those matters to the extent of suggesting that it cannot function without those files. The fact that the Fund is unable to operate has an impact on its ability to even determine what the appropriate settlement amounts should be. As a result of this, it cannot, on its own version, settle the relevant matters.

3.13.4 In its letter dated 15 June 2020 the Fund described the negative impact of not having the aforesaid files as follows:

"*6. Your refusal to hand over the files, as requested in our previous notices, has significantly impacted on the RAF's ability to settle claims which in turn has prejudiced and continues to prejudice the claimants who are waiting to have their claims to be settled.*

7. You have no right in law to retain the files, regardless of whether or not the service level agreement has been terminated. As the client, the RAF is entitled to call for any file in your possession. Your refusal to return the files which are trial ready is unlawful.

8. Your conduct also prejudices claimants. Their matters have stagnated because you are unlawfully holding on to their files which are trial ready for no good reason."

3.13.5 The Fund has given this Court contradictory versions about how it intends to continue to operate. This necessitates this Court's intervention to ensure that the Fund does what this Court considers to be the correct and appropriate way of avoiding the constitutional crisis referred to in its judgment. As stated in the judgment, this Court cannot sit back supine and not intervene to protect the public.

3.13.6 In paragraph 9.2 of its application for leave to appeal, the Fund said:

"*9.2 Second, the RAF made it plain that (a) it will use the services of the state attorneys' offices, (b) issue a fresh tender for 20 panel of attorneys and (c) employ Regulation 16A.6.6 of the Treasury Regulations should it need services of more firms of attorneys but what it no longer needs, is 215 attorneys for 5 years*."

3.13.7 In paragraph 13 of its letter dated 15 June 2020, the Fund said:

"*13. The RAF has openly and repeatedly stated that it has decided not to issue a new tender. The services which have been provided by your firm will now henceforth be rendered differently and internally. The effect of your conduct, which is unacceptable, is to force the hand of the RAF either to create a new panel, or to retain your firm. This is unethical and unlawful on your part*."

3.13.8 In its answering affidavit in this application, the Fund says that it has concluded an agreement with the Solicitor-General for its matters to be handled by the Office of the State Attorney. This is different from what is said in the above quoted letter that the Fund will manage its litigation matters internally.

3.13.9 In the light of the above, the Court cannot trust the Fund to do what is right to protect the public because the Fund does not know what it must do.

3.13.10 The Fund is clearly struggling to find its way to act in a manner that would prevent the continuation of chaos in the Courts and prejudice ensuing to itself and the general public insofar as the prosecution of claims against it are concerned. It is for this reason that the Court granted the orders which it granted and there is now every reason why the relief which the applicant seeks should be granted.

No irreparable harm to the Fund

3.14 The Fund will not suffer irreparable harm if the relief which the applicant seeks is granted. The effect of the order which this Court granted is to preserve the status *quo* – the status *quo* being that the applicant and the panel attorneys continue to render services to the Fund whilst the Fund continues to perform its obligations towards them for a period of six months. Both the Fund, the applicant and the panel attorneys have performed the very same obligations towards each other for the past five years and no irreparable harm would ensue to them in the next six months.

3.15 The Fund's suggestion that it would cost it more money to perform its obligations in terms of the service level agreement is without merit. This would not in any event cause irreparable harm to the Fund. In any event, the Fund is not prohibited from renegotiating the fees payable by it in terms of that agreement.

Applicant will suffer irreparable harm

3.16 The applicant will suffer irreparable harm if the relief which it seeks is not granted because:

3.16.1 The Fund intends to report it to National Treasury to be blacklisted from doing business with organs of the State. The harm to ensue from this is irreparable because it is going to make it impossible for the applicant to be appointed to provide services to both the public and private sector clients. This would result in the closure of its business and this is not going to be reversible by the upliftment of the blacklisting.

3.16.2 The judgment is in operation only for a period of six months. If leave to execute is not granted now, the judgment would have been rendered academic by the time appeal procedures are finalised. In *Incubeta*, the Court took into account the fact that the order was of a short duration. It said:

"*[25] Turning to the circumstances of these litigants, what is relevant, in my view, is the following:*

If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be

forfeited by Incubeta because the short duration of the restraint will expire before exhaustion of the appeal processes …"

3.16.3 In this case, only a period of five months of the six months' period provided for in the order granted by this Court is left. This period will be exhausted before any appeal is heard as a result of which the orders granted by this Court and which are sought to be executed are going to be forfeited.

