

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 15876/2020

17518/2020

18239/2020

Heard on: 5 August 2020

Date of judgment: 18 August 2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED
18/08/20
DATE
SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND

First Appellant

THE CHAIRPERSON OF THE BOARD OF THE

ROAD ACCIDENT FUND

Second Appellant

ACTING CHIEF EXECUTIVE OFFICER

OF THE RAF

Third Appellant

and

MABUNDA INC AND 42 OTHERS

Respondent

(case no.15876/2020)

THE LAW SOCIETY OF SOUTH AFRICA.

Intervening Party
(case no. 15876/2020)

FOURIEFISMER INC AND TWO OTHERS

Respondent
(case no. 17518/2020)

MAPONYA INC.

Intervening Party
(case no. 17518/2020)

DIALE MOGASHOA INC.

Respondent
(case no. 18239/2020)

THE MINISTER OF TRANSPORT

Fourth respondent
(case no. 17518/2020)

JUDGMENT

THE COURT:

INTRODUCTION

[1] This is an appeal in terms of section 18 (4) of the Superior Courts Act, 2013 (*“the Act”*), afforded to the appellants as of right (an automatic appeal), against the carrying into execution of an order of Hughes J in terms of section 18 (3) of the Act. The main protagonist in these three matters before us is the first appellant, the Road Accident Fund (*“the RAF”*) which is a juristic person created in terms of the Road Accident Fund Act, Act 56 of 1996 (*“the RAF Act”*), with the objective of *“the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles”*.¹ The

¹ Section 3 of the RAF Act

second and third appellants are the Chairperson of the Board of the RAF and the Acting Chief Executive Officer (“ACEO”) respectively.

[2] *Mabunda, Fouriefismer, and Diale Mogoshoa*, the respondents in this appeal, together with 41 other applicants in the *Mabunda* application, are all firms of attorneys who have until the end of May 2020 served on the so-called ‘RAF panel’ (“*the panel attorneys*”), by virtue of service level agreements (“SLA’s”) entered into between the panel attorneys and the RAF. The SLA’s were entered into between the panel attorneys and the RAF pursuant to a tender process which culminated in the appointment of approximately 103 attorney’s firms to act for the RAF in 2014 for a period of five years and were due to expire on 25 November 2019. The panel attorneys have, until recently, represented the RAF in all matters in which summons was issued against it for damages resulting from injuries sustained in motor vehicle accidents. The Law Society of South Africa (“LSSA”) has been joined as *amicus curiae*, and it also opposes this appeal.

BACKGROUND

[3] It is no secret that the RAF has been operating on a deficit for a number of years, where the claims and legal costs it was obliged to meet far exceeded its income, and it seems to be common cause that for some time it has been factually insolvent. For that reason, and during or about 2019, the RAF started contemplating an alternative operating model to achieve its statutory objectives within the financial constraints placed upon it. One of the main expenditures of the RAF (although not the largest) is the fees paid to panel attorneys for work

done on behalf of the RAF. It has been estimated that the RAF pays approximately R 3.4 billion to panel attorneys annually. The RAF has determined that its current operating model is unsustainable. It consequently decided not to renew the services of its panel attorneys, by either settling directly with claimants, or by utilizing the services of inhouse RAF attorneys and that of the state attorney to deal with those matters that cannot be settled. Whether this decision was sound or not is a matter of some debate between the parties, and whilst the RAF is of the view that it can successfully implement the proposed operating model, the respondents argue vehemently that the model cannot succeed.

[4] Nevertheless, an attempt was made to implement the model. On 25 July 2019 a “hand-over” letter was sent to the panel attorneys reminding them that the SLA’s were due to expire on 25 November 2019, and requesting the handover of all unfinalized files. The panel attorneys did not comply with the RAF’s instruction. The RAF suspended the hand-over process on 20 September 2019. 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. Eighty Four of the panel attorneys signed the addenda (*“the second addendum”*), resulting in the validity period of their SLA’s being extended to 31 May 2020, evidently in order to afford the RAF sufficient time to implement its new operating model. The second addendum also varied the terms of the SLA’s in certain respects. Respondents allege that they were coerced into accepting the extension and variation of the SLA’s, and on that basis they attacked the validity of the second addendum in the Court *a quo*.

[5] On 30 November 2019 the RAF published a tender no. RAF/2018/00054 (*“the tender”*), in which it sought bids for the appointment of a new panel of attorneys for the following five years.

[6] On 5 December 2019 the interim Board of the RAF was replaced by a permanent Board and on 12 December 2019 the new Board received a presentation which included an overview of the affairs of the RAF, its financial status and challenges, and of the need for the development of a strategic plan for the future. This led to further meetings and on 31 January 2020 the discussions culminated in the Board approving a new strategic plan, and a new operating model. Central to the plan was the need to reduce legal costs, to settle new claims within 120 days, and to reduce the number of old claims.

[7] On 18 February 2020 the RAF notified its attorneys by letter that they were required to return all open files to the RAF. The letter also set out a schedule of dates by which the files were to be returned. On 20 February 2020, evidently as a result of complaints about the time frames set out in its first letter, the RAF sent out a further letter in which new time frames were determined, and in which attorneys were reminded of their obligation to comply with clause 14.4.7 of the SLA in regard to reporting to the RAF on each matter. This clause requires the panel attorneys to ensure that each file contains an opinion on the merits of the case, an opinion on quantum, an analysis of the areas of dispute, the stage of the pleadings, the current status of the matter, and any recommendations that the attorney may have.

[8] On 26 February 2020 the RAF cancelled the tender published on 30 November 2019. The cancellation was conveyed to potential bidders by letter, under the signature of the Acting Chief Financial Officer of the RAF.

[9] The respondents took the view that the RAF had acted unlawfully in that:

- (a) The decision to terminate the services of the panel attorneys and to demand the return of the open files was irrational and thus liable to be set aside and reviewed;
- (b) The cancellation of the tender on 26 February 2020 was unlawful and liable to be reviewed and set aside;
- (b) The existing panel attorneys should continue to render services to the RAF in accordance with the SLA's.

[10] These decisions were referred to by the respondents as "*the impugned decisions*".

THE HISTORY OF THE LITIGATION

[11] On 17 March 2020 *Mabunda* and 41 other attorneys' firms brought an urgent application before Davis J. In Part A, *Mabunda* sought an interdict restraining the RAF "*from implementing and/or giving effect to its notices of handover addressed to the applicants and all panel attorneys..... dated 18 February 2020 and 20 February 2020 respectively.*" The LSSA, and the Black Lawyers Association were granted leave to intervene as *amicus curiae*. The *Diale* application was later consolidated with the *Mabunda* application.

[12] In Part B of the applications, *Mabunda* sought the review of the decision to demand a handover of the unfinalized files, and *Diale* sought a review of the decision to cancel the tender as well as a mandamus that the tender process should continue.

[13] Davis J relied on the following *dictum* in *Government of South Africa v Thabiso Chemicals*² to find that the relationship between the RAF and its panel attorneys is governed by contract:

“What remains are observations originating from comments by the court *a quo* which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the Tender Board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these comments by the court *a quo*, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law”

[14] Davis J also pointed out that a decision to cancel a tender was an executive act, and not an administrative one, and that it is thus not reviewable in terms of the Promotion of Administrative Justice Act, 2000 (“PAJA”).³ He held that the setting aside of a decision to cancel a tender can only be based on the

² 2009 (1) SA 163 (SCA) at par. 18

³ See: *City of Tshwane Municipality v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA)

principle of legality. Part B of the applications attacked the cancellation of the tender on the basis of legality. As Part B was to be heard by another Court, Davis J declined to engage with the decision to cancel the tender. He held that the SLA's were going to terminate on 31 May 2020 by the effluxion of time. In the *interim*, and until the cancellation was reviewed and set aside, the decision to cancel the tender stood, and, so Davis J held, the RAF was entitled to exercise its contractual right to demand the handover of its files. Therefore, none of *Mabunda* and *Diale*'s rights had been infringed. In the absence of a *prima facie* right though open to some doubt, the application for an interdict was dismissed.

