IN THE HIGH COURT OF SOUTH AFRICA

GUATENG DIVISION, PRETORIA

Case NO: 18239/2020
Case NO: 15876/2020
Case NO: 17518/2020

In the matters between:

DIALE MOGASHOA INCORPORATED	Applicant in Case NO: 18239/2020
MABUNDA INCORPORATED AND 47 OTHERS	Applicants in Case NO: 15876/2020
FOURIEFISMER INCORPORATED	First Applicant in Case NO: 17518/2020
PRETORIA ATTORNEYS' ASSOCIATION	Second Applicant in Case NO: 17518/2020
MAPONYA INCORPORATED	Third Applicant in Case NO: 17518/2020

and

THE ROAD ACCIDENT FUND	First Respondent
THE CHAIRPERSON OF THE BOARD OF THE ROAD ACCIDENT FUND	Second Respondent
ACTING CHIEF EXECUTIVE OFFICER OF THE RAF	Third Respondent
THE MINISTER OF TRANSPORT	Fourth Respondent

HEADS OF ARGUMENT FOR THE FIRST TO THIRD RESPONDENT

1.

1.1 These written submissions are filed on the First to Third Respondent's behalf (collectively the "RAF"). The RAF was directed to file its answering affidavit by June 25th, 2020 but could only file the following day. The RAF unreservedly apologized. The Applicants have objected to the RAF's request for condonation. We

respectfully submit that the objection is mere pettifogging and we request the above Honourable Court to grant the condonation.

1.2 Our instructing attorneys only came on record on June 18th, 2020. Due to certain unfortunate circumstances, which as a professional courtesy to colleagues we will not disclose, we were only briefed on the weekend of June 26th, 2020. The answering affidavits had already been prepared and filed. At the outset, we are duty bound to inform the Court that whilst the RAF has every intention to seek the leave of the SCA to appeal this Learned Court's judgement and as the Notice of Application for leave to appeal has been drafted it was only accepted by the Registrar of the SCA on July 2nd, 2020

1.3 The RAF intends to address correspondence to the Registrar of the SCA for an urgent decision on the application to appeal and if successful the appeal itself.

2.

The parties are *ad idem* that the relief sought by the Applicants is relief that should only be granted in exceptional circumstances where the Applicants will certainly suffer damages that it will be irreparable. But these are only the first two hurdles. The Applicants then have to prove that the RAF will not suffer irreparable damages, an almost impossible task. These are statutory requirements. The Honourable Court is therefore tasked to consider prospective events.

> *"[24] The second leg of the s 18 test, in my view, does introduce a novel dimension. On the South Cape test, No. 4 (cited supra) an even-handed balance is aimed for, best expressed as a balance of convenience or of*

hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18 (3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm, the victor must nevertheless sow irreparable harm to itself".[1]

3.

There are two preliminary issues:

3.1 The first preliminary issue is that in the *Diale* application a notice in ito Rule 7(1) was filed. Our instructing attorneys have filed a written power of attorney and we submit that the attorneys are properly instructed.

3.2 The second preliminary issue is the applications to intervene. As we read the judgements, leave to intervene has already been granted. The RAF therefore, no longer, oppose those applications.

A CONSIDERATION OF THE ORDERS GRANTED

4.

We obviously do not wish to reargue the merits of the review nor the application for leave to appeal, but we are perforce obliged to address the RAF's prospects of success on

[1] Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ)

appeal within the aegis of the Section 18 application. In so doing we are again with great respect with perforce obliged to view the actual order granted in a critical light. Our primary submission is that the order creates great uncertainty and we would venture to suggest that the obligations and rights of all parties during the six month period and thereafter are difficult to ascertain. The orders are as follows -

4.1 On June 1st, 2020 the Honourable Court *inter alia* ordered that:

> *"2. The intervening party is joined as the Fourth Applicant in the FourieFismer review application.*
>
> *3. The panel attorneys on the RAF's panel as at the date of the launch of the FourieFismer review application shall continue to serve on the RAF panel of attorneys.*
>
> *4. This order shall operate for a period of six (6) months from this order"*

4.2 On June 9th, 2020 this Honourable Court made an order varying the June 1st, 2020 order. This order stated that

> *"This court on application corrects a patent error or omission in the order made at paragraph 88 of the judgement. (a) by adding paragraph 3 immediately after paragraph 2 which should read as follows: 'the decision of the respondent communicated in a letter dated 18 February and 20 February 2020 demanding that the panel attorneys handover all unfinalized files in their possession to the respondent is reviewed and set aside.' (b) by inserting new paragraph 4 which should read as follows: 'the decision of the respondent to cancel tender number RAF/2018/00054 on or about 26 February 2020 is reviewed and set aside.' 2. No order is made to costs."*

We highlight certain ambiguities in the order:

5.1 We say with respect that the variation order complicates the situation greatly. The first variation was to insert an order after paragraph 2 and the second variation was to insert a new paragraph 4.