3.16.4 If leave to execute is not granted, the Fund is going to proceed as if there is no judgment against it and will make it impossible for the judgment to be executable after appeal procedures and for an appeal Court to formulate another just and equitable remedy which would adequately address that which the judgment is intended to address and in the manner in which it is sought to be addressed.

3.16.5 The Fund's suggestion that an appeal Court is in a position to grant a just and equitable relief is of no moment if the applicant would have closed its business by the time appeal procedures are concluded.

3.16.6 The applicant is going to have to reorganise its business and that is going to entail the retrenchment of a big number of its employees dedicated to servicing the Fund. Once that is done, such employees are going to be forced to look for employment elsewhere. The Fund has not suggested any relief which would reverse this consequence.

3.16.7 The Fund is currently withholding payment of the applicant's fees for services rendered in order to frustrate the applicant and other panel attorneys involved in this litigation. This has already caused serious harm to the applicant's business. The Fund will continue with this spiteful and abusive conduct if leave to execute is not granted and the applicant will continue to be prejudiced to the extent of closing its business.

The Fund has no prospects of success on appeal

3.17 The Fund does not have any prospects of success on appeal for the following reasons:

3.17.1 It has failed to justify the cancellation of the tender, which is the subject matter of this litigation. It has given contradictory versions as to why it cancelled the tender. These contradictions on their own justify the granting of the relief which the applicant seeks.

3.17.2 In an attempt to justify the rationality of cancelling the tender and how it would deal with litigious matters in the future, the Fund again gave contradictory versions. It said it would use:

3.17.2.1 the State Attorney;

3.17.2.2 its corporate panel;

3.17.2.3 a small panel of attorneys.

3.17.3 All of the above is inconsistent with there no longer a need for the services which are the subject of the tender and the Fund no longer having funds to pay for the services. Once these contradictions are highlighted to an appeal Court, an appeal would fail.

3.17.4 As far as the finding about the second addendum is concerned, the Court correctly found that the second addendum was unlawful and that the Fund abused its powers when it coerced the panel attorneys to conclude it. In arriving at the abuse of power conclusion, the Court relied on what the Supreme Court of Appeal said in *Logbro* and other cases. There is no basis for a suggestion that the Court erred in this regard or that the cases upon which the Court relied were wrongly decided. Accordingly, there is no prospect of success even on this point.

3.17.5 The relief which the Court granted was modelled along what the Constitutional Court said in *Hoerskool Ermelo*. Once again, there is no suggestion that the Court got it wrong. This being the case, there is also no prospect of success on appeal on this point.

3.18 In its judgment, the Court made the following important findings of which there are no prospects of overturning on appeal:

"*[70]* *In addition, on the one hand the RAF states that they do not require the services of the panel attorneys and at the same time they reserve the notion of constituting a new panel of attorneys, who by the way will provide the same services the panel attorneys are currently [providing] and who are supposedly no longer required.*

[71] *The additional reason advanced is clearly 'ex post facto rationalisation of a bad decision'. It contradicts the former reasons advanced and nullifies them …*

[72] *There is also the matter of not requiring the services of panel attorneys. Though the RAF wants to do away with these services, they still want to employ new attorneys to assist under the auspices of the State Attorney's office and/or outsource the very work that the panel attorneys are doing to their corporate attorneys. There is no logic in this scheme.*

…

[78] *Consequently, they concede that they will require the service of attorneys from time to time. First price, is to seek the services from the office of the State attorney … If necessary, they may invoke regulation 16A.6.6 and utilise their corporate attorneys to perform the functions of the panel attorneys.*

…

[80] The conundrum that the RAF finds itself in is that they cannot cancel the panel attorneys mandate and replace them with other attorneys funded by them, to perform the same function of the panel attorneys. This contradicts the reason advanced that the service of attorneys is no longer required as they wish to save legal costs. The RAF will still be paying for attorneys, which they are currently doing with the panel attorneys."

3.19 The Fund cannot successfully appeal against any of the above findings. This being the case, there is no prospect that an appeal would succeed. There is therefore, no impediment to granting the relief which the applicant seeks.

The execution and operation of the judgment is not suspended

3.20 The orders granted by this Court are in any event interlocutory in nature and effect in that they were designed and have the effect of preserving the status *quo* whilst the parties try to find an amicable just and equitable solution by themselves.