[15] Before the Court *a quo* three applications were heard simultaneously:

- (a) Part B of the application under case number 15876/2020, the "*Mabunda* application";
- (b) Part B of the application under case number 17518/2020, the "*Fouriefismer* application"; and,
- (c) The application under case number 18239/2020, the "*Diale* application.

[16] Hughes J summarized the relief sought by the various applicants as follows:

- "(a) That the decision of 18 and 20 February 2020 calling upon the panel attorneys to hand over their files which are not finalized be reviewed and set aside as constitutionally invalid;

- (b) That the cancellation of tender RAF/2018/00054 on 26 and 28 February 2020 be reviewed and set aside and declared unconstitutional and invalid;
- (c) That the decision of the RAF to dispense with the services of the panel attorneys from 1 June 2020 be reviewed and set aside as constitutionally invalid;
- (d) That the panel attorneys continue to service the RAF until 30 June 2020, or until the RAF has appointed a panel of attorneys in terms of the tender RAF/2018/00054, or until appointments are made arising from a fresh tender process.”

[17] It was common cause between the parties that the relationship between the RAF and the panel attorneys arose from SLA's entered into in 2014 pursuant to a tender process, and that the SLA's were due to end by the effluxion of time in November 2019. The RAF then presented the panel attorneys with a choice, either to accept the termination of the contractual relationship, or to enter into the second addendum which extended the SLA's until 31 May 2020, albeit on somewhat different terms.

[18] It was also common cause that during November 2019 the RAF published a request for bids under tender no RAF/2018/00054, and that on 26 February 2020 it cancelled the tender. On 18 and 20 February 2020 the RAF, anticipating the end of the SLA's on 31 May 2020, and requested the return of their files according to specific time frames.

[19] *Fouriefismer* contended that the three impugned decisions, the decision to do away with the panel, the decision to demand the return of the files, and the cancellation of the tender, constituted administrative action which was

subject to review under PAJA. In the alternative, they contended that the decisions involved the exercise of a public power, and was thus subject to the principle of legality. The contention was that the decisions were irrational and would infringe on the rights of motor vehicle accident victims. It was also contended that the cancellation of the tender was not authorized by the Board.

[20] The other applicants and intervening parties (*Maponya, Diale and Mabunda*) took much the same approach.

[21] The Court *a quo* first dealt with the question of the extension of the SLA's by way of the second addendum. In respect thereof, the Court *a quo* held that the RAF was obliged, in extending the contract, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as section 217 of the Constitution demands. It found that the process had not been fair and transparent and that the second addendum was thus invalid and unlawful. The Court *a quo* did not declare the second addendum to be unconstitutional, nor did it set it aside. Nevertheless, the Court *a quo* accepted that the SLA's had been extended to 31 May 2020.

[22] As far as the handover notices were concerned, the Court *a quo* held that the issuing of the notices constituted administrative action which required that a fair and transparent process be followed by the RAF, in accordance with its public duty to the panel attorneys. The Court held that the Board had not mandated the issuing of the notices, and that their dissemination to the panel attorneys had thus been unlawful.

[23] Furthermore, the Court *a quo* held that the cancellation of the tender was also an administrative decision, and it criticized the fact that the Board had not mandated the cancellation before the cancellation was conveyed to prospective bidders. The Court *a quo* held that the first notice to cancel did not provide reasons for the cancellation, whilst the second notice had provided reasons but which the Court *a quo* considered to be inadequate. For those reasons both notices were held to be invalid.

[24] The Court *a quo* then considered the rationality of the aforementioned decisions. The Court pointed out that due to the litigious nature of the business of the RAF, the services of attorneys would no doubt be required in future. However, it believed that the “conundrum” that the RAF found itself in was that it could not cancel the services of the panel attorneys and then appoint other attorneys to do the same work, as that would contradict the very reason for the cancellation of the panel in the first instance. For that reason, the Court *a quo* believed the decision to do away with panel attorneys and to demand the return of the files to be irrational and thus unlawful. Significantly, the decision to do away with panel attorneys was not held to be unlawful.

[25] Having held that the notices to hand over the files, and the decision to cancel the tender were unlawful, the Court *a quo* exercised its authority in accordance with the provisions of section 172 of the Constitution, 1996, which reads as follows:

“172. Powers of courts in constitutional matters

1. When deciding a constitutional matter within its power, a court

- a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- b. may make any order that is just and equitable, including
 - i. an order limiting the retrospective effect of the declaration of invalidity; and
 - ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[26] On 1 June 2020 the Court *a quo* granted an order in the following terms (*“the first order”*):

- “1 The forms, service and time period prescribed by the Uniform Rules of Court are dispensed with and the applications are heard as one of urgency in terms of rule 6 (12) of the Uniform rules of Court.
- 2. The intervening party is joined as 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. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.
- 5. This order shall operate for a period of six (6) months from the date of this order.
- 6. The respondents are ordered to pay the costs of the review application on a party and party scale, jointly and severally.

7. Such costs are to include the costs of two counsel for each legal team where so employed.”

[27] Evidently, the first order left the parties in a quandary. The decision by the RAF to implement a different model and to do away with panel attorneys, which was the underlying cause of the later decisions, was not set aside and thus it remained in place. The second addendum for the extension of the SLA's was held to be invalid, but was not set aside. It seemed clear that the parties were uncertain as to the effect of the first order, because *Fouriefismer* brought an application in terms of rule 42 (1) (b) of the Uniform Rules of Court for the variation of the first order by the addition of the following orders:

- (a) That the second addendum be set aside;
- (b) That the decision to demand the handover of the files be set aside;
- (c) That the decision to cancel the tender be set aside;
- (d) That the RAF be directed to proceed with the award of a new tender for panel attorneys;

[28] On 9 June 2020, pursuant to the rule 42 (1) (b) application the following additional relief was granted (*“the second order”*):

- “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.”

[29] On 3 June 2020 the appellants delivered an application for leave to appeal against the judgment and first order of the Court *a quo*. The application was dismissed on 17 July 2020.

[30] In the *interim*, on 17 June 2020, *Fouriefismer, The Pretoria Attorneys' Association and Maponya* (“*the applicants*”) launched an application in terms of section 18 (3) of the Act for leave to carry the first and second orders into execution pending the appeals process. In addition to the relief sought in terms of section 18 (3), they sought an order that pending any appeals, the RAF was precluded from using the services of any attorneys other than those that were on the RAF panel as at 10 March 2020, which was granted (“*the extended order*”). Having heard the parties, the Court *a quo* granted the following order⁴:

- “(a) The LSSA is granted leave to intervene in the *Mabunda* application;
- (b) The respondents are granted condonation for the late filing of their answering affidavit.
- (c) In terms of section 18 (3) of the Superior Courts Act 10 of 2013 pending the outcome of the applications for leave to appeal or appeals by the respondents,
- (d) The order of the 1st of June 2020 varied on 9 June 2020 is operational and given effect to.
- (e) Pending any applications for leave to appeal or appeals in respect of the Road Accidents Fund’s (RAF) the use of attorneys specifically in dealing with personal injury claims against under the Road Accident Fund Act 56 of 1996, the Road Accident Fund may only use the services

⁴ The order has been quoted verbatim

of the attorneys' firms (panel attorneys) which were on the Road Accident Fund panel as at 10 March 2020.

