



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MAIN SEAT)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

24/01/2023

DATE

LEGODI JP

SIGNATURE

CASE NUMBER 3242/2019

In the matter between:

DUMISANI ELVIS HLATSHWAYO

Plaintiff in Case No. 3242/2019

MZWANDILE MODCAY MASILELA

Plaintiff in Case No. 1741/2019

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

LEGODI JP (with Mphahlele DJP and Mashile J concurring)

[1] At the hearing of the matter, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or such party's attorney, because such party or party's attorney-(i) did not attend a pre-trial conference; or (ii) failed to a material degree to promote the effective disposal of the litigation¹. The case management judge may at a case management conference, make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct has conducted unreasonably to frustrate the objective of the judicial case management process². Any failure by a party to adhere to the principles and requirements of rule 37A may be penalised by way of an adverse costs order³.

[2] Rule 37A(12) (h) and (16) referred to above should be read in the context of sub-rule(2)(a) of rule 37A which provides that case management through judicial intervention shall be used in the interest of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. Furthermore, rule 37A(12)(h) and (16) must be read with sub-rule (2)(c) which provides that case management through judicial intervention shall be construed and applied in accordance with the principle that notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court and act professionally in expediting the matters towards trial and adjudication. The drafters of rule 37A(12)(h) and (16) read with rule 37(9)(a) were clearly deliberate and resolute in ensuring that the courts do not find themselves helpless when the parties, their lawyers and or any other person dictates litigation at a snail pace without serious consequences. The drafters of these rules must have intended to dispel the notion that courts have no authority or power to dictate the pace of litigation. The two cases of Messrs Elvis Dumisani Hlatswayo and Mzwandile Masilela separately instituted against the Road Accident Fund under different case numbers, were settled on the

¹ Rule 37(9)(a) of the Uniform Rules of Court

² Rule 37A(12)(h)

³ Rule 37A(16)

date of trial or partly settled close to the date of trial contrary to Forms A and A3 of the Practice Directive of this Division. In paragraph 9 of Form A is recorded that *'failure to comply with any of the case management directives herein, shall invite summary inquiry with regards to costs as contemplated in sub-rules 12(h) and 16 of Rule 37A'*.

[3] Form A3 is used as a trial readiness certification Form. In paragraph 5 thereof is recorded that *"should the matter be settled on the date of trial, parties run the risk of punitive costs order / or forfeiture of a day fee, against any person responsible for the late settlement of the matter and any such costs order may include payment out of own pocket by whoever is responsible for the late settlement including claim handlers and or attorneys for the parties"*. Paragraph 14 of the Practice Directive deals with settlements on the dates of trial or hearing. Paragraph 14.1 thereof provides that there shall be no settlement on the date of trial. In paragraph 14.2 is recorded that any settlement on a date of trial or hearing is tantamount to failure to a material degree to promote the effective disposal of the matter as contemplated in rule 37(9)(a)(i) and (ii). In paragraph 14.3 of the Practice Directive is recorded that many matters against the Road Accident Fund are settled on the dates of trial and at a huge legal expense to the public purse and thus the need for the directive in paragraph 14.1. In paragraph 14.5 of the Practice Directive is recorded that settlements on the dates of trial will prompt an enquiry as to costs so occasioned by settlement on the date of trial and that the defaulting party may be ordered to pay the costs of litigation connected to or occasioned by the late settlement on a punitive scale and or out of own pocket, including forfeiture of appearance or day fee. I now turn to deal briefly with the background facts of each of the two cases.

Brief background facts in Masilela case

[4] On 11 January 2018 the plaintiff's attorneys lodged the claim with the Road Accident Fund. On 12 January 2018 the Fund acknowledged with no objection receipt of the lodgement of the claim and registered the claim under number 6901/12588297/202/0. It did so without lodging an objection. It does not appear that anything was done by the Road Accident Fund since the claim was so lodged.

[5] On 22 May 2019 the Road Accident Fund was served with the summons followed by appearance to defend delivered by Attorneys Tau Phalane on behalf of the defendant (the Fund). In a plea dated 17 July 2019 the defendant also included a special plea on the basis that the plaintiff has not submitted a “serious Injury Assessment Report”. Despite notice for pre-trial and or case management conferences been served, the Fund refused, neglected and or failed to participate in such conferences. Resultantly, the matter was laid before the judicial case management judge in accordance with Division’s applicable practice directive. On 25 January 2022 the case was certified trial ready without the defendant participating and was accordingly enrolled for trial on 14 March 2022. Notice of set down was served on 3 February 2022.

[6] After 3 February 2022 the matter was allocated to a claim handler, namely Mr Keith Wakeford. Upon allocation, he asked for the physical file and upon receipt thereof, he allegedly *‘promptly begun assessing the matter on the available information’*. He then requested more information from the plaintiff’s attorneys. He received further supporting documents on 23 February 2022. He then continued to assess the information. He noted that the plaintiff’s claim for loss of earnings was not competent. According to Mr Wakeford, further information and investigation were required to adequately consider that portion of the plaintiff’s claim before any decision or settlement could be made.

[7] On 6 March 2022 Mr Wakeford requested copies of other further lodgement documentation and enquired also whether plaintiff attorneys had dealt with the issues raised in respect of forensic accountant’s report. On 8 March 2022 the plaintiff’s attorney directed an email to Mr Wakeford. The plaintiff’s attorneys requested that the matter be partially settled and that the plaintiff’s claim for loss of earnings be postponed sine die for the outstanding information, documentation and the addendum report to be filed. Mr Wakeford then obtained a mandate in respect of merits, future medical expenses and general damages in respect of the plaintiff’s claim. A tender was then made on 9 March 2022 which offer was accepted on the same day.

[8] The explanation given in above is contained in an affidavit deposed to on 22 March 2022 by Mr Wakeford. This was in a response to a directive issued on 15 March 2022 by this court which directive reads as follows:

- “1. The enquiry regarding the costs occasioned by partial settlement of the matter and postponement of the remaining unresolved head of damages is hereby postponed pending the filing of the affidavits and written heads of argument to deal with the following:*
 - 1.1. The defendant (RAF) and the claim handlers who dealt with this matter as per the correspondence hereto marked “A” is hereby ordered to file affidavits explaining why they did not deal with this matter expeditiously to avoid partial settlement and postponement on or close to the date of the trial of 14 March 2022;*
 - 1.2. The plaintiff’s attorneys to file an affidavit explaining the reliability of the email addresses used on the communication as per Annexure “A” above and also explain why they did not proceed with trial on a remaining head of damages which has not been resolved regard being heard to paragraph 15 of the Practice Directive dated 9 January 2020 read together with the consolidated Covid-19 directive;*
 - 1.3. Furthermore, the defendant and the claim handlers are ordered to file affidavits explaining why they did not cooperate in having a meaningful pre-trial conference with the plaintiff attorneys and why they did nothing about the judicial case management of 25 January 2022 and why they did not attend the court on 14 March 2022.*
- 2. The affidavits referred to in paragraphs 1.1 and 12 above shall be filed with the Registrar of this court by not later than **12h00 on Tuesday 22 March 2022** and shall be filed by email;*
- 3. The parties are hereby directed to file written heads of argument should they so wish by not later than 12h00 on Thursday 24 March 2022;*
- 4. This court order shall be sent by the Registrar of this court to the defendant’s claim handlers as per the email addresses appearing in annexure “A” and also brought to the attention of Mr. Justice Mdluli and Chief Executive Officer of Road Accident Fund and that they should ensure that the court order herein is complied with;*

5. *The costs relating to the proceedings of today are reserved and in the affidavits, the parties should explain why a punitive costs order, forfeiture and payment out of own pocket should not be made”.*

[9] Worried by the lack of information regarding the response by Ms Mogorosi and Mr Wakeford, a further directive was issued as follows:

- “1. *Further enquiry herein is postponed to 9 May 2022 for hearing in person or virtually as the parties may decide and such election to be indicated by not later than 14 April 2022.*
2. *Should the parties elect to have the enquiry be conducted in person, the hearing will then be conducted at a bigger high court room H, Magistrate Court building in Middelburg.*
3. *This matter shall be consolidated with the matter of **D.E HLATSWAYO V RAF** under case number 3272/2019 which has been postponed for similar enquiry to 9 May 2022 and copy of the order in Hlatswayo matter is hereby attached and marked A.*
4. *The parties herein are directed to deal with the issues raised as per the order in HLATSWAYO case referred to in paragraph 3 above.*
5. *The Road Accident Fund herein should deal with the issues identified in the matter of HLATSWAYO in order to enable the court to understand if some of the challenges expressed in the affidavits filed herein and Hlatswayo matter are wide-spread or isolated.*
6. *Reference to the officials in HLATSWAYO case should be understood as reference to the officials who have filed affidavits in this matter.*
7. *This order is made in the light of the many matters that are settled on the dates of trial and where meaningful pre-trial and judicial case management conferences were not attended to or held, including matters proceeding on trial in the absence of the Road Accident Fund”.*

[10] The order in the matter of Hlatswayo was crafted and issued as follows.