5.2 The order, therefore actually now reads as follows -

> *"3. The decision of the respondent communicated in a letter dated 18 February and 20 February 2020 demanding that the panel attorneys handover all unfinalized files in their possession to the respondent is reviewed and set aside.*
>
> *4. The decision of the respondent to cancel tender number RAF/2018/00054 on or about 26 February 2020 is reviewed and set aside.*
>
> *5. The panel attorneys on the RAF's panel as at the date of the launch of the FourieFismer review application shall continue to serve on the RAF panel of attorneys.*
>
> *6. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.*
>
> *7. This order shall operate for a period of six (6) months from this order"*

5.3 In view of the fact that the cancellation of the addenda to the SLA were not pressed by the Applicants the "existing" SLA would logically be the SLA and addenda. The defects alleged by the Applicants in the addenda will be perpetuated. The question now arises whether the one month period for handing over the files (which was criticized by the Learned Court) may be invoked by the RAF.

5.4 Would the RAF be entitled, for instance, despite the criticism of the judgement of the Learned Court to demand the return of files within 1 month? Hence, no doubt the belated relief sought regarding the further notice.

5.5 Despite the period of operation of the order being six months as per paragraph 7 this must be read in the context of paragraph 6 which records that *"The RAF will fulfil all of its obligations… in terms of the existing Service Level Agreement"*. But here lies the rub. The original SLA entitled the RAF to terminate (Clause 24 of the original SLA) with a notice period of 30 days. Would that entitle the RAF to terminate on 30 days' notice within the six month period? The clause allows for termination without cause, at any time.

6.

It is not certain which panel of attorneys the order impacts. The RAF has two panels. There is no allegation that we could find in the judgements that the second panel (being the Corporate Panel) were given any notice by the Applicants that such an order could be made and allowing them an opportunity to respond. It is uncertain whether the order extends the SLA or only extends the RAF's obligations in terms of the SLA.

7.

What exacerbates the suggestion is that in FourieFishmer application requests that the Court further trammel the order by granting exclusivity to the attorneys on the panel. (See for instance paragraph 71 of their reply). The use of section 18 to craft an interdict against the RAF from using the GEPF panel of attorneys is a slight of hand to circumvent the necessity of setting aside an alleged unlawful administrative decision in terms of the

Oudekraal principles. Section 18, we respectfully submit, was never intended to permit such an order being grafted onto an existing order particularly when no notice has been given to parties that have a clear legitimate legal interest by the GEPF attorneys. What makes this belated embellishment of the order even more draconian is that it would prevent the RAF from appointing in house attorneys to handle and settle matters.

8.

Furthermore, the conferring of exclusive rights upon the existing panel (when no such rights existed previously) will also clearly have competition law consequences.

9.

The further additional relief that the RAF be directed to adjudicate the tender and announce the results within 30 calendar days, and to order the withdrawal of the letter dated 5 June 2020, in which the RAF withdrew its instructions to the applicant to represent it in litigation matters, is similarly not competent.

THE SYNOPSIS OF THE RAF'S CASE:

10.

10.1 This is indeed an exceptional case but the exceptionality is not of the type that redounds to the Applicant's advantage as envisaged in section 18. Indeed the opposite is true. It is exceptional because in the same case and on the same facts two judges have expressed widely divergent opinions. We raise this issue not because we contend that this Learned Court was not entitled to differ from the

views expressed by Davis J. We point out that the conflicting judgements must surely point to a real possibility that there are prospects of an appeal court opting for the Davis J approach rather than that of this Honourable Court. Hence no doubt the inclusion of section 17 (1) (a) (ii) of the Superior Courts Act. We shall expatiate on the divergent judicial opinion hereunder[2].

10.2 It brooks of no doubt that the RAF will suffer damage should the order not be suspended. The parlance state of the RAF's finances will clearly be exacerbated if they are compelled to continue using the exclusive services of a panel of attorneys. The Davis J judgement for temporary relief, in our respectful submission, makes it clear that the RAF will suffer irreparable harm.