- (f) The respondents are to pay the costs jointly and severally. Such costs to include the cost of two counsel where so employed. No costs order is made against the Minister of Transport.”(sic)

SECTION 18 (3) OF THE SUPERIOR COURTS ACT, 2013 – The test and the approach to be taken

[31] Section 18 (1) to (3) of the Act reads as follows:

“18 Suspension of decision pending appeal

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

[32] The introduction of Section 18 heralded a significant departure from the common law where the prevailing position was that even though generally an application for leave to appeal had the effect of suspending the operation of the

order appealed against, the Court retained a wide discretion whether to allow execution or not.⁵ It was held in *South Cape Corporation* (*supra* at 545 B) that:

“The purpose of this rule as to the suspension of a judgment on the noting of appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.....”

[33] Section 18 of the Act brought with it a more stringent and onerous measures for the implementation of orders pending appeal. The provisions of section 18 (3) were elegantly summarized by Sutherland J in *Incubeta Holdings (Pty) Ltd v Ellis*⁶:

“It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- * First, whether or not 'exceptional circumstances exist; and
- * Second, proof on a balance of probabilities by the applicant of-
 - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
 - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.”

[34] The question as to what constitutes exceptional circumstances was canvassed by Sutherland J in *Incubeta* (*supra* at par. 22):

⁵ *South Cape Corporation (Pty) Ltd v Engineering Management Services* 1977 (3) SA 534 (A)

⁶ 2014 (3) SA 189 (GJ); *Incubeta* was affirmed in *University of Free State v Afriforum and another* [2017] 1 ALL SA 79 (SCA) and *Ntlemenza v Helen Suzman Foundation and another* [2017] 3 ALL SA 589 (SCA);

“Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be ‘exceptional’ must be derived from the actual predicaments in which the given litigants find themselves.”

[35] In addition the Court also made reference with approval to the comprehensive overview of exceptionality expounded upon in *MV Ais Mamas*⁷ in the following terms :

“What does emerge from an examination of the authorities, however, seems to be the following:

1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or especially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by

⁷ 2002 (6) SA 150 (C) 156I – 157C

applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.” (emphasis provided)

[37] This was also the departure point utilised by the Court *a quo* in its determination of exceptional circumstances. Of course the summation of the Court in *MV Ais Mamas* was not in the context of Section 18 but may well be of general universal application with the necessary caution that in each case context remains an important determinant of what would constitute exceptional circumstances.

[38] It therefore follows that an applicant in a Section 18 (3) application who seeks a deviation from the default position that an appeal stays an order and who seeks to do so before the last Court has made a determination does indeed face a significant evidential burden to overcome. Section 18 has in effect removed the equitable discretion the Court had under the common law and replaced it with a fact specific determination that in significant part is not predicated on an even handed approach in relation to harm but rather one that is heavily slanted in favour of the party who faced operationalizing of the order.

[39] In this regard the Court in *Incubeta (supra)* also made two significant observations which in our view clearly reflect the characterization of the new dispensation that Section 18 introduced and they are :-

- (a) The putting into operation of an order pending appeal constitutes a deviation from the default position based on the rationale that generally speaking, finality must await the last court's decision and

(b) The test in so far as it relates to irreparable harm is not about an even handed approach as to who will be worse off if the order was operationalized but rather that if the loser who appeals will suffer irreparable harm if the order was put into operation, the order must remain stayed. This is what the Court referred to as the 'hierarchy of entitlement'.

PROSPECTS OF SUCCESS

[40] An issue which had attracted some difference of view in principle and approach was whether the prospects of success on appeal should be considered in a section 18 (4) appeal. In *Incubeta Holdings (supra)* Sutherland J was of the view that the prospects of success on appeal are not relevant to the question at hand. The same view was held in *Liviero Wilge Joint Venture & another v Eskom Holdings Soc Ltd*⁸. However, the opposite view was taken by Binns-Ward J in *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another*⁹ and in *Joubert v Joubert*¹⁰.

[41] This issue has now become settled. In *University of the Free State v Afriforum*¹¹ the Supreme Court of Appeal held that:

"I am in agreement with the approach of Binns-Ward J. In fact, Justice Alliance serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief."

⁸ [2014] ZAGPJHC 150

⁹ [2016] ZAWCHC 34

¹⁰ Gauteng Provincial Division case no. A357/2018 (delivered 14 December 2018)

¹¹ 2018 (3) SA 428 (SCA)

[42] The Court also endorsed the position taken in *Justice Alliance*:

‘... the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. Those same considerations would apply when a court deals with an appeal against an order granted in terms of s 18 (3).’

[43] One should, however, be mindful of the fact that while the prospects of success on appeal cannot be ignored, an appeal against the finding of the Court *a quo* is pending, and it is not the function of this Court to pre-empt the appeal. This conundrum was alluded to in *Ntlemeza v Helen Suzman Foundation and another*¹²:

“In adjudicating the application for leave to execute the principal order the High Court considered General Ntlemeza’s prospects of success on appeal in relation to the finding that his appointment was unlawful. It concluded that the findings by Matojane J which reflected negatively on General Ntlemeza were a major obstacle for him to overcome and held that his prospects of success were “severely limited”.

In UFS, this Court, after considering that Incubeta had held that the prospects of success in the pending appeal played no part in deciding whether to grant the application, preferred the contrary approach of the court in *The Minister of Social Development Western Cape and others v Justice Alliance of South Africa and another (WCC)*, unreported, case number 20806/13 (1 April 2016) [reported at [2016] JOL 35612 (WCC) – Ed]. However, in UFS, in deciding the matter before it, this Court recorded that the review record was not before it and thus had no regard to the prospects of success. We are in the same position in the present

¹² [2017] 3 ALL SA 589 (SCA)

appeal. As in UFS, but more so, because of the application for leave to appeal the principal order pending in this case, before us the question of prospects of success recedes into the background. As stated at the commencement of this judgment, section 18 has now had as a consequence the curious and ostensibly undesirable position that there are two appeal processes in one appeal court in relation to the same case.”

[44] Therefore, in appropriate cases, and without being definitive on the prospects of success or otherwise on appeal, the Court may well have regard to those prospects and the stronger the prospects of success the less likely the prospect of the granting of exceptional relief while on the other hand weak prospects may well be a factor, taken together with the other factors that require consideration, that could trigger the grant of exceptional relief.

[45] Whilst we accept that the appeal is to be heard by another Court, to the extent that we may have regard to prospects of success, we cannot say that they are weak. On the contrary, this case engages significant legal issues, including the relationship between administrative law and the law of contract insofar as an organ of state is concerned, the nature of the attorney/client relationship, as well as the question to what extent the RAF, as the largest litigator in the country may be constrained in the exercise of its mandate. Ultimately, however, the prospects of success on appeal have no bearing on the conclusion that we have reached.

RES IUDICATA

[46] The appellants contended that the arguments raised and the causes of action and facts relied upon by the panel attorneys for the Part A relief before

Davis J and the arguments advanced in the section 18(3) applications, were identical or substantially similar. They argued that the requirements for the Part A relief, being an *interim* interdict, particularly the requirement of irreparable harm, overlap with the requirements for a section 18(3) order. They contend that the same arguments were dismissed by the Pretoria High Court (Davis J) and thereafter the Pretoria High Court considered those same arguments as valid (Hughes J). Thus they say, the court *a quo* erred as it ought to have dismissed the application based on *res judicata* and issue estoppel.

[47] The first point made by the respondents in respect of this argument is that this issue was never raised in the court *a quo* and that the appellants should be precluded from raising it at all. There is merit in this objection as Hughes J did not deal with this argument in her judgment and there was one oblique reference to this in the papers but the respondents have nonetheless put this point to bed persuasively and we accordingly deal with it briefly.

[48] The cause of action and relief claimed before Davis J was in the form of an *interim* interdict. The requirement which the appellants contend overlaps with the section 18(3) test, is that of irreparable harm and it is in respect of this requirement that the court was bound by the findings of Davis J.

[49] A structural analysis of Davis J's judgment reveals that, of the 4 requirements of an *interim* interdict¹³, he only deals with 2 being a *prima facie*

¹³ *Setlogelo v Setlogelo*, 1914 AD 221 at 227

right and the balance of convenience. He does not deal with the requirement of irreparable harm at all.