3.20.1 In paragraph 85 of the judgment, the Court said that the "*status quo has to prevail to allow all parties to reach an amical just and*

equitable solution to protect the rights of the South African public" and the orders which it granted were intended to do exactly that.

3.20.2 In paragraph 86 of the judgment, the Court said that it is "*necessary to retain the status quo for at least six (6) months with the panel attorneys present contractual relationship*" and thereafter granted the orders which it did.

3.20.3 It follows that if the parties have not amicably resolved the matter by finding a just and equitable remedy by themselves within the six months' period, they must go back to Court for further directions or a final order.

3.21 In the light of the above, the orders sought to be appealed against are interim in nature and effect and an appeal against them does not suspend the execution and operation thereof.

The additional relief

3.22 The additional relief is sought in order to give effect to the leave to execute relief which the applicant seeks.

3.23 The interdictory relief is sought so as to ensure that the leave to execute relief is not frustrated by the Fund instructing other attorneys to render the very same services which are the subject of the tender.

3.24 This Court has already said, in paragraph 80 of its judgment, that the Fund cannot replace the panel attorneys "*with other attorneys funded by them, to perform the same function of the panel attorneys*." For this reason, this Court has already found that the Fund ought not to do that which is contemplated in the interdictory relief.

3.25 The Fund cannot rationally and honestly oppose the interdictory relief because, on its version, it no longer seeks to instruct other attorneys to render the services which are the subject of the tender. It said so in paragraph 13 of its letter dated 15 June 2020 when it advised the panel attorneys, amongst others, that the "*services which have been provided by your firm will now henceforth be rendered differently and internally*."

3.26 The relief to adjudicate the tender is consistent with the order in terms of which the Court reviewed and set aside the decision to cancel the tender. The setting aside of the decision to cancel the tender means that the tender process is alive again. This being the case, the tender ought to be adjudicated and the outcome thereof published.

3.27 In paragraph 4 of its letter dated 5 June 2020, the Fund called upon the applicant and other panel attorneys to deliver "*notices of withdrawal as attorneys of record*." On the other hand, the orders granted by this Court, for which leave to execute is sought, require the applicant and other panel attorneys to continue to perform their obligations in terms of the service level agreement which includes representing the Fund in litigation matters.

For this reason, the notice to withdraw as attorneys of record ought to be set aside as it is in direct conflict with the orders in terms of which the applicant and other panel attorneys are authorised to do exactly that which the notice says they must not do.

3.28 There is obviously a risk that the Fund is going to appeal any leave to execute order which may be granted against it in this application because of the automatic right of appeal provided for in section 18(4) of the Act.

3.28.1 If the Fund were to exercise its right in terms of section 18(4) of the Act, the leave to execute relief would be suspended.

3.28.2 In order to avoid a suspension of the leave to execute relief, if there is an appeal in terms of section 18(4) of the Act, and for the very same reasons relied upon in this application, this Court should extend the relief which it grants to also apply to any appeal in terms of section 18(4) of the Act. The inherent jurisdiction of this Court is wide enough to empower it to grant this relief.

3.28.3 If the relief which the Court grants in this application does not extend to an appeal in terms of section 18(4) of the Act, then in that event, such relief is going to be frustrated and will be forfeited before the appeal itself is even heard.

3.28.4 The circumstances of this case and the short duration of the orders sought to be executed pending the application for leave to appeal are such that it is strictly necessary to extend the relief sought in this application to also apply to an appeal in terms of section 18(4) of the Act. If this is not done, the applicant is going to be irreparably prejudiced.

3.28.5 The Fund is not going to be irreparably prejudiced if the relief sought in this application is extended to any appeal in terms of section 18(4) of the Act. Such relief is intended to ensure that the relief sought in this application is of practical effect because no purpose would be served by granting an order which would be of no practical effect and could easily be frustrated by the automatic appeal provided for in section 18(4) of the Act. If this is not done, the applicant will have to bring another application for leave to execute the leave to execute relief, if it is granted and it is appealed against in terms of section 18(4) of the Act. This will just escalate the litigation between the parties and should be avoided.

3.29 For the reasons stated above, the applicant is entitled to all the relief set out in its notice of motion with costs.

Dated at Sandton on this 2nd day of July 2020.

Kennedy Tsatsawane SC

Applicant's Counsel