- “1. *The Defendant’s officials, Ms. Maite Makola and Mr. Stephen Mashatole, are hereby ordered to file supplementary affidavits to explain the following issues:*

- 1.1. *The vagueness of their affidavits pertaining to the specific departments to which the matter was previously allocated to.*
- 1.2. *The exact procedure that is followed by the RAF in matters that were previously defended, especially in the event where the previous attorneys of record have withdrawn from the matter.*
- 1.3. *The procedure that is followed by the RAF in the event where they are called upon to attend meaningful pre-trial conferences as per the applicable practice directives of this division.*
- 1.4. *The procedure that is followed where the Defendant is called upon to attend or form part of Judicial Case Management Conferences in terms of the directives of this division to determine trial readiness of any matter where the Road Accident Fund is involved.*
- 1.5. *Why both of them were moved to different sections or departments and what happens to the matters allocated to them in these cases and exactly when the matters are handed to different officials.*
- 1.6. *Who is responsible to re-allocate the matters to the correct officers.*
- 1.7. *If they are qualified and admitted to legally represent the RAF in matters that comes before court in all proceedings.*
- 1.8. *Indicate how many matters were allocated to them to deal with on a daily basis from 26 June 2021 to date.*
- 1.9. *When this matter was allocated to Ms. Dorcas Mashile.*
- 1.10. *Who is the person that assisted them in drafting the affidavits filed in this matter, and explain what procedures are followed when an officer of the RAF is called upon to give reasons for non-compliance with court orders or directives that are issued.*
- 1.11. *Fully explain why the affidavits were not filed before or at 10h00 on Monday 14 March 2022 as so directed by the court.*
2. *The Defendant's officials Dorcas Mashile and Lizette Wannenburg should file supplementary affidavits to explain the following:*
 - 2.1. *The role and duties of senior claims officers and claims officers.*
 - 2.2. *The amount of claims / trials that the officers needed to attend to on a daily basis as from January 2022 to 7 March 2022.*
 - 2.3. *Indicate if they are authorized, and or admitted to legally represent the RAF in Court Procedures.*

- 2.4. *The exact procedure that is followed by the RAF in matters that were previously defended, especially in the event where the previous attorneys on record have withdrawn from a matter.*
- 2.5. *The procedure that is followed by the RAF in the event where they are called upon to attend meaningful pre-trial conferences amongst the parties as the applicable directives of the division.*
- 2.6. *The procedure that is followed where the Defendant is called upon to attend or form part of Judicial Case Management Conferences.*
- 2.7. *The procedure that is followed by the RAF from date of allocation of a trial date to date of Trial.*
- 2.8. *Explain the significance of requesting payments, how long it takes and how many of these requests are done on a daily basis, and why, in addition to the amount of trials they need to attend to, they have to do this.*
- 2.9. *Who is the person that assisted them in drafting these affidavits, and what procedures are followed when an officer of the RAF is called upon to give reasons for non-compliance with court orders of directives that are issued.*
- 2.10. *Fully explain why the affidavits were not filed before or at 10h00 on Monday 14 March 2022.*
3. ***The Supplementary affidavits referred to in paragraphs 1 and 2 are to be filed on or before the 14th of April 2022.***
4. *In order to assist the courts in understanding the challenges or difficulties that the Road Accident Fund might be faced with, The Chief Executive Officer of the Road Accident Fund, is hereby ordered:*
 - 4.1. *To attend court either in person or virtually at 10h00 on the 9th of May 2022 and for this purpose an affidavit should be filed by the CEO of RAF **by not later than 14 April 2022** explaining:*
 - 4.1.1. *Why many matters are settled on the dates of trial **and what are the legal costs implications caused to RAF** by such late settlements and what steps are intended to be taken to avoid late settlements and unnecessary legal costs caused late settlements.*
 - 4.1.2. *Why the RAF often does not participate in the meaningful pre-trial conferences as per the directive of this division where parties are expected to discuss matters as per rule 37A(10) of the Uniform Rules of Court and why matters are enrolled on the judicial case management conferences without the Road Accident Fund participating and thus causing the judicial case management judge proceeding on the basis that the RAF has been an uncooperative party as per the applicable directive of this division.*

- 4.1.3. *The procedures that are followed by the RAF to ensure compliance with court rules, practice directives relating to pre-trial proceedings, judicial management conferences and **cost enquiries when matters are settled late or on the dates of trials or postponed or removed from trial rolls late or on the dates of trials contrary to the applicable directives of this division, something which is being experienced by the division as a trend.***
- 4.1.4. *Who, and how many officers are authorized to represent the RAF in judicial case management conferences, signing pre-trial minutes, and to appear on behalf of the RAF on the dates of trials.*
- 4.1.5. *Why officials involved in this matter should not pay the costs of these proceedings de bonis propriis or jointly and severally with RAF on punitive scale including such costs as may have been occasioned by the late settlement.*
- 4.3. *Provide the court **on or before the 14th of April 2022** with the Road Accident Fund's policy document/s which regulates the following:*
 - 4.3.1 *Allocation or Transfer of claims between claims-handlers.*
 - 4.3.2 *Attendance at Pre-Trials.*
 - 4.3.3 *Attendance of Judicial Case Management Conferences.*
 - 4.3.4 *Appearance in court on the day of the trial.*
 - 4.3.5 *The amount of claims that may be allocated to each claims handler to work on.*
 - 4.3.6 *The amount of court cases each claims handler should deal with on any given trial date.*
 - 4.3.7 *Settlement of claims in defended and undefended matters.*
 - 4.3.8 *Procedure to be followed on matters that was previously handled by attorneys.*
5. *A copy of this order will be emailed to all relevant officers, the CEO of the Road Accident Fund and served on the Road Accident Fund's Head Office for attention of all concerned.*
6. *A copy of this order will be sent to the LPC and to the General Bar Council of South Africa **who are hereby invited as friends of the court** in the enquiry herein regard being had to their interests as professional bodies **and the plaintiff's attorneys are***

directed to bring a copy of this order to the attention of the LPC national and The General Bar Council of South Africa and confirm with the registrar of this court that same has been done.

7. The plaintiff, LPC and GBC are at liberty to collate information from other divisions regarding the issues raised with the Road Accident Fund herein and file affidavits in relation thereto **by not later than 21 April 2022** and also dealing with the issues that might be raised by the RAF in their affidavits that are supposed to be filed by not later than 14 April 2022.
8. Should RAF find the need to respond to affidavits as contemplated in paragraph 7 above, it shall do by not later than 26 April 2022.
9. The parties, including the friends of the court shall **file written heads of argument by not later than 29 April 2022** and on the same date the plaintiff shall ensure that the court file is properly paginated and indexed and preferably arch-lever files should be used.
10. It is hereby recorded that depending on the issues that might be raised, a full court might be instituted to deal with this matter.
11. This matter is consolidated with the matter of **Masilela v Road Accident Fund** case number 1741/2019 and a court order in relation thereto is hereby attached and is marked A.
12. The parties are hereby directed to indicate by not later than **29 April 2022** whether they prefer in person hearing or virtual. In the event of in person hearing, the proceedings will be conducted in Middelburg as indicated in the **Masilela** order”.

[11] On 17 April 2022 Ms Mogorosi and Mr Wakeford deposed to affidavits in a somewhat detailed manner. The Chief Executive Officer of the Fund in accordance with paragraph 4 of the order quoted in paragraph [10] above also filed detailed affidavit. These affidavits by the officials of the Fund including the Chief Executive Officer contain very worrying averments which raise the issues whether the Fund since the termination of services of its panel attorneys conducted its affairs in accordance with the legislative imperative in the Road Accident Fund Act. Furthermore, the affidavits contain averments which raise the issue whether the Fund as it terminated the mandate of its panel attorneys and demanded the return of all the files, had a plan in place to ensure that all those matters pending in our courts are efficiently and expeditiously attended to and ensuring that new matters are dealt with and disposed of effectively and efficiently in accordance with the object of the Act.