[50] An applicant in a section 18(3) application must show exceptional circumstances and must prove on a balance of probabilities that she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[51] The irreparable harm requirement in an application for an *interim* interdict is met if a reasonable person, confronted by the facts, would apprehend the probability of harm. Actual harm need not be established upon a balance of probabilities and thus on the face of it, the test seems less stringent.¹⁴

[52] Davis J was not required to apply the same standard of proof to the question of irreparable harm but as stated, he did not consider the question at all as he had found that the panel attorneys had not established a *prima facie* right.

[53] Insofar as he did consider some overlapping facts in dealing with the balance of convenience, Davis J had an incomplete picture. Subsequent to him hearing the matter, the rule 53 record was obtained, additional affidavits were filed, as is the want in review applications, and the section 18(3) application itself was filed which placed a host of additional facts before Hughes J. An argument based on issue estoppel cannot succeed because the two courts

¹⁴ *McIlongo NO v Minister of Law and order and Others*, 1990 (4) SA 181 (E) at 184J – 185E

relied on different sets of facts and time periods. For these reasons we are not persuaded that an argument on either *res iudicata* or estoppel is sustainable.

THE SECTION 18 (3) APPLICATION BEFORE THE COURT A QUO

[54] Appellants' application for leave to appeal was ultimately unsuccessful, and appellants have now petitioned the Supreme Court of Appeal for leave to appeal. Respondents took the view that the inevitable delay in implementing the order whilst the appeal was pending would negate the purpose of the order, and accordingly respondents sought an order in terms of section 18 (3) which the Court *a quo* granted.

[55] Section 18(4)(i) of the Act provides that a Court that grants an order putting into operation an order pending an appeal must record its reasons for doing so. It may then be useful, both as a starting point but also an ongoing point of reference, to have regard to those reasons as they appear in the judgment in the Section 18(3) application and evaluate both the cogency of the conclusions arrived at, as well as whether in their nature, they would trigger both the requirements of exceptional circumstances and irreparable harm. We deal with these two parts of the test separately.

The disconnect between the orders and the harm to be averted

[56] Before dealing with the content of exceptional circumstances and irreparable harm we consider what we have termed the disconnect between the order made in terms of Section 18(3) and the harm sought to be averted by operationalising the order. The main thrust of the Respondents argument in this

appeal was that the civil trial roll was in chaos and the judicial system was in disarray, largely because the RAF was not represented in court proceedings . That was characterised as constituting part of the exceptional circumstances by the Court a quo and in its view also translated into irreparable harm justifying the relief it granted in terms of Section 18(3) .

[57] Therefore we must assume that if the relief granted in the Section 18(3) was to succeed in avoiding irreparable harm it would have to remedy the mischief that it was intended to address, and that squarely was the lack of representation of the RAF in the civil trials before our courts. The argument was that if RAF was represented in those matters there would be order, and prejudice to claimants and others would be avoided.

[58] The order of the 1 June as amended and put into operation by the Court a quo would however not achieve this effect in that nowhere in those orders is there an obligation created on the part of the RAF to ensure it is represented in the civil trial courts in personal injury matters. What the orders granted do is to retain the Respondents on the RAF panel exclusively with the proviso that if the RAF decided to use attorneys, it is bound to only use the panel attorneys.

[59] Under those circumstances, where RAF can still elect whether it wishes to have any representation at all in civil trials the order, with respect, does not address the harm that it is intended to rectify. If the RAF elects not to be represented in court but to settle matters using its staff, the crisis that the Respondents say has arisen will persist and the orders made will serve no purpose.

Exceptional Circumstances

[60] In its judgment the Court found in support of the existence of exceptional circumstances that:

a) the RAF was deliberately failing to adhere to the Court's order even in respect of work done prior to the 1st of June 2020:

(i) The Court set out in some detail the conduct of the RAF from the 1st of June 2020 and thereafter and included: communications to experts, panel attorneys and claims handlers that the RAF was proceeding with its new model of doing work and that the services of panel attorneys would no longer be required; that experts would only be paid if they took instructions directly from the RAF; meetings between the RAF and attorneys other than panel attorneys for possible engagement. In addition the Court took into account the failure by the RAF to pay panel attorneys for work done prior to 1 June 2020 as an act of *mala fides* to punish those attorneys who took part in the review against it.

(ii) What emerges however is that much of this conduct in so far as it relates to the new model the RAF had elected to follow, took place after the application for leave to appeal had been filed on the 3rd of June 2020 which had the effect of suspending the order of the 1st of June 2020. The RAF was not obliged to give effect to that order as amended. In addition, if the RAF was deliberately disobeying the order then contempt proceedings would have been available to the panel attorneys. Indeed, in the review judgment the Court accepts that nothing precludes the RAF

from implementing its strategic plan provided that it accorded with the principle of legality. It must therefore follow that when the order of the 1st of June 2020 as varied was suspended by the submission of the application for leave to appeal there would have been no obligation on the RAF to give effect to the suspended order and that it was under those circumstances entitled to proceed with its strategic plan. It could hardly have been expected to do nothing in that period.

(iii) On the question of non-payment for work done prior to the 1st of June 2020, the RAF responded that this was on account of its parlous financial circumstances (which in general appears not to be in dispute) and nothing else. In any event, the panel attorneys would have remedies in contract to enforce payment of the amounts due to them and the non-payment of accounts for work done prior to the order of 1 June 2020 could not in our view constitute a basis to find exceptional circumstances to put into operation the order of the 1st of June 2020. Simply put, if non-payment created a predicament for the panel attorneys they enjoyed a remedy in contract to address that predicament and we are doubtful if that issue warranted any consideration in the Section 18(3) determination.

- b) That the civil trial rolls in the Courts were in chaos and that many matters are being postponed, default judgments are being granted against the RAF and the approach of the RAF is to settle at any cost. The Court expressed the view that the crisis was well known and was an indication of exceptionality. In addition it said that the South African population was

being held to ransom by the RAF and that the judicial system was in disarray. These are serious conclusions and if indeed are correct then it may well trigger a finding of exceptional circumstances and therefore require further examination.

(i) In support of the above the Court made reference to a directive issued by the Judge President of the Limpopo Division removing and suspending all RAF matters from the court roll until September 2020. This directive was withdrawn a few days after it was issued but given the timing of the filing of the affidavits, may not have been properly brought to the attention of the Court. The existence of the since withdrawn directive can therefore not continue to be relied upon in support of the exceptional circumstances threshold having been met.

ii) Chaos in the civil rolls and the judicial system in disarray: The Court cited examples of cases being postponed, matters proceeding by default and a general state of uncertainty in the system as well as the Courts regarding RAF matters. In those examples Courts stood matters down to the next day where in one instance it appears finality was reached for the benefit of both the claimant and the RAF and in the other it was not clear what occurred. The RAF says that its inhouse staff including lawyers are making good progress in resolving matters and that the crisis that the respondents allude to are in the words of Davis J 'more illusionary than real'.

(iii) Of course any suggestion of a crisis in the civil rolls or of the juridical system being in disarray requires to be taken seriously. What emerges however is that there has been some disruption which one imagines would have been inevitable with the transition from an old established model to a new model whose fault lines are still to emerge. There has certainly been disruption and a level of uncertainty but given the volume of RAF matters that come before our Courts, even in those cases cited, the outcomes have generally not been prejudicial to claimants or the system as a whole. In this regard it must be recalled that claimants are generally represented by attorneys and counsel who will seek to ensure that the interests of claimants are not imperiled and courts at the same time will seek to ensure that those interests are also protected and that the judicial system does not fall into disarray. Some of the examples cited compellingly demonstrate how courts have been proactive in protecting the integrity of the system for the benefit of all and are duty bound to oversee settlement agreements when they are made orders of court.¹⁵

(iv) Finally, and in passing, one is compelled to observe that some two and a half months after the grant of the review order and the ongoing suspension of its operation occasioned by both the application for leave to appeal as well as the automatic appeal in terms of Section 18(4), the evidence of chaos, disruption and a judicial system in disarray remains scattered, anecdotal and relatively isolated if regard is had to the nature

¹⁵ *Eke v Parsons*, 2016 (3) SA 37 (CC) at paras [25] & [26]

of the disruptions, how they have been managed as well as the volume of cases that are being dealt with. If anything, the crisis the respondents make reference to, would have exacerbated over time resulting in the possible implosion of the system or the emergence of more sustained harm but no further evidence of this has emerged.