10.3 There is no reason why the attorneys cannot continue practising in other fields of the law in keeping with hundreds of their counterparts in South Africa. We also respectfully point to the provisions of section 18 (4) of the Superior Court Act. We with, great respect, do not seek to anticipate this Court's decision on this application but merely raise the spectre of an automatic suspension which the legislator saw fit to introduce in section 18 in response to their argument that the relief they seek will become moot.

10.4 They further argue that if the order is not executed pending leave to appeal (which the applicants repeatedly argue will not be granted) then chaos will ensue in the courts. The difficulty with this, of course is that the Applicants simply ignore judgments regarding chaos that ensued <u>while the SLA's were in force</u> by panel

[2] Of course, an act of parliament as any other document must be read as a whole and in context. It would therefore be not only competent but indeed mandatory to read section 18 in conjunction with section 17.

attorneys. In this regard the Davis J judgment has reference, which we deal with herein below.

THE SYNOPSIS OF THE DAVIS J JUDGEMENT:

11.

The Davis J judgments have already pronounced on the arguments, alternatively the underlying requirements for the relief. The Applicants' arguments are not competent, if read with the Davis J judgements. As a final judgment, ordinarily it should not be departed from save if it is clearly wrong. We do not read any of our learned friend's arguments as contending that it was clearly wrong. Of course, the requirements for temporary relief are far easier to overcome than the extraordinary relief in section 18. Despite this, the Applicants were unsuccessful in their applications for temporary relief. We respectfully submit that this shows how weak the arguments actually are. Section 18 was inserted by Parliament to ensure that the relief is only available in the most exceptional cases. In the Davis J judgement, the following pronouncement were made:

11.1 that the *"litigation model"* of the RAF over the years has been absolutely disastrous[3]. This of course was during the period while the RAF used the model which the Applicant's wish to preserve.

11.2 It hardly lies in the mouth of the Applicants to complain about the "chaos" which would ensue were the relief not to be granted. After all the legal practitioners on

[3] Para. 3.3 of the First Davis Judgement *"During the existence of the SLA's, the High Courts have at various stages and in numerous judgments expressed dissatisfaction and concern at how the "litigation model" of the RAF, which, particularly in this Division, clogs the civil trial roll, has been handled over the years. In his answering affidavit, the Acting CEO of the RAF refs to the cases of Modise obo a minor v RAF 2020 (1) SA 221 (GP) and Mncube v RAF (26060/2018)"*

the panel are at the very coal face of the litigation and one would assume that they are as much, if not more, to blame for any perceived chaos.

11.3 David J quoted a judgement by His Lordship Mr. Justice Legodi where it was *inter alia* stated that:

> *"[14] It is not in the interest of justice or proper conduct towards an attorney's client to settle on the date of trial at a huge legal cost to client or public purse. By completion of a case management form, the parties' legal representatives undertook to settle much earlier to avoid cost occasioned by attendance at court on the date of trial. Had the matter been settled in time, there would not have been a need for any of the parties to appear.*
>
> *[18] To have settled in time and remove the matter from the roll without an appearance would have been in the interest of their clients because unnecessary legal costs would have been spared. On the other hand, to come to court on the date of trial and with a blink of an eye settle the matter without any blame on the part of the clients, can only have been driven by the desire to escalate legal costs to the prejudice of the client and public purse. In this case, the Road Accident Fund funded through the public purse, is involved.*
>
> *[24] More than 90% of matters on our trial roll are the Road Accident Fund which is funded through public purse. One would have thought the parties and or legal practitioners in dealing with these matters, will be more expedient and professional. However, the contrary appears to be the case. This is despite continuous financial woes the Funds finds itself in.*
>
> *[25] Things can be done much better by the legal practitioners who are practicing in this field instead of seeing the Funds as an easy quick money making machine. That amounts to an abuse and unprofessional conduct."*

11.4 The above findings about legal practitioners representing the RAF are absolutely astonishing. The Court furthermore referred to other matters such as Ntombela v RAF 2018 (4) SA 486 (GJ) and Kleinhans v RAF 2016 (3) ALL SA 850 (GP) and stated that there are *"many others"*.