[12] Before the enquiry on 27 June 2022 the court also drew the parties' attention to "Report Project 142 and directed the parties to file affidavits and comment thereon including written heads of argument. The directive was crafted as follows:

*"1. The report by the South African Law Reform Commission titled: **"Report Project 142: Investigation into legal fees, including access to justice and other interventions: 23 June 2021 ISBN"**, which has recently been reported in the media, has come to the attention of the Judge President and on pages 67 to 70 of the report the Commission deals with the topic **"Late Settlement"**, pages 71 to 73 it deals with the topic **"General conduct of the parties"** and then on pages 73 to 80 the Commission discusses **"Insufficient use of case management"**. All of this, appears to be relevant to the enquiry regard being had also to this Division's Practice Directive dated 9 January 2020.*

2. In the light of the Commission's report, it is hereby directed that the parties including the LPC and GBC in their affidavits and written heads of argument as per the order, should also have regard to what is articulated in the Commission's report and comment thereto insofar as it might be relevant to the enquiry".

[13] On 27 June 2022 and thereafter the to 17 September 22 after the parties' legal representatives were engaged at length. The parties were further directed as follows:

- 1. "This matter is postponed to Wednesday 21 -22 September 2022 for further hearing.*
- 2. The Road Accident Fund is hereby directed to file further papers or affidavits by not later than 12h00 on 11 July 2022 to deal with the issues raised by this court in particular the legislative framework as pointed out at the beginning of the hearing today including issues raised regarding the agents or the previous panel of attorneys acting on behalf of the RAF.*
- 3. Any party may respond to the further affidavits or papers so filed by not later than 18 July 2022.*
- 4. In dealing with the issues so identified and referred in this order, the parties should try to be as brief as they could, seen in the context of the issues already dealt in the papers filed with this court.*
- 5. It is hereby directed that counsel for the RAF with the assistant of his junior, should deal with the issues as so raised by this court relating to the legislative framework and the issue of the agent by not later than Friday this week, the 1st of July 2022.*

6. *The costs for today including those occasioned by the postponement today is hereby reserved”.*

[14] Subsequent to the enquiry and the order of 27 June 2022, Mr Letsoalo in his “personal capacity”, so he said, daringly wrote to the court as follows:

“Dear Honourable Judge President Legodi

The joint matters of Hlatswayo vs RAF and Masilela vs RAF held in Mpumalanga High Court division, hereby refers. I write this letter in my personal capacity and without prejudice. My rights regarding matters, referred to in this letter, remains fully reserved. In the interest of transparency, I sent copies of this letter to the parties and others that were present during the proceedings held on Monday 27 June 2022.

I have taken this unprecedented decision of penning this clarity seeking letter to you, after much introspection and various consultations with some distinguished members of the legal profession.

The attempt to consult was with a view to get for myself, in my personal capacity a legal representative to represent me in the now joint matters of Hlatswayo vs RAF and Masilela vs RAF, currently in front of the full bench of the Mpumalanga High Court Division.

I must at the outset make it clear that I respect the court and the judiciary and hold dearly the view that the court holds a high legal and moral duty to hold all accountable, especially state officials like myself. I will do everything legally permissible to assist the court in anyway, legally permissible, to enable the court to arrive at its determinations; I am duty bound to do so.

In my consultations, with various legal practitioners, I asked questions that I had already posed to the legal representatives of the RAF, led by Advocate Cedric Puckrin, SC, which remains unanswered, at least to my satisfaction.

I am consequently, struggling to get personal legal representation, without a full understanding of these proceedings, and therefore seek the Honourable Judge President’s indulgence in answering these questions to enable my informed participation in these proceedings.

The answering of these clarity seeking questions, will assist me in understanding my role in the proceedings and what my rights are under the circumstances. Kindly note that, although I understand, to a limited extend, the court and legal processes, I

possess no legal qualifications and most of my participation in court proceedings are through legal advice.

My questions are therefore as follows:

- 1. What is the nature of these proceedings before the full bench? Is it an enquiry and, if it is, under what provision of the court rules is it held? What is intended to be achieved or determined in these proceedings?*
- 2. Except for Hlatwayo, Masilela and the RAF, who are parties to these proceedings? What is the role of each party and how did they join these proceedings? How were these parties selected to join these proceedings and invited to these proceedings? Are there any examples of proceedings of this nature held in the past, in any high court division, that one can refer to, where this kind of proceedings were held?*
- 3. What is my role, personally in these proceedings? What is expected of me and how do I participate in these proceedings? I ask this questions given what happened, during these proceedings on 22 June 2022 when the legal representative of the RAF, Advocate Cedric Puckrin, SC, informed the court of my presence and that I requested to address the court on matters to my personal knowledge and this was denied. An instruction was then issued to the effect that I must instruct Advocate Puckrin, who is the legal representative of the RAF. This is notwithstanding me being personally invited by the court to attend the proceedings.*
- 4. What is the procedure in this kind of proceedings? I am asking, this in the context of where RAF was asked to address the court first and about 17 question were asked to be addressed, questions which were mostly generic and did did not form part of the papers. I was also asked to present myself personally at these proceedings, only for RAF legal representative, Advocate Puckrin, to be instructed to take instruction from me without him being appointed my legal representative. I believe that I have a right to a legal representative of my choice. A right I don't intend to forgo.*
- 5. Some of the questions are in relation to matters that are active various court cases and proceedings, serving in divisions of the high courts and the Supreme Court of Appeal. This includes matters in reference to Section 13 of the RAF*

Act, regarding RAF's Annual Report. How am I or any of the parties expected to answer those questions? It is also not clear how I and any of the parties are expected to answer these questions which are subject matters in the province of these courts.

6. In one of the questions reference is made to the "CEO, of RAF and the Board" of RAF and that costs may be awarded de bonis propis. Who, amongst the parties asked for this prayed costs order? To the extent that such a request was made, a copy is hereby requested to enable my appropriate response. Furthermore, to whose benefit will those costs be, if so awarded?

7. Lastly, who usually pays for costs associated with these kind of proceedings? I hope that the answering of these clarity seeking questions will aid me personally, and as CEO of RAF, to understand these proceedings and help my meaningful participation going forward.

I trust that you will find the above in order".

[15] This letter appears to have been prompted by the court's refusal to hear Mr Letsoalo on 27 June 2022 as at that time the Fund was legally represented. Furthermore, it looks like the letter was prompted by engagement that ensued between the Counsel for the Fund and the court. The court declined to comment on his lament in the letter against the proceedings of the proceedings of the 27 June 2022. I deal with his lament later from paragraphs [185] to [199] of this judgment and in some more details with the three affidavits deposed to subsequent to the directives of this court. The engagement that ensued between the Fund's Counsel and the court was later clarified. The parties were requested to deal specifically with the imperative in sections 3, 4, 7, 15, 24 read with section 19 and why the Board and CEO should not be held liable for the costs connected to or occasioned by the late settlements regard been had to the facts of the present proceedings and also taking into account the other legislative imperatives under the Act. As indicated in Mr Letsoalo later affidavit, this clarity and specifically giving the CEO and Board an opportunity to file further affidavits was received by Mr Letsoalo on 1 July 2022.

Background facts in Hlatswayo case

[16] The claim in relation to a motor vehicle accident that occurred on 1 December 2016 was lodged with the defendant on 26 March 2018. The claim was so lodged with the RAF by submitting completed RAF1 Form, special power of attorney, consent forms, SAPS Accident report, affidavit by the plaintiff, salary slips, copy of identity document and hospital records. In the lodgement letter, the Fund's attention was also drawn to the fact that if the Fund did not object within 60 days upon receipt of the lodgement documents, the validity of the claim shall be deemed to be compliant in all respects. For this, the Fund was referred to the imperative in section 24 of the Act. I deal later in this judgment with the provisions of section 24.

[17] On 8 May 2018 the Fund acknowledged receipt of the claim. RAF4 Form was then requested. The injury photographs, specified vouchers, actuarial report, medico-legal reports if any and any employment certificate which may not have been included in the lodgement documents were also requested.

[18] On 23 September 2019 the Fund's attorney at the time, wrote to the plaintiff's attorneys requesting for lodgement of documents. This was requested despite the fact that previously the documents were lodged and thus suggesting that when the instructions were given by the Fund, it did not provide its attorneys with lodged documents. In the communication of 23 September 2019, the Fund's attorney also indicated that 'should the plaintiff have claimed damages, and failed to submit RAF4 Form, a special plea will be raised. For this, the plaintiff's attorneys were requested to file RAF4 Form before special plea was filed. On 4 October 2019 the plaintiff's attorneys indicated that past medical expenses and RAF4 Form will be provided as soon as possible. On 7 October 2019 RAF1 Form and the medical report completed by Dr Okokoa and the hospital records were furnished to the RAF's attorneys. On 10 October 2019 a plea was filed and thereafter discovery notices in terms of rule 35 were concluded. In November 2020, the RAF's attorneys apparently withdrew as attorneys of record.