(v) The effect on the system in its entirety continues to remain a matter of contention and on the available evidence we are not satisfied that from what emerges, it can be said to trigger the requirement of exceptional circumstances defined in the strict sense to which reference has already been made.

(vi) Finally, the court took the view that the conduct of the RAF through its delays would result in the order evaporating and being declared moot and that this alone would trigger exceptionality. We have already dealt with the effect of the suspension of the order and our difficulty in the conclusion that the conduct of the RAF constituted deliberate non – compliance with the order.

(vii) At another level however the issue requires further attention as the Respondents have argued that if the order is not put into operation then the benefit of 6 months that the order provides to them may well have been evaporated by the time the matter enjoys the attention of the appeal court. While there is such a risk there is equally nothing in principle that would prevent the appeal court from, in appropriate circumstances, granting relief that would ensure that the substance of

the relief that the Respondents enjoyed was not rendered academic (in the event that court finding that the original relief was warranted).

[61] In conclusion and having regard to all of the considerations relied upon by the Court *a quo* to which we have made reference, we are not satisfied for the reasons given that considered either individually or cumulatively, they constitute exceptional circumstances. The appeal should therefore succeed on this basis alone.

IRREPARABLE HARM

To the Respondents:

[62] However, proceeding on the basis that we may have erred in our conclusion with regard to the existence of exceptional circumstances, we proceed to deal with the second component of the Section 18 (3) enquiry – irreparable harm.

[63] The Court *a quo* largely relied on its conclusions with regard to exceptional circumstances to buttress its conclusion that the Respondents and the public at large will suffer irreparable harm if the order of the 1st of June 2020 as amended was not put into operation. In this regard it found the following:-

- a) That litigants were being held to ransom by the RAF: – we have already dealt with that earlier in this judgment and simply must reassert that on the evidence the interests of litigants are not being imperiled and where

there are disruptions or even prejudice it is not in the nature of harm that is irreparable.

- b) That the RAF is deliberately delaying adherence to the order of the 1st of June 2020 in order to render the order moot:- We have addressed this issue and pointed out that the effect of the application for leave to appeal was to suspend the operation of the order of the 1 June 2020 as varied. There is no suggestion that the application for leave to appeal nor the appeal in terms of Section 18(4) was vexatious or an abuse of process and accordingly it must constitute a valid assertion of the constitutional and legal rights of the Appellants and as such cannot be translated into irreparable harm on the part of the Respondents.
- c) That RAF is withholding payment to panel attorneys for work already done:- We have also dealt with this issue and with respect, non-payment of an account cannot constitute irreparable harm when the panel attorneys have a remedy in contract for the recovery of any monies due to them for work done.

[64] On this basis the conclusion of irreparable harm to the Respondents and the public at large is not a conclusion supported by the evidence.

To the Appellants:

[65] In introducing this part of its judgment, the Court *a quo* posed the question as to whether the RAF would endure irreparable harm if the relief to execute is granted. The Court's response to that is as follows :- “
Considering the submissions and arguments advanced by the RAF there is

no serious contention, if any, against the grant of the section 18(3) application. “ This would suggest there was nothing in substance that the RAF advanced in opposition to the 18(3) application. An overview of the answering affidavit of the RAF in the 18(3) application indicates that the RAF advanced the following arguments in support of its assertions that it would suffer irreparable harm if the order was put into operation. They are:-

a) That the RAF would be forced to continue using the services of attorneys whose mandate had expired and who acted contrary to the interests of the RAF as client and principal.

(i) The Section 18(3) order of the Court a quo does compel the RAF, when they have a need to use attorneys in personal injury litigation, to use, to the exclusion of any other attorneys, only those attorneys who were on the RAF panel as at the 10 March 2020 .

(ii) The relationship between an attorney and his/her client is a *sui generis* one, with a “*very special character with certain aspects peculiar to itself*.”¹⁶ The relationship between attorney and client must be characterised by mutual honesty and trust:¹⁷

“The law exacts from an attorney *uberrima fides*—that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a vigorous accuracy in minutiae, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently . . . he must in no way betray his client to the other side, either by secret

¹⁶ *Goodriche and Son v Auto Protection Insurance Co Ltd (in liquidation)* 1967 (2) SA 501 (W)

¹⁷ Van Zyl, *Judicial Practice of South Africa*, 4th Ed

correspondence or communications, or in any other manner whatsoever; he must duly and faithfully keep the secrets of his client, and on no account disclose them without the client's consent; . . .”

(iii) In *Jordan and Another v Farber*¹⁸ the Court held that loyalty is an essential element of the attorney and client relationship. It further stated that an ethical attorney is expected to maintain a measure of detachment from clients. The court also referred to the following passage:

“An attorney should not act for a client whose interests conflict with his or her (the attorney's) interests or those of another client. The attorney must, while holding his position of trust and confidence, prefer the interest of the principal even to his or her own in case of conflict, and to his skill, diligence and zeal must be added good faith”.¹⁹

(iv) It is thus clear that the attorney/client relationship cannot be equated with a normal contractual relationship. It can, with respect, only work effectively when there is a level of trust and confidence between the contracting parties. Furthermore, the relationship arises from contract, and once the contract is terminated, the legal duty of an attorney to the client ends, save for the duty (based on public policy) to maintain confidentiality in respect of the client's affairs. The attorney/client relationship, and the duties of the attorney arising therefrom, cannot be revived save should the parties enter into a contract once again:

“Once the attorney-client relationship has come to an end, the only basis on which any legal duty can remain is if an implied term of the

¹⁸ (1352/09) [2009] ZANCHC 81 (15 December 2009)

¹⁹ See also 'Conflict of interests' 14(2) LAWSA

contract provides for this or Aquilian principles impose one. It was held, in *Meter Systems* (supra), that the legal duty in question was “to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such information otherwise than as permitted by law or by contract”. If the legal duty arose from the attorney-client contract, it would be introduced by an implied term. In the case of delict, it would be imported by way of public policy.²⁰

(v) It is clear given the acrimony that has been revealed in this litigation and the manner in which the parties have characterised their lack of trust and confidence in each other that the revival of that relationship under coercion of a court order is likely to create more problems going forward than it is likely to resolve.

(vi) The RAF is accused by panel attorneys of acting with *mala fides* of scurrilous conduct and of deliberately disobeying and not implementing a court order for ulterior motives - in order to render it moot and to deprive the panel attorneys of the benefits they have obtained under that order. At the same time the RAF accuses the panel attorneys of directing defamatory remarks towards its CEO and of being only motivated by their narrow financial interests and not that of the greater public.

(vii) Without even attempting to assess the veracity of these allegations and counter allegations, that the parties hold them to be true must raise serious questions as to whether a relationship of attorney and

²⁰ *Wishart and Others v Blieden NO and Others* 2013 (6) SA 59 (KZP) at para 38

client that the Court has directed can meaningfully come into existence in such a toxic environment.