11.5 We specifically emphasize the following:

> *"3.6 On 1 March 2019 in De Rebus, an article appeared by a well-known author in the field of "third party" claims, Prof Klopper… The article gives very alarming statistics. An analysis of claims against the fund revealed that, although over the years, there has been a decrease in the claims lodged, legal costs have increased exponentially. As an example, in 2005 there were 185 773 claims lodged which resulted in legal costs of R 941 million. In 2018, when there were only 92 1010 claims, the legal costs had ballooned to R 8,8 [billion]. In 2019 the legal costs have increased to R 10,6 [billion]. The various applicants in the two urgent applications before me have not refuted these statistics and neither the fact of the rise in costs during the period of their SLA's. They were at pains, however to point out that more than half the costs were those paid to plaintiffs and further they pointed out that these costs not only consisted of that of legal practitioners, but also included experts' costs."*

11.6 Clearly billions of Rand of the public purse are at stake. Professor Klopper's conclusions in this regard are important in the context of his suggestion that the RAF *"change its litigation model and properly deal with and settle all meritorious claims expeditiously, it could save up to R 10 billions of public funds*".

11.7 The Court stated that during July 2019[4] (almost a year ago) the RAF directed a "handover letter" to the panel attorneys[5]. The Applicants' reaction towards the RAF's request (made last year) is alarming.

---

[4] "The Services Level Agreement (SLA) entered into between you and the RAF is due to expire on 25 November 2019. Pursuant to clause 14 of the SLA, you are hereby notified of your obligation to prepare all unfinalised files in your possession for handover to the RAF'. (An attached excel spreadsheet template indicating certain required information per file as required by clause 14 was also sent. Nothing turns on the difference between the alleged expiry date of 25 November 2019 and that of 29 November 2019 as mentioned elsewhere or in respect of certain of the panel attorneys)."

[5] 3.10 The relevant parts of Clause 14 read as follows: "14. 1 Four months before the expiry of this Service Level Agreement by the effluxion of time the Fund ... shall deliver ... a Notice of Handover advising [the panel attorney] to start to prepare all unfinalised files in this possession for the hand over process; 14.2 The Firm [panel attorneys] waives any and all rights of retention over documents in respect of any work done by it on behalf of the Fund; 14.3 During the period referred to in clause 14.1 above the fund reserves the right to issue or not to issue further new instructions ... ; 14. 4.1 Immediately on a Notice of Handover being given by the Fund, the firm shall commence preparations for handover of the unfinalised files; 14. 4. 2 The firm shall within 10 days of Notice of Handover provide . . . a list in excel format . . . containing . . . (a host of information is then provided for)" .

The Court stated that

> "3.11 Counsel in the urgent applications confirmed that, on the evidence before court, the panel attorneys did nothing to comply with this notice."(Own emphasis)
>
> "3.15 On 19 November 2019 the RAF advised the panel attorneys that the RAF was willing to extend the SLA's to those attorneys amenable thereto with certain amendments. Relevant to the present dispute is the amendment of clause 14.1 which reads as follows in the "second addendum", constituting the SLA extensions: "At least one month before the expiry of the Service Level Agreement (as amended) the Fund's Panel Manager shall deliver to the firm in writing a Notice of Handover advising the firm to start to prepare all unfinished files in its possession for the handover process and the logistics thereof The Notice of Handover will stipulate the handover procedure to be followed ... " (The waiver of the right of retention contained in clause 14.2 remained intact)."
>
> 3 .16 The panel attorneys were required to sign the addendum, should they wish their SLA's to be extended. 84 of the panel attorneys signed the addenda, resulting in the validity period of their SLA's being extended to 31 May 2020." (Our own emphasis)

12.

The following findings in the Davis J judgment are particularly important in this current application:

> "5.13 There is an added dimension to the matter and that relates to the nature of the services to be rendered. There is no automatic or Constitutional right of an attorney to insist that a specific client, even an organ of State, must use its services or, absent an existing agreement, can be compelled to furnish it with instructions or a mandate to act on its behalf.
>
> 5.14 The applicants' last ditch agreement that, should any other attorneys be utilized by the RAF in the interim and the applicants succeed in resurrecting the panel attorney system, that their "work" will already have been given away to someone else, is also flawed. Any "work" in the interim would, if all goes according to plan, be limited and/or on an ad hoc basis. The panel attorney system was in any event on an "as and when" basis and, even if the panel is reinstated, no attorney can insist on being given specific work."

"6.2 The applicants' "convenience" is to continue to litigate as before and to charge fees as they have always done. Whilst I appreciate the fact that, over the years, panel attorneys have come to build their practices around the work received from the RAF, in some instances exclusively so, and that they have expended funds and commitment regarding infrastructure and personnel to cope with the flow of instructions, this all relate to each particular firm's own "convenience". They argued that they were exclusively concerned for the RAF's wellbeing and the administration of justice and the rights of claimants, but in the end, it still appears to be about the retention of their lucrative practices."