[19] On 11 February 2021 the plaintiff delivered a notice intending to call an orthopaedic surgeon and the report thereof was provided. The notice and the report was later served on the RAF physically on 16 July 2021. This matter was only thereafter certified trial ready and 7 March 2022 was set as a date of trial. I deal later

with some other salient features relating to this matter. For now, it is important to deal with the legislative framework for the context to appear clearer in this judgment.

The mandate of RAF and applicable legislative framework

[20] Section 3 of the Act provides that the object of the Fund shall be to pay compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicle. In other words, before the Fund can be held liable for payment of compensation, it must first be proved or shown that the loss or damage was wrongfully caused by the negligent driving of a motor vehicle.

[21] Section 4 of the Act deals with the powers and functions of the Fund which in terms of section 4(1)(b) includes investigation and settling of claims arising from the loss or damage caused by driving a motor vehicle. This should be considered in the light of section 24 of the Act. Section 24 deals with the procedure for lodging of claims with the Road Accident Fund. Section 24(5) entitles the Fund to object to the validity of the claim within 60 days upon receipt of the lodgement of such a claim. On the other hand in terms of section 24 (6)(a), no claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent-; (a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund and before all requirements as contemplated in section 19(f) have been complied with, provided that if the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period of 120 days, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be.

[22] Section 19(f) of the Act provides that the Fund shall not be obliged to compensate any person in terms of section 17 for loss or damage if the third party refuses or fails-; (i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable time thereafter and if he or she is in a position to do so an affidavit in which the particulars of the accident that gave rise to the claim concern are fully set out; or (ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

[23] Furthermore, in terms of section 19(e)(ii) the Fund or agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage suffered as a result of bodily injury to any person who refuses or fails to furnish the Fund or such agent, at its or agent's request and costs, with copies of all medical reports in his or her possession that relate to the relevant claim for compensation. It is clear from the above legislative framework that the Fund is not only given a grace to investigate, settle and pay as speedily as possible, but, it is also given the power to object to the validity of the claim lodged as contemplated in section 24(5) of the Act. The power or authority to repudiate the claim is also founded in section 24(6)(b). That is, when the third party refuses or fails to furnish the Fund with copies of all statements and documents relating to the accident that gave rise to the claim concerned as contemplated in section 19(f)(ii).

[24] Whilst it appears that repudiation can be invoked at any time upon service of the summons or during plea stage, an objection to the validity of the claim is confined to the 60 days upon receipt of the lodgement documents. At this stage, the question is whether the third party has substantially complied with the requirements for lodgement. *Inter alia*, the claim for compensation as contemplated in section 24 when it is lodged must be accompanied by a medical report under section 17(1) which must- ; (a) be set out in the prescribed form which shall be completed in all its particulars; (b) be sent by registered post or delivered by hand to the Fund at its principal branch, or regional office or to the agent who in terms of section 8(a) shall have the powers to investigate and settle on behalf of the Fund the prescribed claim contemplated in section 17(1). In terms of section 24(2)(a), the medical report shall be completed on the prescribed form by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained in the accident from which the claim arises or by the superintendent or his or her representative of the hospital where the deceased or injured person was treated for such bodily injuries.

[25] If the medical practitioner or superintendent or his or her representative concerned fails to complete the medical report upon request within a reasonable time and it appears that as a result of the passage of time the claim concerned may become prescribed, the medical report may be completed by another medical practitioner who

has fully satisfied himself or herself regarding the cause of the death or nature and treatment by the bodily injuries in respect of which the claim is made. This is also provided in section 24(2)(a) of the Act. In terms section 24(2)(a) thereof, where a person is killed outright in a motor vehicle accident the completion of the medical report shall not be a requirement, but in such a case the form referred to in subsection (1)(a) shall be accompanied by documentary proof, such as a copy of the relevant inquest record or in the case of a prosecution of the person who allegedly caused the deceased's death, a copy of the relevant charge sheet from which it can clearly be determined that such person's death resulted from the accident to which the claim relates.

[26] The main object of the legislative imperative alluded to in paragraphs [24] and [25] above, must be obvious. First, it is meant to ensure that when the claims are lodged, the Fund is placed in a better position to investigate merits in time and if need be, dispose same out of the way including the extent of the injuries. For this purpose, the Fund has 60 days to decide whether the claim has validly been lodged in accordance with the legislative imperative alluded to above. The 120 days, as I see it, is meant to ensure that the Fund pursue settlement than to be entangled in unnecessary protracted and costly litigation started by the issuing of the summons after the expiry of the 120 days from date of lodgement.

[27] The 60 days' period is confined to statutory compliance on lodgement. That is, furnishing information to the Fund as contemplated in section 24 read with section 19. Anything short of the required information or documentation will entitle the Fund to activate objection to the validity of the claim as contemplated in section 24(5). Failing which, the claim will be deemed valid in law and in all respects. The 120 days from the date of lodgement seen in the context of section 19(f), appears to be a bit wide to include events and or investigations after compliance with the statutory requirements in section 24(1) and (2). I am not making a final finding in this regard. The Fund is entitled to request for more information and documentation in the process of its investigation for the primary purpose of settling and paying unless there are good grounds to take the litigation route. For example, where clear bogus claim is lodged and or where the plaintiff refuses, fails or neglects to furnish the requested information

or documentation before the issuing of the summons, a litigation route might be justified.

[28] It however, defeats the object of the Act to start asking for information and documentation after the issuing of the summons or at the brink of trial date when enormous legal costs are unavoidable. Just to restate the point, the object of the Act is payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of the motor vehicle. This must be read in the context of section 4(1)(b) of the Act which bestows power and duty on the Fund to investigate and settle the claim arising from loss or damage caused by the driving of motor vehicle. For this purpose, in terms of section 4(1)(c) the Fund must manage and utilise the monies of the Fund for the purpose connected with or resulting from the exercise of its power or performance of its duties. Any such power and duties are to investigate, settle and pay as contemplated in section 4(1)(b). The same power is given to the agents in terms of section 8.

[29] After the expiry of the 60 days' period and once the lodgement without an objection is acknowledged, there appears to be a two-way process. That is, investigation by the Fund and in the process thereof endeavour to get as much information as it could for the purpose of settling. In so doing, the Fund is entitled to ask for further information and or documentation. At this stage, the plaintiff is obliged to cooperate promptly and to provide information as so required within a reasonable period. It is important at this stage for both the Fund and claimant to be mindful of the fact that time is of essence to avert the issuing of the summons or to avoid a situation where the Fund is obliged to file a special plea in the form of repudiation as contemplated in section 19(f)(i)(ii).

[30] Ideally, litigation against the Fund ought to be avoided, almost like making litigation to be the last resort. The power of the Fund or that of the Board through agents to commence, conduct, or to defend legal proceedings in connection with claims lodged against the Fund as contemplated in section 8(1)(b) of the Act, has to be resorted to sparingly and not just as a matter of must simply because summons have been served. Everything will however be dependent on how the Fund conducts or has conducted itself from date of lodgement until when summons is served. To

defend every matter by filing notice of intention to defend and subsequent plea without having meaningfully and diligently investigated and settled as contemplated in section 4(1)(b), should in my view, be seen as an abuse and inconsistent with the object of the Act. It will also be contrary to the powers bestowed on the Fund, its Board and agents in terms of the provisions of the Act as a whole.

Applicable rules of court intended to avoid costs of protracted litigation

[31] In paragraph [1] and [2] of this judgment I referred to the weapon which the courts have in the form of costs orders when rules of court are not complied with in particular, rules 37(6) and rule 37A(10) read with sub-rules 7(d)(ii), (8) and (9). All these sub-rules deal with what I refer to as a “meaningful pre-trial conferences” between the parties. This must happen before judicial case management conferences are held. As indicated earlier in this judgment, sub-rule(2)(c) of rule 37A places an obligation on the parties or parties’ legal representatives to prepare properly, comply with all rules of court and to act professionally in expediting the matter towards trial and adjudication. This should be seen in the context of rule 37A(2)(a) which provides that case management through judicial intervention shall be used in the interest of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. In this Division all matters on any roll are subject to judicial case management process in terms of rule 37A (4) read with sub-rule (1)(a) and (b) thereof. The two cases before us are therefore subject to judicial case management process. A meaningful pre-trial conference has a two-fold purposes. The primary aim is to assist towards the resolution of disputes without recourse to protracted trials. The parties are given the benefit and an opportunity of resolving or curtailing the issues between themselves before trial and without the involvement of the court. The costs of litigation related to such pre-trial conferences between the parties are very minimal. A meaningful pre-trial conference is intended to enable the parties to explore settlement, to identify and limit issues and also to seriously consider settlement through voluntary mediation the latter of which is regrettably not taken seriously despite rules 41A and 37(6)(d) read with rule 37A(11)(a).