(viii) It must in our view follow that the risk of irreparable harm in being compelled to contract with the panel attorneys for legal services where no relationship of trust or respect exists, must be significant. In addition the risk of irreparable harm is likely to redound to the panel attorneys and the legal system as a whole where a court may be called upon not only to deal with litigating parties in an adversarial relationship but also with clients and their lawyers bound together in an acrimonious relationship. It may well have the makings of a crisis. In addition, and even though that part of the order is only meant to operate for six months, what is not clear is what would happen after the expiration of the six months and the risk of the six month period being extended. For these reasons we are of the view that RAF will in all likelihood suffer irreparable harm if the order is put into operation.

b) The RAF says that it is in a parlous financial position and the effect of the order, if put into operation will compel it to use and pay money to attorneys it does not wish to use and in terms of an operational model that it has discarded and which is not cost effective. It says that irreparable harm will be visited upon it if the order is operationalised.

(i) The order of the 1 June 2020 as amended sets aside the cancellation of the tender the RAF had commenced in order to appoint a new panel to provide legal services to it. The setting aside would ordinarily then require the RAF to proceed with the tender, adjudicate

the tender and act in accordance with the tender. Recalling that the court in its review judgment indicated that the RAF could proceed with its strategic plan (including its new operating model) it is difficult to understand how that can become possible if the order of the 1st of June 2020 is operationalised and the RAF is compelled to proceed with the tender that is inextricably linked to the old discarded model and which is diametrically opposed to the RAF's new model.

(ii) It would accordingly follow that the RAF and others will suffer irreparable harm if the order is operationalised and if ultimately the RAF were to find success on appeal. By then it may have adjudicated the tender with all the attendant costs that go with it and would have been compelled in doing so to give effect to an operating model that it has expressly eschewed. On the other hand its ability to give effect to its new strategic plan (which the review court said it could do) would not be possible as long as the order is put into operation. Simply put it would be impossible for the RAF to run 2 models simultaneously – one of its own choice and the other court imposed. That it would suffer irreparable harm under those circumstances would be fairly obvious in particular the costs it would be obliged to incur in reviving and maintaining its old operating model.

(iii) It is for these reasons that we take the view that the evidence does indeed demonstrate irreparable harm to the RAF if the order of the 1 June 2020 as amended is put into operation. It does indeed have far

reaching implications for the future of the RAF's operations and its desire and decision to embrace a more efficient model of operating .

[66] In the light of this and regard being had to the 'hierarchy of entitlement ' which the Court referred to in *Incubeta*, the presence of irreparable harm to the RAF must mean that the appeal must also succeed on this basis and on this basis alone if need be. There is however, another feature. One raised, in part, for the first time on appeal. It is the nature of the orders.

Nature of the orders

Indeterminate, open ended and irredeemably vague

[67] In *Minister of Water v Kloof*²¹, the court held as follows:

"[13] Moreover, interrogating the suggestion appears to lead one to the conclusion that **the order is indeterminate, open ended and irredeemably vague**. For, it seems impossible for the Minister to know with any measure of confidence what she is obliged by the order of court to do. Here, the court offers the Minister no guidance as to when she is required to step in. **Litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them** (*Minister of Home Affairs and others v Scalabrini Centre, Cape Town and others* 2013 (6) SA 421 (SCA) at paragraph 77 [also reported at [2013] 4 All SA 571 (SCA) - Ed]). Courts are entitled to operate on the assumption that government will comply with orders of court (*Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at paragraph 27 [also reported as *Minister of Home Affairs and others v Somali Association of South Africa, Eastern Cape (SASA EC) and another* at [2015] 2 All SA 294 (SCA) - Ed]). **But, in order to do that, it has to know where its obligations start and end**. It does seem to me to be difficult in the extreme for the Minister

²¹ 2016 (1) ALL 676 (SCA) paras [13] and [14]

to know with any measure of confidence precisely what steps she is required to take to comply with the order of the High Court.

[14] An order or decision of a court binds all those to whom, and all organs of State to which, it applies. All laws must be written in **a clear and accessible manner. Impermissibly vague provisions violate the rule of law**, which is a founding principle of our Constitution. **Orders of court must comply with this standard.** In *Mazibuko NO v Sisulu NO and others* 2013 (6) SA 249 (CC) [also reported at 2013 (11) BCLR 1297 (CC) - Ed], which concerned the right of a Member of Parliament to move a motion of no confidence in the President, the Constitutional Court, in its consideration of a similarly worded prayer to paragraph (c) of the order of the High Court, stated (in paragraph 24) that:

"the prayer in the applicant's notice of motion that the Speaker personally take whatever steps are necessary to vindicate the applicant's constitutional right, is so open-ended and vague as to render the relief incompetent."

As the preambular part of order (c) governs the whole of that order and determines the Minister's obligations under it, it may well be that, without more, order (c) falls in its entirety, to be set aside. But, in addition, the remainder of that order can also hardly withstand scrutiny." (emphasis provided and footnotes omitted)

[68] The appellants argued that the compendious order offended the principle distilled by the Supreme Court of Appeal being that court orders cannot be indeterminate, open ended and irredeemably vague as litigants are required to comply with them at the risk of being in contempt if they do not.

The common cause differences between the SLA's and the second amendment

[69] It is common cause that: the SLA provided for rights of suspension of the SLA in clause 10 and that the second addendum had deleted the entire clause 10, and therefore the rights of suspension; the SLA gave the RAF the right to terminate the SLA by giving 30 days written notice; clause 11.5 of the SLA had provided that upon receipt of a notice to terminate the agreement, the firm would be deemed to be under suspension as contemplated by clause 10 for the duration of the 30 day notice period contemplated in clause 11.1 and that during the 30 day notice period, all terms set out in clause 10.6 would apply to the firm.

[70] The SLA made provision that 4 months before the expiry of the SLA by the effluxion of time, the RAF had to deliver to the firm, in writing, a notice of handover advising the firm to start to prepare all unfinalized files in its possession for the hand over process. The second addendum provided that at least 1 month before the expiry of the SLA, the RAF's panel manager would be required to deliver to the firm, in writing, a notice of handover advising the firm to start to prepare all unfinalized files in its possession for the hand over process.

[71] The second addendum did not entitle the panel attorneys to R4 per page copied in respect of the hand-over requirements²² and they would not be entitled to bill any amount for making copies, scans of file or uploading information into any of the IT systems.

[72] The respondents argued that these amendments made in the second addendum (and differences between the two agreements) are of no consequence. This is simply not so. The absence of the R4 per page copying

²² This fee alone could translate into R1.1 billion in costs.

charge could change the RAF's ultimate bill by R1.1 billion. This difference can hardly be labelled inconsequential.

Meaning of 'existing' as provided for in the first order

[73] The Court *a quo* ordered that the panel of 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 and that the RAF shall fulfil all of its obligations to such attorneys in terms of the **existing** SLA.

[74] The first point is that the second addendum expired by the effluxion of time a day before the first order was granted, which occurred on 1 June 2020, and that no SLA existed on 1 June 2020 and thus no obligations capable of being labeled 'existing'. Assuming one can overlook this, it still creates confusion as the Court *a quo* held in its judgment that the second addendum is invalid and unlawful but did not declare the second addendum invalid and unlawful.

[75] In the *Diale* application the applicant sought an order that the second addendum be declared invalid and unlawful and at paragraph 28 to 38 of the Court *a quo*'s judgment, the Learned Judge considered the relief. In paragraph 38, the Court *a quo* held:

"The RAF derives its power to procure services from the panel attorneys from the Constitution. **It therefore stands to reason, to me, that an extension sought of the procurement of those services would also be subject to the Constitution.** This is so as the initial time frame sought for the procurement of those services are were (sic) sought to be extended by the second addendum. If the imposition of the second addendum was not transparent and fair, as I have concluded, then the second addendum would have been imposed upon the panel attorneys in contravention of section 217 of the Constitution. **This then amounts to the second addendum being invalid and unlawful.**" (Emphasis provided)

[76] Despite the above finding, no order declaring the second addendum invalid and unlawful was made. Put differently, the agreement that the Court *a quo* held was unenforceable, is potentially still enforceable.