"6.3 And money, or rather the lack of it, is where the RAF's "convenience" lies. Each passing day that the present litigation model continues to exist, the deeper the RAF's financial outlook sinks. The deeper the RAF sinks, the less it is in a position to satisfy claims, both timeously on at all. And this impacts on the public purse and on the pockets of fuel-using public. Any, and I stress any, reduction of the R l0 billion costs expense, be it a saving in costs paid to claimants due to early settlement or due to a saving of having done away with the panel, far outweighs each individual applicant's private (as opposed to public) "convenience".

6.4 The applicants ague that "there would be chaos" if the RAF is left unrepresented on 1 June 2020 with over 6 000 files to attend to. This fear appears to be more illusory than real: on 1 June 2020 there would only be the then as yet unsettled matters on the trial roll to attend to. This is far less than the spectre of 6000 alleged by the applicants. What little could not be settled or referred to mediation, will have to be dealt with by way of ad hoc instructions.

6.5 The real chaos is the result which would occur should the panel attorneys not hand over the files to the RAF. By refusing or failing to do so, it would be the panel attorneys who, by clinging to their files despite their agreed waiver of retention, would disable the RAF from attempting to finalise matters out of court, more cheaply and expeditiously.

6.6 The applicants have, as already indicated, failed or refused (on the papers before me) to heed the initial hand-over instructions given in July 2019 (prior to its suspension). They have since, on their own version, failed or refused to heed any of the hand-over instructions given on 18 and 20 February 2020. They alleged that it was "impossible" to do so and that they cannot give opinions as to merits or quantum without expert reports. This is a nonsense argument. Any client would at any stage in litigation be entitled to be informed by his attorney what the state of his case was, what the stage of the litigation was, whether his attorney knew of or were in possession of particulars of any witnesses or their statements regarding the merits or what the trial readiness of the case is regarding quantum. Should the attorneys not yet have all the facts or lack any identifiable expert assistance, then any responsible attorney would be able to tell his client so and give his opinion or advice in respect of the remainder of the particulars sought. The applicants have not even attempted to do so, not in respect of even a single file of those requested, let alone those on the roll for June 2020. Currently the applicants are all in breach of their extended SLA"

13.

The argument that the Applicants are *"unable"* to handover the files is astonishing[6]. The *"chaos"* that the Applicants refer to ignores the fact that the panel of attorneys have been criticized in judgements for years as referred to above. The Applicants now state that the RAF is to blame for this alleged chaos. The *Diale applicants* state that a *"long list"* of the RAF's litigation files which the RAF says it requires *"in order to continue to manage those matters to the extent of suggesting that it cannot function without those files"*. In their affidavit they make the following statements

> *"the panel attorneys have been unable to hand over the files before the litigation of this matter is concluded. It is an order of this court, that this application now seeks to preserve, that the applicant and other panel attorneys must continue to render the services. On the Fund's own version, it is unable to operate without the files which the panel of attorneys are unable to hand over to it".*[7]

14.

Put differently they say that as long as they refuse to comply with the provisions in the SLA wherein they waived their rights to retention, then the RAF will be unable to operate and the RAF will have to pay those firms. The allegation that they cannot handover the files is untenable. Davis J was obviously prescient - *"The real chaos is the result which would occur should the panel attorneys not hand over the files to the RAF. By refusing or failing to do so, it would be the panel attorneys who, by clinging to their files despite their agreed waiver of retention, would disable the RAF from attempting to finalise matters out of court, more cheaply and expeditiously"*. The Applicants refused to hand over the files,

---

[7] Para. 4.9.5

and chaos has ensued which was furthermore made clear in the RAF's letter referred to in the *Diale application*[8]

> *"*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 read for no good reason."*
>
> (Emphasis added)

15.

However, it should be noted that although hundreds of third-party matters are on the rolls nationally, every day, the Applicants have only cited a handful. As already mentioned there are also instances where:

> *"[25] Things can be done much better by the legal practitioners who are practicing in this field instead of seeing the Funds as an easy quick money making machine. That amounts to an abuse and unprofessional conduct."*

[8] Para. 4.9.6

16.