[32] Intervention through a judicial case management process also allows the court to have an oversight and to refuse to certify matters trial ready as contemplated in rule

37A(5)(b) unless satisfied that the matter is indeed ready for trial. The courts are required to take charge of the pace of litigation and not only dictated by the parties. The pro-activeness of the courts is required.

[33] Rule 37A(3) provides that the provisions of rule 37 shall not apply, save to the extent expressly provided in rule 37A) in matters which are referred to for judicial case management. I now turn to deal with the applicable part of rule 37 and the imperative in rule 37A insofar as it relevant in avoiding protracted litigation and at the same time encouraging settlement at an early stage and not on the date of trial or very close to date of trial when costs are already incurred. Sub-rule (6) of rule 37 is the only sub-rule of rule 37 that is expressly referred to in rule 37A(10)(a).

[34] Rule 37(6) provides for several issues which must be considered when parties conduct pre-trial conferences amongst themselves before any matter is laid before a case management judge during judicial case management conference. Eleven issues are listed under sub-rule (6) which issues shall appear in the minute document. Minute document of the pre-trial conference amongst the parties before judicial case management conference, shall be prepared and signed by or on behalf of every party and the following shall appear therefrom (a) the place, date and duration of the conference and the names of the persons present; (b) if a party feels that he or she is prejudiced because another party has not complied with the rules of court, the nature of such non-compliance and the prejudice; (c) whether the case should be transferred to another court; (c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto; (d) whether any issue has been referred by the parties for mediation; arbitration or decision by a third party and on what basis it has been so referred; (e) whether the case should be referred to another court; (f) which issues should be decided separately in terms of rule 33(4); (g) admissions made by each party; (h) any dispute regarding the duty to begin or the onus of proof; (i) any agreement regarding the production of proof by way of an affidavit in terms of rule 38(2); (j) which party will be responsible for the copying and other preparations or documents and (k) which documents will without further proof, serve as evidence of what they purport to be, which extracts may be provided without proving the whole document or any other agreement regarding the proof of documents.

[35] Looking at the need for meaningful pre-conferences and number of issues or matters to be considered and be particularised or listed in the minute document as provided for in rule 37A (8), is in my view, an indictment on the parties and their legal representatives to prepare properly for the pre-trial conference and comply with the applicable rules of court as if they are preparing for trial. Unfortunately, history and the practice have shown that pre-trial conferences are held as a matter of procedure without substance and details. This is clearly an abuse and has to be curbed or discouraged. Looking at the nature of the issues that must be discussed and specified in the pre-trial minute document, details are required, but very often you will find that the time spent in dealing with all these issues in details, is short.

[36] The many issues to be discussed during the pre-trial conference as set out in sub-rule (6) of rule 37 have specific objective. That is, to settle instead of engaging in a protracted litigation or at least to shorten the length of trial and most importantly to ensure that each party is ready for trial. Readiness for trial is everything and in terms of sub-rule (5)(a) of rule 37A the fact that a matter has been allocated for a trial date, in particular regarding cases that are subject to judicial case management, does not mean that the matter is trial ready. It is trial ready only when the case is certified trial ready by the case management judge. As indicated earlier in this judgment, in terms of paragraph (b) of sub-rule(5), a case management judge shall not certify a case as trial ready unless he or she is; (i) satisfied that the case is ready for trial, and in particular that all issues that are amenable to being resolved without a trial have been dealt with; (ii) that the remaining issues that are to go to trial have been adequately defined; (iii) that the requirement of rules 35 and 36(9) have been complied with if they are applicable and (iv) that any potential causes for delay in the commencement or conduct of the trial have been pre-empted to the extent practically possible.

[37] Speaking about “*pre-empted to the extent practically possible*”, Form A to the Practice Directive of this Division is designed in such a manner that by the time the parties conduct a pre-trial conference by a specific date as per Form A and before the second case management conference or before trial, any potential cause for delay is pre-empted. Clearly, seen in the context rule 37(6) read with some provisions of rule 37A, every party to litigation has a role to play and an obligation to cooperate and not

stay away from pre-trial and judicial case management conferences as it has happened in the two cases. In fact, sub-rule (2)(c) of rule 37A speaks to this. That is, rule 37A shall be construed and applied in accordance with the principle that notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication. At the risk of repetition, it is for this reason that in terms of sub-rule (2) of rule 37A, case management through judicial intervention; (a) shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of case; and (b) the nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending. Detailed Practice Directive of this Division is designed to supplement or complement rule 37A as the Division is so entitled to do in terms of sub-rule (2)(b) thereof. The Practice Directive is also meant to ensure that there is efficient and structured practice of dealing with proceedings issued and pending in the Division, more so that this is a new Division where many practitioners never had an opportunity to litigate in the high courts.

[38] This then brings me to some other imperatives in rule 37A. Sub-rule (6) thereof requires of the registrar to issue a notice for the holding of a case management conference before a judge. This has been supplemented by the Division's designed Form A. In terms rule 37A(7)(c) before any such case management conference, the parties are required to have held a pre-trial before the case management conference at which the issues identified in sub-rule (10) of rule 37A in relation to the conduct and trial of the action must have been considered.

[39] Sub-rule (10) referred to in sub-rule (7)(c) of rule 37A can only be construed as a weapon for trial readiness. Sub-rule (10) of rule 37A read in context with rule 37(6) referred to above, in my view, speaks to the primary responsibility that remains with the parties and their legal representatives to prepare properly, comply with all the rules of court and to act professionally in expediting the matters towards trial readiness and adjudication as contemplated in rule 37A(2)(c).

[40] Sub-rule (10) of rule 37A deals with matters that the parties must address at the pre-trial meeting to be held in terms of sub-rule (7). Those matters are: (a) The matters set forth in rule 35, 36 and 37(6); (b) the soliciting of admissions and the making of enquiries from and by the parties with a view to narrowing the issues or curtailing the need for oral evidence; (c) the time periods within which the parties propose that any matter outstanding in order to bring the case to trial readiness will be undertaken; (d) subject to rule 36(9), the instruction of witnesses to give expert evidence and the feasibility and reasonableness in circumstances of the case that a single joint expert be appointed by the parties in respect of any issue; (e) the identity of the witness they intend to call and in broad terms, the nature of the evidence to be given by each such witness; (f) the possibility of referring the matter to a referee in terms of section 38 of the Act; (g) the discovery of electronic documents in possession of a server or other storage device; (h) the taking of evidence by video conference; (i) suitable trial dates and estimated duration of trial (j) any other matter germane to expediting the trial readiness of the case.

[41] Before I deal with sub-rules (8) and (9), *“the time periods within which the parties propose that any matters outstanding in order to bring the case to trial readiness will be undertaken”* referred to in paragraph (c) of sub-rule (10) has to be seen as supplemented by information to be filled in Form A. In terms of Form A, parties must first agree on the date on which the matter was to be enrolled on the second case management roll, being the date on which the case management judge is expected to determine whether the case is ready for trial or not and if so to certify it trial ready by completion of Form A3. In Form A, the parties themselves or their legal representatives set the time-frames by which the plaintiff and defendant are to file all reports required in the case. The parties also agree amongst themselves as to when to file joint minute document of experts, thereafter by when to hold a pre-trial conference amongst themselves and when to file such pre-trial minute document. The parties also in Form A set the date by which the matter ought to be settled, should it be capable of being settled which date has to be at least 7 clear court days before the second management conference. This is intended to minimise the costs of litigation by avoiding settling on the date of trial or very close to the date of trial when costs of litigation for trial are already incurred.

[42] Coming to sub-rule (8), it provides that the minute referred to in sub-rule (7)(d)(ii) shall particularise (list) the parties' agreement or respective positions on each of the issues identified in sub-rule (10) and to the extent that further steps remain to be taken to render the matter ready for trial, explicitly identify them and set out a timetable according to which the parties propose, upon a mutually binding basis, that such further steps will be taken. In terms of sub-rule 7(d)(ii) the plaintiff is required, not less than two days before the time appointed for the case management conference; deliver an agreed minute of the proceedings at the meeting held in terms of paragraph (c), alternatively, in the event that the parties have not reached agreement on the content of the minute, a minute document signed by the parties filing document together with an explanation why agreement on its content has not been obtained.