[77] The SLA expired by the effluxion of time on 29 November 2019 if the second addendum is invalid and unlawful. The second addendum expired by the effluxion of time the day before the Court's first order, it expired on 31 May 2020.

[78] The question is therefore: which terms regulate the over 190 000 briefs currently pending? Did the Court *a quo* extend the obligations in terms of the SLA (which expired on 29 November 2020) or the second addendum which it held was unlawful?

The order amends the terms of the SLA and the second addendum

[79] In granting the extended relief i.e. in granting exclusivity to the panel attorneys who signed the second addendum, further uncertainty has been created. The RAF has 5 firms of attorneys on its corporate panel that handle corporate matters, 3 of those firms were also on the claims panel. The respondents argue that the Corporate Panel cannot be instructed to do third-party litigation on the RAF's behalf. The Corporate Panel's agreement with the RAF entitles it to do just that. The extended relief granted by the court and which gives exclusivity to some of the panel attorneys, infringes upon 2 out of the 5 firms' rights without them having been heard or joined. The relief granted materially affected their rights²³. The extended relief granted prohibits the RAF

²³ See *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*, 2017 ZACC 35 at [92] and [93]

from giving instructions to the Corporate Panel although 3 out of 5 of those firms are also on the current panel of attorneys. It prohibits the RAF from giving any instructions to the Government Employment Pension Fund ('GEPF'), which it had already contracted with before the Court's first order²⁴ and it prohibits the RAF from giving instructions to the State attorney or to any appointment in terms of Regulation 16A.6.6²⁵ of the Public Finance Management Act no 1 of 1999.

[80] The extended relief was granted although the terms of the SLA specifically stated at paragraph 9.1 that nothing in the SLA was to be construed to be interpreted as precluding the RAF from procuring similar or equivalent products or services from other firms.

Did the court order one sided compliance with either the SLA or the second addendum and the effects thereof?

[81] The Court did not order the extension of all of the rights and obligations of the SLA's between the RAF and the panel of attorneys. The Court only made the following orders:

“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”

²⁴ May 29th, 2020. Commenced on June 1st, 2020.

²⁵ “The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors.”

[82] Can the RAF exercise its rights under the second addendum or did the Court order one sided compliance with obligations of the “existing” service level agreement?

[83] It is clear from the judgment of the court *a quo* that it considered the exercise by the RAF of its rights as contempt of the order.

[84] In paragraph [20] of the Court *a quo*’s judgment reference is made to a decision to require the firms to handover the files which demand was made on June 25th, 2020. This decision has not been impugned by any Court order. Despite this, the Court referred to this decision to show its displeasure with the RAF’s conduct. The court *a quo* expressly recognized that the RAF has contractual rights²⁶ yet construed the exercise of such rights as contemptuous of its orders. This uncertainty will lead to harm.

[85] Another and perhaps more fundamental problem is the fact that the court *a quo* had preserved all of the panel attorneys’ rights under the extended unlawful contracts. Although the court made no declaration of invalidity in respect of the second addendum, it had found that the second addendum was imposed upon the panel attorneys in contravention of section 217 of the Constitution and was accordingly invalid and unlawful. That being so and despite the absence of a declaration to that effect, the court *a quo* ought to, at the very least, have given consideration to ordering the disgorgement of profits for the 6 month period.

²⁶ Paragraph [50] of the section 18(3) judgment

[86] Quite recently the court in *Special Investigating Unit & SABC v Vision View Productions CC*²⁷, summarized the applicable legal principles when applying section 172(1)(b) following a declaration of invalidity due to procurement irregularities in a contract's award and conclusion as follows:

[57] When it comes to a Court's remedial powers under s 172(1)(b), the Court has a wide discretion. Where it is just and equitable, it may limit the retrospectivity of its order or suspend it. The Constitutional Court in *Steenkamp* held that:

'In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. The court is bound only by considerations of justice and equity. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function.'

[58] In *Allpay (2)*, the Constitutional Court noted that the emphasis on correction and reversal was based on s 172(1)(b). Further, that remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally. It went on to hold:

'Logic, general principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.' (Emphasis added)

[59] Similarly, in *Bengwenyama*, the Court emphasised the importance of the principle of legality in determining a just and equitable remedy, and the need for Courts to justify a remedial order that does not give full effect to a declaration of invalidity:

'It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follow upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would

²⁷ Case No: 2019/20801 (18 June 2020), paras [57] to [63]

suffer prejudice if the administrative action is set aside, but even then the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality.' (Emphasis added)

[60] In order to assess what is just and equitable, a Court should have regard to various factors involved in the award of the contract, the nature of the irregularity and the role of the respective parties. The just and equitable inquiry is multi-dimensional. A just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between.

[61] In the context of public-procurement matters, priority should be given to the public good. The primacy of the public interest must be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. Consequently, the inquiry is not one-dimensional, but has a broader range.

[62] Significantly, in *Allpay (2)*, the Constitutional Court held that:

'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit it may derive should not be beyond public scrutiny.' (Emphasis added)

[63] The principle laid down in *Allpay (2)*, that even an innocent tenderer should not benefit from the proceeds of an invalid contract, was applied by Sutherland J in this Division in *Mining Qualifications Authority*:

'... taking the circumstances under which the respondent came to be awarded the tender, no factor is apparent why it should retain any profit made by its efforts. In my view it (is) unnecessary that a clear case of complicity is proven; it is enough that the award was tainted by irregularity. Were it otherwise, the plea of an innocent tenderer would as a matter of course outweigh the public interest. The pendulum should usually swing the other way. What one has not obtained through a fair and transparent process ought not to vest any moral claim to retain the spoils.' (Footnotes omitted)

[87] The Court *a quo* gave no consideration to these principles. We accept that the section 172(1)(b) remedy formulated was done pursuant to a declaration of invalidity following from the cancellation of the tender and not the second addendum (and that no order was granted pursuant to such finding), but a court cannot enforce the terms of an agreement which it had substantively found to be unlawful and invalid and not give any consideration to what should

happen to the fruits to be derived from the enforcement of such an invalid and unlawful agreement even if, in its view, the one party (in this case the panel attorneys) are not to blame for the conclusion of the contract. Innocence is no shield as restated in para [63] of *Vision View*. In considering this feature it is not insignificant that from 2014 to 2019 the panel attorneys knew that (at that stage) the SLA's would be expiring on 25 November 2019, that they had been given notices on 25 July 2019 requesting the handover of all unfinalised files (albeit that this was withdrawn on 20 September 2019) and that after the conclusion of the second addendum, the expiry date was 31 May 2020. The Court *a quo*'s primary concern in extending the contractual period for 6 months was to protect the claimants and the public interest, yet the disgorgement of profits issue was not expressly considered when a just and equitable remedy was considered nor when exercising its wide discretion.²⁸ Indeed, the court *a quo* did not exercise a discretion at all.²⁹

[88] What is appealed against is the substantive order of a court and not the reasons for judgment.³⁰ The failure to have considered these legal principles accordingly also weighs in on the prospects of success as it seems that the structural interdict that the court *a quo* was intent on crafting, might well be interfered with on appeal if the principle formulated in *Vision View* is extended to the current factual scenario ie one in which the court did not make a declarator of invalidity but disregarded its own findings and extended the contract (or imposed a new contract) and ordered the enforcement of such contract's invalid and unlawful provisions.

²⁸ *Swart & 1 other v Cash Crusaders Franchising (Pty) Ltd*, 2018 (6) SA 287 (GP) at para [4]

²⁹ para [12], [57] and [61] of section 18(3) judgment.