In the leave to appeal judgement by Davis J the following was stated:

> "4.4 On behalf of Diale Mogashoa Inc it was further argued that its application differed in its slant of attack on the extended SLA's from that of the Mabunda Application. The argument is that this slant, primarily the contention that the extended SLA's were "unlawful" and therefore, all calls by the RAF for return of its files could not be enforced, was not sufficiently separately dealt with in the judgment or considered by the court. The factual chronology of events as set out in the judgment has not been attacked. I find that on the facts, whatever angle or slant they are looked at, there is no reasonable prospect of success on appeal available to Diale Mogashoa Inc, whether treated separately or jointly with the other Applicants. The point which I had dealt with in paragraphs 5.4 to 5.6 of the judgment still has no answer. <u>The reasoning set out in paragraph 4.3 above again illustrates this: whether the files are to be returned in terms of the SLA's, or whether the files are to be returned once the SLA's lapse through the effluxion of time or whether the SLA's are, as contended by Diale Mogoshoa Inc unlawful, Diale Mogoshoa Inc has no right to refuse to hand the RAF's files back to it</u>. There is no scope for a finding of a reasonable prospect of success of an appeal against this inevitability, whatever the slant put on the facts."

17.

The consequence of the order of this Honourable Court is that the RAF has no alternative to use attorneys to litigate matters which it no longer wishes to do. The RAF no longer wishes to take legal advice from this panel of attorneys who refuse to accept the cancellation of their mandate to represent a client in Court. In the LSSA's affidavit[9] the argument is advanced that the RAF now simply has the right to retain the ability to instruct attorneys *"it needs to. The RAF does not have to use their services, <u>because it can settle matters on its own without involving panel attorneys</u>."*[10] They further state that

---

[9] Para. 47

[10] Para. 47 *"By retaining its panel of attorneys in the interim, the RAF does nothing more than retain the ability to instruct attorneys if it needs to. The RAF does not have to use their services, because*

> *"the RAF has all the information it requires to settle matters, alternatively it can instruct panel attorneys to settle matters on its behalf"*[11].

18.

If this was the true state of affairs the Applicants should have no complaint about handing over the files and to await instructions from the RAF should it become necessary and then only in the discretion of the RAF and not under the duress. Paradoxically in the FourieFismer application it is stated that:

> "*[the First Respondent] is now settling its pending litigious matters directly with plaintiff attorneys and counsel, bypassing the panel attorneys (who remain the attorneys of record in those matters altogether"*[12]

On the one version, the RAF does not need to use attorneys. On the other hand, when the RAF does not use attorneys it is criticized[13].

---

it can settle matters on its own without involving panel attorneys. Indeed, in its application for leave to appeal, the RAF complains that "the Learned Judge has ignored the fact that the RAF can settle claims on their own without the need for panel attorneys." Further, and as has been well documented in these proceedings – 47.1 panel attorneys are only paid when their services are required, and are not fixed cost to the RAF; … 47.4 the RAF has all the information it requires to settle matters, alternative it can instruct panel attorneys to settle matters on its behalf"

[11] Para. 47.4

[12] Para. 39.

[13] *"What the Applicant want(s) to do, in truth, is hold the RAF's feet to the fire and force it to keep paying them huge sums of money where the RAF tells the Court it cannot afford to do so, the underlying contract between the RAF and the applicants has lapsed, and the RAF tells the Court it can still provide the services the applicant used to." "Third, the RAF agrees this dispute between the parties should not be allowed to prejudice the general public. However, it is the conduct of the attorneys that is prejudicing the general public. The RAF would very much like to go on about its business of settling the claims it is faced with and clearly the backlog of cases – but it cannot do this when its new model is being frustrated by attorneys whose only interests is in their own pockets. Even if their opposition to that change were understandable, the fact that the panel of attorneys goes so far as to exercise a right of possession over the RAF's files is nothing other than "*self-help".

19.

Astonishingly, new relief is further sought in this application. *Inter alia* an order is sought that the RAF may only brief the panel of attorneys in third-party matters[14]. If leave to appeal is granted, this would force the RAF (despite leave being granted) to only to brief those attorneys for years to come. The financial implications of such an order would be enormous. The Davis judgement in this regard is again indicative hereof. The effect is clear from the following statement[15]

> "In order to attain the abovementioned objectives, the RAF came to the realization that it must drastically adopt a different model than the previously utilised "counter-productive legal strategy". To continue therewith, was to increase the RAF's exposure to claimants on a virtually daily basis whilst at the same time increase its insolvency, all at the expense of the public purse. Should the old litigation model (including the retention of a panel of attorneys) be retained many, including Board members, had warned that the RAF then risked going down the path envisaged in section 21(2)(a) of the RAF Act, which comes into operation when the RAF becomes unable to pay claims against it. The consequence thereof would be dire for claimants as it would terminate the RAF's position as statutory defendant for claims arising out of the driving of a motor vehicle and would re-institute the common law position. The "insured driver" as it is now known, would ceased to be insured leaving claimants with huge claims against impecunious defendants."