[43] Sub-rule (8) is very important. The word "*particularise*" on each of the issues identified in sub-rule (10) regarding the agreement or respective positions, should mean that such agreement or respective positions should individually be dealt with in the minute document as "headings" or be so listed. That is, each issue identified in sub-rule (10) must be set out separately and then indicate the agreement if any or set out respective positions whether the other party participates or does not participate in the pre-trial conference proceedings. It is peremptory to deal in the minute document with every issue identified in sub-rule (10) and deal with each party's position in the event the parties did not agree on any of the issues under sub-section (10). Sub-rule (8) imposes a duty on the parties to set the time frames in case arising from the pre-trial conference, there are certain things still to be done by any of the parties and if so by when. Trial readiness is therefore emphasised in the sub-rule (8). "*Particularise*" in sub-rule (8) should be understood to mean "*to specify, detail, list, enumerate, spell out or cite*". Sub-rule (9) is similarly very important. It prescribes what the parties to a pre-trial conference before the judicial case management conference must do. Sub-rule (9)(a) of rule 37A provides that in addition to the minute referred to in sub-rule (7)(d)(ii) the parties shall deliver a detailed statement of issues, which shall indicate:-; (i) issues in the case that are not in dispute and; (ii) the issues in case that are in dispute, describing the nature of the dispute and setting forth the parties' respective contentions in respect of each such issue. This is a requirement that is almost like forcing parties to file written heads of argument in addition to the minute document wherein twenty one issues identified in rule 37(6) and rule 37A(10) must appear in the

minute document. It requires every party to participate in the pre-trial conference and to prepare properly for such pre-trial conference as if each party is preparing for trial. Otherwise, the parties to a pre-trial conference amongst the parties before a judicial case management conference, would not be able to identify the witnesses they intend to call during trial and, in broad terms state the nature of the evidence to be given by each such witness as contemplated in rule 37A (10) (e). Similarly, unless properly prepared for the pre-trial conference as if each party is preparing for trial, the parties would not be able to make settlement proposals as contemplated in rule 37(6)(c).

The consequences of failure to comply with the rules of court

[44] I deal with this topic at the risk of being repetitive. For the imperative in rule 37A to be heeded to and meaningfully to be complied with by the parties or parties' legal representatives, all parties to the proceedings need to be proactive and cooperate with each other. But for the parties, legal practitioners and or other persons who do not heed to the rules of court in litigation and in case management proceedings, they run the risk of being met with the might of the court as is so entitled to do in terms of the applicable rules of court as set out hereunder.

[45] The drafters of rules 37 and 37A in my view, saw meaningful pre-trial conferences and judicial case management conferences as important tool to alleviate congested trial rolls and address the problems which cause delays in the finalisation of cases. For this, courts are given teeth to bite and are no longer toothless bystanders in expediting the pace of litigation.

[46] As contemplated in rule 37(9)(a)(i)(ii), at any hearing, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or such party's attorneys, because such party or party's attorney did not attend pre-trial conference or failed to a material degree to promote the effective disposal of the litigation. Similarly, in terms of rule 37A(12)(h) a case management judge may at a case management conference make an order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct has conduced unreasonably to frustrate the objective of the judicial case management process. Furthermore, in terms of rule 37A(16), any failure by a party to adhere to the

principles and requirements of this rule 37A, may be penalised by way of an adverse costs order. At the risk of repetition, the principle in rule 37A is to use it in the best interest of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases as contemplated in sub-rules (2)(a) of rule 37A. The nature and extent of its utilisation in this Division is complemented by the relevant directives or practices of this Division. These practices and the Directive are well known or expected to be known to the litigants through their legal representatives having matters pending in this Division. I deal with this topic in some more detail from paragraph [215] and other paragraphs in the body of the judgment relevant hereto.

Issues raised in the current enquiry regarding costs

[47] The current enquiry was prompted by the late settlements and or on the dates of trial when enormous costs of litigation were already incurred or not preventable. The approach to this enquiry will be; (a) what the Fund did upon lodgement of claim; (b) what the Fund did upon receipt of the summons; (c) what the Fund did upon receipt of request for holding of pre-trial conference amongst the parties; (d) what the Fund did upon receipt of date of case management conference, and (e) what the Fund did upon receipt of notice of set down.

[48] Upon receipt of the affidavits directed by this court and upon hearing of argument on 27 June 2022, other issues of concerns emerged. These included whether the Fund had anything in place to absorb and effectively deal with cases pending in our courts and country-wide when it terminated the mandate of panel attorneys and demanded the return of the files. I must make it clear upfront. I am not questioning in these proceedings the Fund's entitlement or otherwise to terminate the mandate of panel attorneys. That is not the issue before us. The issue is whether when the Fund demanded the return of all the files from all its panel attorneys, it had a plan and the capacity in place to deal with those matters pending in courts throughout the country including those matters in this Division. And if not, whether such shortcoming has a bearing on the late settlements in these two matters and on the Fund's failure to attend pre-trial and judicial case management conferences and to attend trial on the dates as scheduled. The other question is what impact did such an action have on the congested trial rolls and failure to address the problems which cause delay in the

effective and efficient finalisation of cases? Put differently, was the demand for the return of files from the Fund's panel attorneys made without a plan? And if so, what impact it had on in the interest of justice and effective disposal of cases on the trial rolls? Lastly, what measures are currently in place to address and avoid the problem of cases against the Road Accident Fund being finalised in court in the absence of the Fund?

The system implemented by the Fund post disposal of panel of attorneys and the challenges thereof.

[49] I find it necessary to deal with this topic as it appears to be the real problem for failure by the Fund to participate effectively in the pre-trial procedures and failure to attend court on the dates of trial. The challenges can be located to the affidavits filed by the claim-handlers as they try to explain why they should not be ordered to pay costs out of their own pockets for late settlements in these two matters. The claim-handlers in their affidavits inter alia, deal with the procedure in matters that were previously defended. According to the claim-handlers during 2021 the Fund's staff were re-organised into three main departments. The first one is referred to as "settlement hub" department; the second one is called "*short term trial department*" and the other one as "*long term trial department*". These are the three departments meant to deal with the so called "*previously defended matters*" and the two matters are such "*previously defended matters*". The claim handlers were mandated to attempt to assess and finalise these matters as soon as possible. It is said these matters are '*considered from the earliest trial date going forward*'. It is not clear what this means.

[50] In the assessment and consideration of "previously defended matters going forward", the claim-handlers determine whether all documents and information necessary to assess and finalise previously defended matters have been met. Just to pause for a moment: These kind of assessments and requests for documents should have taken place within the 60 and 120 days referred to in section 24 read with section 19 of the Act. If this was followed through, the requests for further information and documentation would have happened before the summons were issued and many matters in all probabilities would not have become "previously defended matters" because they would have been settled much earlier.

[51] The claim-handlers in their affidavits also explain the procedure that is followed and obliged to comply therewith upon receipt of the pre-trial and judicial case management conferences. The pre-trial and case management notices are sent to the State Attorney as per the directive issued by the management on behalf of the CEO and the Board. This is said to be based on the fact that only the State Attorney is authorised to sign pre-trial notices and to attend to such conferences on behalf of the Fund. As regards to the procedure to be followed upon receipt of the trial date, the procedure is explained as follows: The claim-handler is informed of the notice of set down and the matter will accordingly be diarised. A strange and unexplained procedure is then stated as follows by some of the claim handlers who filed the affidavits:

“Because of the number of matters that we need to assess, finalise and attend to, the matters can only be considered from the earlier trial date going forward”.

[52] It is further explained that in some days, claim-handlers could have over 20 trials to attend to on a single day. Most claim-handlers are said to have over hundred matters in their respective portfolios to attend to. A further statement is made as follows by one of the claim-handlers:

“However, currently matters set down for trial are referred to the short or long term trial departments, respectively, who focus only on matters set down for trial and focus on specific months.

For instances, the long term trial department focuses on matters for March and April 2022 and the short term departments focuses on matters set down for trial May 2022 and June 2022”.

[53] It is said claim officers would then assess and prepare those matters as best as they can considering, the number of matters allocated to them. This is done based on the earlier to the latest trial dates, so is explained. The procedure to be followed with regards to trial matters is then further explained as follows by one of the claim-handlers namely, Mr Wakeford in paragraphs 41 to 43 of his affidavit deposed to on 17 April 2022:

“41 One of the biggest problems we have is that there is usually not enough evidence in the files to properly and quickly assess the matter and had that information been available earlier it would have been settled before the matter was set down for trial.

42. Much of the time by the claim officer in those departments is used to request further information from the plaintiff’s attorneys in order for them to assess the claim.

43. We usually then receive that further information close to trial and then assess the further information to enable us to draft a memorandum, which will need to be approved and thereafter a settlement offer is made. If that offer is rejected, then the matter will be referred to the state attorneys and they will act for the defendant”.