³⁰ *ABSA Bank Ltd v Mkhize and two similar case*, 2014 (5) SA 16 at para [64], *South African Reserve Bank v Khumalo and Another*, 2010 (5) SA 449 at para [4]

Other difficulties with the orders granted

[89] What transpires after the 6 months? Is the RAF entitled to the immediate return of its files? Is it enjoined to give 4 months' notice (as per the SLA which expired in November 2019) or is it enjoined to give 1 months' notice as per the second addendum?

[90] The decision to cancel the tender was set aside. The panel attorneys were thereafter vested with a right to participate in a tender process that was fair and lawful and not to any right to represent the RAF in the meantime and pending the conclusion of a fair and lawful tender process. The tender lapsed on 14 June 2020. What effect does this have on the order? Is the RAF obliged to re-tender during the 6 months?

Concessions i.r.o. ambiguity

[91] The appellant's argued that the respondents agree that the situation has or will create great confusion and possibly irreparable harm. These concessions, they contended, are clear from the respondents' notices and applications filed after the Court *a quo*'s second order in applications brought in terms of Rule 42(1)(b) to include additional orders or to amend orders granted. Such as for the following relief, i.e.:

- a) a declarator that the second addendum is invalid and unlawful;
- b) that the SLA's (and not the second addendum) have application during the 6 month period;

- c) that the RAF adjudicate and award the tender cancelled during the 6 month period;
- d) that the RAF perform its obligations during the 6 month period.

[92] We agree that the reasoning for the second attempt at varying the order buttresses the appellants' case for ambiguity:

"2. The above amendment is based on the following grounds:

2.1 It is consequential upon the setting aside of the decision to cancel the tender. **No purpose is served by setting aside the decision to cancel the tender if the RAF is not ordered to complete the adjudication of the tender.**

2.2 The fact that the aforesaid orders are not contained in the orders granted by this Court amounts to an omission by the Court itself as a result of which there is a patent error in the judgment.

2.3 **In paragraph 17 of its notice of application for leave to appeal, the RAF correctly says that it does not know what it must do within the six months period provided for in the order insofar as the tender is concerned. It asks if it should adjudicate and award the tender or if it should issue a fresh tender.** The first proposed order is intended to answer these questions.

2.4 In paragraph 6 of the order, the Court directed the RAF to fulfil its obligations to the panel attorneys in terms of the service level agreement. **The service level agreement contains reciprocal obligations. The RAF cannot perform its obligations towards the panel of attorneys unless the panel attorneys have performed their obligations towards the RAF.**

...

2.6 **The whole judgment and orders granted by this Court are not going to have any practical effect unless the aforesaid amendments are**

allowed. This ground of amendment is particularly important because the Court intended its order to have practical effect.” (Emphasis provided)

[93] It is so that incorrect concessions of law are not binding on the party who made them,³¹ but we find that the difficulties identified and the construction placed on the orders as formulated in the paragraphs quoted above, are correct and we have highlighted those portions impacting on the practical execution of the orders. When the section 18 order was made the Court therefore extended a “judgment and orders” that “are not going to have any practical effect”. The order impacts over 190 000 RAF cases, and billions of Rand.

Finding in respect of the nature of the orders

[94] For the reasons set out herein, we conclude that the orders are indeterminate, open-ended and irredeemably vague and ought not to have been declared operational pending the hearing of the appeal, should leave to appeal to the supreme court of appeal be granted as the appellants will, in all likelihood, suffer irreparable harm and that being so, the orders should remain stayed. This is so too, as the orders infringe on the rights of parties who were not joined to the proceedings.

COSTS

[95] In our view there is no reason why the normal principle as to costs should not apply: that the costs follow the result. However, the LSSA has joined as

³¹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others*, 2006 (5) SA 47 (CC) at para [67]

amicus curiae to assist the Court, for which we are grateful. It would not be appropriate to order the LSSA to share in the appellants' costs.

ORDER

[96] We therefore make the following order:

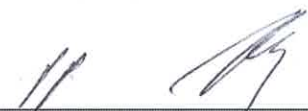
- (a) The appeal is upheld.
- (b) The order granted by the Court *a quo* in terms of section 18 (3), and the additional relief in paragraph (e) of the order, is set aside and replaced with the following order:

“The application is dismissed with costs including the costs of two counsel.”

- (c) With the exclusion of the Law Society of Southern Africa and the Minister of Transport, the respondents and the other intervening parties shall pay the appellants' costs of the appeal jointly and severally the one paying the other to be absolved, which costs shall include the costs of senior and junior counsel where so employed.



N. KOLLAPEN
Judge of the High Court
Gauteng Division, Pretoria



I OPPERMAN
Judge of the High Court
Gauteng Division, Pretoria



C SWANEPOEL
Acting Judge of the High Court
Gauteng Division, Pretoria

Summary: The RAF and Others v Mabunda Inc and Others

Section 18(4) of the Superior Courts Act 10 of 2013— Automatic Appeal — Execution of decision pending leave to appeal —Test — Requirements more onerous than those of common law — Higher threshold set, namely, in addition to presence of exceptional circumstances, proof on balance of probabilities that applicant will suffer irreparable harm if order not granted, and conversely that respondent will not, if the order granted — Extraordinary deviation requiring 'truly exceptional' circumstances — Whether exceptional circumstances present depending on facts of case — Prospects of success also a relevant consideration exceptional circumstances

This is an appeal in terms of section 18 (4) of the Superior Courts Act, 2013 (*"the Act"*), afforded to the appellants as of right (an automatic appeal). The first appellant is the Road Accident Fund (*"the RAF"*). The second and third appellants are the Chairperson of the Board of the RAF and the Acting Chief Executive Officer (*"ACEO"*) respectively. *Mabunda*, *Fouriefismer*, and *Diale Mogoshoa*, the respondents in this appeal, together with 41 other applicants in the *Mabunda* application, are all firms of attorneys who have until the end of May 2020 served on the so-called 'RAF panel' (*"the panel attorneys"*), by virtue of service level agreements (*"SLA's"*) entered into between the panel attorneys and the RAF.

On 17 March 2020 *Mabunda* and 41 other attorneys' firms brought an urgent application. In Part A, *Mabunda* sought an interdict restraining the RAF *"from implementing and/or giving effect to its notices of handover addressed to the applicants and all panel attorney dated 18 February 2020 and 20 February 2020 respectively."* In Part B of the applications, *Mabunda* sought the review of the decision to demand a handover of the unfinalized files, and *Diale* sought a review of the decision to cancel the tender as well as a mandamus that the tender process should continue. The Court *a quo* held that both notices were invalid and were set aside.

On 17 June 2020, *Fouriefismer*, *The Pretoria Attorneys' Association* and *Maponya* launched an application in terms of section 18 (3) of the Act for leave to carry the first and second orders into execution pending the appeals process. Having heard the parties, the Court *a quo* granted the order sought and held that pending any applications for leave to appeal or appeals in respect of the Road Accidents Fund's (RAF) the use of attorneys specifically in dealing with personal injury claims against under the Road Accident Fund Act 56 of 1996, the Road Accident Fund may only use the services of the attorneys' firms (panel attorneys) which were on the Road Accident Fund panel as at 10 March 2020.

This appeal is therefore against the carrying into execution of an order of the Court *a quo* in terms of section 18 (3) of the Act. The appeal court stated that a starting point was to have regard to those reasons as they appear in the judgment in the Section 18(3) application and evaluate both the cogency of the conclusions arrived at, as well as whether in their nature, they would trigger both the requirements of exceptional circumstances and irreparable harm.

With regard to exceptional circumstances, the appeal court found that the reasons given by the Court *a quo* (considered either individually or cumulatively) were not satisfactory to constitute exceptional circumstances. Accordingly, the appeal court held that the appeal should therefore succeed on this basis alone. Having said that, the appeal court went further to consider the

reasoning of the Court a quo as far as irreparable harm is concerned. In this regard, the appeal court held that the appellants will, in all likelihood, suffer irreparable harm and that being so, the orders should remain stayed.