20.

The order proposed would even prohibit the RAF from appointing in-house attorneys, referring matters to the State Attorney, and briefing its corporate attorneys involving matters of principle or corporate affairs, effectively making the agreements that have been

---

[14] Para. 58 of the FourieFismer application *"58. As part of this application, the applicants seek an order directing that pending the final determination of the applications for leave to appeal or appeals, the RAF may only use the services of the panel attorneys as at the launch of the FourieFismer review application in third-party matters."*

[15] Para. 3.19

signed with the GEPF unworkable. In fact the order would effectively severely hamper the RAF's Access to Courts.

21.

There are references in the papers, that the Applicants are of the view that it is interlocutory and therefore the application for leave to appeal does not suspend the operation thereof. The Honourable Court made a definitive pronouncement on the rights of the RAF in a Constitutional context. The effect is permanent for the foreseeable future. The order can even be further extended for years[16].

22.

The Courts have given pronouncement on "*appealability"* in the context that the interest of justice is paramount. Similarly the interest of justice where such pronouncement are made allow that such definitive orders must also be suspended and be regarded as final (at least for the foreseeable future). In Philani-Ma-Afrika and Others v Mailula and Others[17] the Supreme Court of Appeal *inter alia* stated that

> [20] It remains for me to deal with the issue referred to this court by the Constitutional Court. The application was brought in the Constitutional Court because it was believed that the execution order was not susceptible to appeal to the full bench of the High Court or to this court. That belief was erroneous. It is clear from such cases as S v Western Areas Ltd and Others 2005 (5) SA 214 (SCA) (2005 (1) SACR 441) in paras 25 and 26 at 226A - E <u>that what is of paramount importance in deciding C whether a judgment is appealable is the interests of justice</u>. See also Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) in para 8 at 411A - B. <u>The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be regarded as appealable in the interests of justice</u>."

[16] As alluded to by the Applicants.
[17] 2010 (2) SA 573 (SCA)

23.

In Nova Property Group Holdings Ltd and Others v Cobbett and Another[18] the principle of *"interest of justice"* was reiterated:

> "[8] On the test articulated by this court in Zweni v Minister of Law and Order, the dismissal of an application to compel discovery, such as by the court a quo, is not appealable as it is (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the B parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. However, three years later in Moch v Nedtravel this court held that the requirements for appealability laid down in Zweni '(d)o not purport to be exhaustive or to cast the relevant principles in stone'. Almost a decade later, in Philani-Ma-Afrika v Mailula, this court considered whether an execution order (which put C an eviction order into operation pending an appeal) was appealable. It held the execution order to be appealable, by adapting — 'the general principles on the appealability of interim orders . . . to accord with the equitable and more context-sensitive standard of the interests of justice favoured by our Constitution'. D In so doing it found the 'interests of justice' to be a paramount consideration in deciding whether a judgment is appealable.
>
> [9] It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. E The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a F resolution of the seemingly conflicting decisions in La Lucia Sands v Barkhan and Bayoglu v Manngwe, on the one hand, and A Basson v On-Point Engineers and Mail & Guardian Centre for Investigative Journalism v CSR E-Loco, on the other."

> "[11] Rule 35(14) provides that a party may, for purposes of pleading, require any other party to make available for inspection, within five days, a clearly specified document or tape recording in his possession 'which is F relevant to a reasonably anticipated issue in the action', and to allow a copy or transcription to be made of it. In the context of this appeal, the Companies are required to demonstrate that the documents are relevant to a tenable ground of opposition to the main application. Since the Companies seek to compel discovery for the purpose of interrogating the 'real motives' of Moneyweb for requesting access to their securities G registers, in terms of s 26 of the Companies Act, the question of the 'relevance' of the documents sought would be integral to the interpretation of s 26(2) of the Companies

[18] 2016 (4) SA 317 (SCA)

> Act. It is important to bear in mind, in this respect, that, although the court a quo did not decide the main application, it did pronounce on the proper interpretation of s 26(2) of the Companies Act in deciding whether to grant the interlocutory relief sought H by the Companies. Before us, therefore, the parties in essence accepted that if the court construes s 26(2) of the Companies Act to confer an unqualified right of access to the securities register of a company, then Moneyweb's 'motives' for requesting access to the registers would be irrelevant to the main application, and it would be entitled to an order compelling compliance with s 26(2) of the Companies Act, I thereby resolving the 'real issue' in the main application, as envisaged in s 17(1)(c) of the Superior Courts Act. On this basis, A therefore, Moneyweb was constrained to concede that the judgment of the court below, although not appealable under the traditional Zweni test for interlocutory applications to compel discovery, would be appealable under s 17(1) of the Superior Courts Act."