[54] I find it necessary to comment on the statement quoted above. in the preceding paragraph. It is strange that this is how the Fund operates with regards to trial matters once the notices of set down are served as opposed to what the Fund does upon receipt of the notices for pre-trial conferences. Perhaps the explanation as quoted in above explains why so many matters are finalised in our courts in the absence of the Fund or are settled on the dates of trial or very close to the dates of trial when trial costs are already incurred.

[55] The explanation with regards to receipt of the notices for pre-trial and judicial case management conferences is that they are sent straight to the State Attorney Office to attend to as the claim-handlers cannot appear on behalf of the Fund regarding pre-trial and case management conferences. so is explained in the affidavits. Why the Fund came up with a system to let claim handlers be seized with trial matters upon receipt of set down notices for the purpose of considering settlements and or to ask for more information boggles one’s mind. It is actually baffling to refer trial matters with the notices of set down to claim handlers than to refer same to legal representatives.

[56] I understand the claim-officers who had deposed to affidavits in these two matters to say in terms of the policy or directive issued to them and to which they are

obliged to comply therewith, they are not permitted to ask for information and seek to settle at an earlier stage of the pre-trial and judicial case management conferences. They are only allowed to resort to seeking to settle at a very late stage when matters are enrolled for trial. This cannot be in the best interest of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases as contemplated in rule 37A(2)(a). In fact, this procedure to which the claim-officers are obliged to comply with, fails to a material degree to promote the effective disposal of the litigation as contemplated in rule 37(9)(a)(ii). It is also a procedure that can be categorised as offending against the principles and requirements of rule 37A, seen in the context of sub-rule 16 referred to earlier in this judgment. The procedure can only serve to conduce unreasonably to frustrate the objectives of the judicial case management process as contemplated in sub-rule 12(h) of rule 37A. At the risk of repetition, I turn to deal further with and evaluate the facts of each case insofar as is relevant to the enquiry on costs occasioned by the late settlement or settlement on the date of trial.

Masilela case

[57] In paragraphs [4] to [8] of this judgment briefly referred to some background facts relating to this matter. This matter started as a direct claim, something which appears to be encouraged by the Fund and there is nothing wrong with direct claim as long as the Fund is prepared and able to assist the claimant. The Fund has to be more proactive when direct claims are lodged. It is in the best interest of both the Fund and the claimant to do so. Only when this is done correctly, will matters be settled timeously before the issue of the summons or at least during pre-trial and or judicial case management conferences. It will also encourage interests to go for direct lodging of claims if the public is satisfied that direct lodging of claims is attended to correctly and above board. One must be concerned by the statement in paragraph 56 of Mr Wakeford's affidavit deposed to on 17 April 2022 which is articulated as follows:

“...matters are allocated to different officials based on which department they have been assigned to and whether the specific matter has a set down date or not, in which case the matter would be allocated to an officer in the settlement hub or short or long term trials, depending on the circumstances”.

[58] The statement should be seen in the context of what is alluded to in paragraph [53] above. The statement above suggests that matters which have trial dates and often to which the Fund played no role during pre-trial and case management conferences, are referred to the settlement hub and thus causing matters to be settled only when enormous costs have been incurred and very often on the dates of trial. This appears to have been the case in Masilela case.

[59] Mr Masilela directly lodged the claim with the Fund on 12 January 2018. Within 14 days upon receipt of the lodgement of the claim, the Fund is said to have made the verification and validation report. This appears in paragraph 9 of Mr Letsoalo's affidavit deposed to on 11 July 2022. With regard to the nexus between MVA and injuries it was recorded "False". (b) whether or not MMF3/RAF3 was available or not it was recorded "False". (c) Under 5.7.3 it was recorded "substantial compliance"; (d) as regards whether a copy of the SMR was completed correctly is recorded "False"; (e) regarding whether there was RAF4 on file, is recorded "No"; (f) regarding whether the Doctor who completed the form is registered with the HPCSA is recorded "No"; and (g) whether the RAF4 was received within the prescribed time, it was recorded "No".

[60] Mr Letsoalo further in paragraph 10 of his affidavit states that letters requesting the plaintiff to provide hospital records and clinical records were sent after the 60 days' period. Mr Masilela was informed in the letter that his claim will be handled by Mr Khoza. He was also advised that all further correspondence in relation to the claim should be directed to the said claim-officer, Mr Khoza. Mr Letsoalo further in paragraph 10 of his affidavit states as follows:

"It appears that the RAF's staff waited for the hospital and clinical records which did not arrive (and were in fact only made much after the summons)".

[61] Having said what is quoted above, Mr Letsoalo then makes another statement as follows:

"It is clear that the outstanding information was requested, the claim was considered objectionable due to insufficient information".

[62] It is one thing to consider the lodging of a claim as objectionable due to insufficient information, but is another not to formally object to the lodgement thereof within 60 days as so legislated. The request for information and or documentation is not an objection to the validity of the claim as required in terms of the relevant provision in the Act. Having considered the claim objectionable due to insufficient information and still not formally object, does not activate the imperative in section 24(5). Once the validity of the lodgement of the claim is not formally objected thereto within 60 days, the claim is deemed valid in law in all aspects as so provided in section 24(5). Upon the expiry of the 60 days' period without objection, further documentation or information can still be sought from the claimant. This has to be done within 120 days from the date of receipt of the lodgement documents as contemplated in section 24(6) read with section 19(f). Failure to furnish such information or documentation as prescribed, will entitle the Fund to formally repudiate the claim. As it appears from Mr Letsoalo's affidavit, upon service of the summons a special plea of repudiation for failure to provide the Fund or its attorneys with required records, was never delivered. Therefore, an attempt to blame the plaintiff for the late settlement has to be seen in context.

[63] When the summons was served, the Fund instructed a firm of attorneys during July 2019 to enter an appearance to defend. The fact that the plaintiff's attorneys filed the hospital records in April 2019 which was requested on 27 March 2018 does not make the Fund case better if it did not object to the validity of the claim and had not repudiated the claim by way of a special plea within 60 and 120 days respectively seen in the context of sections 24 and 19(f) of the Fund Act.

[64] With regards to failure to cooperate and attend the pre-trial and judiciary case management conferences, Mr Letsoalo in his affidavit states that *"the plaintiff's attorney served a notice of set down for a pre-trial / civil trial, case management directive order on the RAF's previous panel attorney who then failed to respond to the rule 37 notice and failed to appear at the case management meeting. Therefore, it was not the disbandment of the panel attorneys that left the RAF unrepresented at that case management meeting, but the fact that the RAF actually had an attorney on record who simply ignored its duties and obligations in terms of the SLA and the Rules of Court"*.

[65] That might be so. But that does not immune the Fund from scrutiny of what it did or did not do upon its panel attorneys having withdrawn as attorneys of record and returned the file on demand by the Fund. Two claim-officers of the Fund filed affidavits. Ms Mogorosi in her affidavit deposed to on 22 March 2022 alluded to the fact that on 30 September 2020 there was a communication between RAF and the plaintiff's attorney. Therefore, one can move from the premise that as on 30 September 2020 the Fund's previous panel attorneys were no longer dealing with the case, as their mandate has been terminated by effluxion of time. When the Fund was to make an offer, and this is said without specifying the time period, the Fund realised that according to the claim system, the Fund had instructed an expert to make a report which they had to wait for. Ms Mogorosi in Paragraph 7 of her affidavit noted that according to her system notes, the last time the plaintiff's attorney made a follow-up in respect of this matter was on 5 November 2020.

[66] Reading the affidavits filed in Masilela and Hlatswayo matters, one is given the impression that the Fund would only act and seek to do something when "follow-up" is made by the plaintiff's attorneys. The Fund seldom acts proactively in investigating and looking for more information to expedite finalisation or settlement of the claims before protracted litigation looms. This prognostication by the Fund doing nothing to investigate, settle and pay after lodgement or at least immediately after service of the summons, is the result of settlements at the doorstep of trial dates when costs are already incurred. This seems to be a trend and is in conflict with the main object, powers and functions of the Fund as contemplated in section 3, 4 and 11 of the Act including section 7. The latter section deals with the resources of the Fund and utilisation thereof. It provides that the resources and facilities of the Fund shall be used exclusively to achieve, exercise and perform the object, powers and functions of the Fund respectively. In my view, any conduct that is in conflict with the imperative provisions in the Act, may in justifiable circumstances remove the shield or limitation of liability envisaged in section 15(3) of the Act. I deal later with the imperative in section 15(3) under paragraphs [179] to [184] of this judgment.

[67] Ms Mogorosi sought to suggest that she had never received the 2022 pre-trial and case management conference notices. In the same breath, she does not dispute

the fact that such notices were sent to her. But she seeks to hide behind the fact the Road Accident Fund suffered a massive computer security attack in 2021. This is not convincing for the present case.