24.

In the Constitutional Court judgement of the EFF v Gordhan and Others Public Protector and Another v Gordhan and Others [2020] ZACC 10 the principle of *"interest of justice"* was again confirmed:

> "The law concerning the appealability of interim interdicts is settled. Interim interdicts are generally not appealable.48 This is because interim interdicts are not final in nature; they are not determinative of the rights of the parties and do not have the effect of disposing of a substantial portion of the relief claimed.49 However, these reasons are not exhaustive.50 There are various other sound policy reasons for the general non-appealability of interim interdicts. One of these is that appeals are not entertained in a piecemeal fashion, as that would prolong the litigation, resulting in the wasteful use of judicial resources and incurrence of legal costs.51 However, an interim order may be appealed if the interests of justice so dictate.52 Accordingly, the paramount test for the appealability of a particular interim interdict is whether it would be in the interests of justice for that interim interdict to be appealed in light of the facts of its specific case.53 As stated in *South Cape Corporation*, a court has a wide general discretion in granting leave to appeal in relation to interim interdicts.54 The appropriate test for the appealability of an interim interdict was perspicuously laid out by Moseneke DCJ in *OUTA* where he affirmed that— "[t]his Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."55 Accordingly, in determining what the interests of justice demand, a

court must have regard to, and carefully weigh, all relevant circumstances and factors. Undoubtedly, the relevant factors will differ based on the facts of each case. These non-exhaustive factors include:

(a) The kind and importance of the constitutional issue raised;

(b) the potential for irreparable harm if leave is not granted;

(c) whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;

(d) whether there are prospects of success in the pending review;

(e) whether, in deciding an appeal against an interim order, the appellate court would usurp the role of the review court;

(f) whether interim relief would unduly trespass on the exclusive terrain of the other branches of government, before the final determination of the review grounds; and

(g) whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs."

25.

In the matter of Black Sash Trust v Minister of Social Development and Others (2017) ZACC 8 the Court *inter alia* stated the following regarding "*just and equitable"* relief that is granted:

"[42] SASSA failed to honour its assurance to this Court that it will be in a position to make payment of social grants after 31 March 2017. It an CPS failed to timeously conclude a lawful contract to provide for that payment. These circumstances provide a different context for the enforcement of a just and equitable remedy from that obtained when we made the remedial order in AllPay2. The context then was a breach of the constitutional and legislative framework for fair, equitable, transparent, competitive and cost-effective procurement. The constitutional defect here lies elsewhere.

[43] The primary concern here is the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution. It is that threatened breach that triggers the just and equitable remedial powers the Court has under section 172(1)(b)(ii) of the Constitution, not only the potential invalidity of the proposed new contract that SASSA and CPS seeks to conclude. The need to intervene under these and similar circumstances was aptly captured by Mogoeng CJ in Mhlope in these terms:

> *"It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted . . . ."*

[44] This Court's extensive powers to grant a just and equitable order also permit it to extend the contract that would otherwise expire on 31 March 2017. Since the contract was declared invalid in AllPay 1, if we extend the contract, it will be necessary to also extend the declaration of invalidity and the suspension of that declaration for the period of extension of the contract. In Allpay 2 we tied up the suspension of the declaration of invalidity to the period of the invalid contract. That was done, in order "to allow the competent authority to correct the defect" and to avoid disrupting the provision of crucial services that it was constitutionally obliged to render."

"[51] It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one."

<u>CONCLUSION:</u>

26.

The RAF moves for an order that the applications under case number 18239/2020, 15876/2020 and 17518/2020 be dismissed with costs, that the additional relief sought in the FourieFismer application be dismissed with costs, that the additional relief sought in the Diale application be dismissed with costs and that costs include the costs of two counsel, one of which is a senior counsel.

CEDRIC PUCKRIN SC
R SCHOEMAN