[68] Ms Mogorosi like other claim-handlers was very scanty in her initial affidavit. As a result, she was directed to file a detailed supplementary affidavit dealing with the issues raised in the court's directions quoted in paragraphs [9] and [10]. In her supplementary affidavit deposed to on 17 April 2022 she suggested that the claim in Masilela matter was rejected within the statutory 120 days due to insufficient information being made available and that for this, the claim could not be properly assessed by the Fund. This is not correct seen in the context of what is stated in paragraphs [59] to [62] above. On 16 February 2022 Masilela matter was re-allocated to Mr Wakeford. Regarding receipt of the notice for pre-trial and case management conferences, Ms Mogorosi seeks to assert another reason why she may not have seen the emails including the year 2022 notices.

[69] In paragraph 4.7 of her affidavit deposed to on 17 April 2022 she gives an explanation as follows:

"However, I do receive a huge number of emails per day and it might have ended up in my span folder. If I did receive such a notification, I would have sent to the State Attorney's office as that is our instructions in regard to notification received for pre-trial or judicial case management".

Pressure placed on the claim-officers

[70] I am not satisfied with the explanation by Mr Wakeford and Ms Mogorosi. But, whether or not they should be held liable for the costs connected to or occasioned by the late settlement will be dictated by my findings elsewhere in this judgment. The pressure that the claim-handlers had to bear appear in all affidavits filed by the claim-handlers in these two cases. For example, Ms Mogorosi in her portfolio, she was responsible for about 1900 RAF matters as on 17 April 2022. Similarly, Mr Wakeford had about 2400 trial matters in November 2021. In December 2021 he had only 7 trial matters due to recess. Between January and February 2022 he had to attend to 35 trial matters which included matters transferred to him. In March 2022 he handled 122

trial matters. According to him from January 2022 to March 2022 he attended to 157 trial matters. He settled about 320 matters from June 2021 to 17 April 2022. The remaining other trial matters were partially settled in respect of merits. All of the above appears to be a trend for every claim-officer since the Fund terminated its relationship with the panel attorneys. I later deal in some more detail with this challenge when I deal with the impact of doing away with panel attorneys without something tangible to deal with the load of work previously assigned to them.

[71] Masilela file was allocated to Mr Wakeford on 8 February 2022. By this time the matter had already been certified trial ready without the Fund participating and cooperating in the pre-trial conference and in the completion of Form A referred to earlier in this judgment. The Form A serves as part of judicial case management process. The 8th February 2022 was preceded by the following undisputed events: On 30 September 2020 at 11:15, Ms Mogorosi was provided by the Plaintiff's attorneys with detailed settlement proposals and all necessary documents were also provided. The documents included combined summons, return of service, notice of intention to defend, defendant's plea, claimant's identity document, application in terms of regulation 6(3), registration report, verification and evaluation report, hospital records, section 19(f) affidavit, medical examiner's report by Dr Monareng and RAF4 Form completed by the Doctor.

[72] Ms Mogorosi apparently upon receipt of the email of 30 September 2020 and the documents attached thereto, instead of making an offer or counter proposal for settlement chose to respond by asking for lodgement documents. Namely, copy of summons, medico-report, RAF4 Form, calculations and settlement proposals. One should gravely be concerned whether Ms Mogorosi ever took time to read the email of 30 September 2020 from the plaintiff's attorneys together with the documents attached thereto. It looks like when Ms Mogorosi received the settlement proposal on 30 September 2020 and other documents, she elected to shelve her attention thereto. Instead without reading the email and attachments thereto, she diarised the file for 7 October 2020 almost like copying the plaintiff's attorneys. I say so because the plaintiff's attorneys in the email of 30 September 2020 which was sent to Ms Mogorosi, Wednesday 7 October 2020 was flagged as a follow-up date. This is the very same

day that Ms Mogorosi asked for documents and or reports already provided as per the email of 30 September 2020.

[73] One should even be more concerned that Ms Mogorosi asked for the lodgement documents, copy of the summons and RAF Form from the plaintiff's attorneys. It is expected that when Mboweni Attorneys were instructed by the Fund to defend the action, the Fund would have provided the attorneys with the summons and lodged documents including RAF form. The chess play of delays is startling to say the least. Therefore, her assertions that *'the claim team requested several documents as well as reports from the plaintiff's attorneys in order to settle as in paragraph 4 of her affidavit deposed ton 22 March 2022'*, (referring to the affidavit of her colleague), has to be seen in context. She did nothing since the communication of 30 September 2020. When she responded on 7 October 2020 she startled the pace of litigation by asking for information or documents provided to her on 30 September 2020.

[74] On 9 December 2021 at 11:18 the Fund was informed of the judicial case management conference enrolled for 25 January 2022. The notice was sent to the long term trial department and to one Ms Cindy Ntsiyane who was apparently supposed to attend to the matter. In the email, the Fund was advised to diarise the date accordingly and to make an offer. That did not happen. On 3 February 2022 at 13:04 the Fund was notified of the trial date of 14 March 2022. This was sent to Ms Cindy Ntsiyane and Ms Puleng Sengadi who were expected to attend to the matter. They were requested to make an offer of settlement. That too did not happen.

[75] As indicated earlier, during February 2022 this matter was re-allocated to Mr Wakeford. This was only done after having received notice of set down on 3 February 2022 for hearing on 14 March 2022. According to Mr Wakeford upon the matter having been allocated to him, he requested for the physical file. In paragraph 5 of his affidavit deposed on 22 March 2022 he states that he "requested more information from the plaintiff's attorneys". This he said without being specific in his affidavit. He says upon receipt of further supporting documentation, the plaintiff's attorneys provided an updated settlement proposal and all attachments on 23 February 2022. Mr Wakeford does not state what he did between 8 February 2022 to 23 February 2022. The email

of 23 February 2022 and documents provided thereto by plaintiff's attorneys were only acknowledged on 8 March 2022.

[76] In the email of 8 March 2022 Mr Wakeford *inter alia*, states:

"May I kindly request copies of your client's lodgement documentation, specially copies of your client's section 19(f) affidavit, accident report, hospital records as well as the SAPS Docket."

[77] One wonders how the Fund operates. The documents in question were not requested for the first nor the second time. They formed part of the lodgement documents that were long repeatedly provided after repeated requests for documents.

[78] In the email of 8 March 2022 Mr Wakeford requested to be provided with '*direct contact of the attorney dealing with the matter in order to discuss the matter*'. This request was made despite the fact that in the email of 23 February 2022 addressed to Mr Wakeford, Mr Siyabonga Mndawe was indicated as the writer of the email in question. Be that as it may, on Wednesday 9 March 2022 the matter was partially settled. That was very close to the date of trial and by this time costs of trial were unavoidable. Monday 14 March 2022 was the date of trial. There was no appearance on behalf of the Fund.

[79] Mr Wakeford asserts that he had acted reasonably. He seems to move from the premise that the matter was partially settled late due to the plaintiff or his attorneys. According to him the plaintiff's attorneys should have filed proper documents before approaching the court for trial. This appears to be the general view by the Fund and its claim-handlers in every matter. This stance in my view, is often wrong and without factual basis. First, the Fund's powers and functions is to investigate the claims lodged, settle and then pay for damages arising from the negligent driving of a motor vehicle. Second, if lodgement documents are not satisfactory to the Fund and thus non-compliant with statutory requirements, the Fund has the authority and obligation to object to the validity of the lodgement of the claim. Third, before the expiry of 120 days from date of lodgement, the Fund can request for more information and or documentation. Failure or refusal by the claimant to provide such information or documentation within reasonable time as soon as such information becomes

available, entitles the Fund to plead that its liability is excluded. This can be done by the Fund filing and serving special plea in the form of repudiation.

[80] Therefore, the statement by Mr Wakeford that the *'plaintiff's attorneys should have filed proper documents before approaching the court for a trial date'*, has to be seen in context and has to be rejected as a justification for the late partial settlement of the case. The assertion that 'the matter is not ripe for hearing as the Forensic Report was not adequate', cannot help Mr Wakeford or the Fund. The Fund did not participate in the pre-trial conference where they would have raised prejudice. They did not participate in the completion of Form A wherein the parties on agreed mutual basis could have set the time-frames for trial readiness. Therefore, it is too late to make the assertion seeking to blame the plaintiff or his attorneys. Mr Wakeford further in paragraph 12.3 of his affidavit deposed to on 22 March 2022 makes a statement as follows:

"After I had informed the plaintiff's attorneys that their case was not competent, and they then suggested that an addendum report be obtained, I promptly obtained instructions on the issue that could be decided and made a tender".

[81] Mr Wakeford whilst he works for the Fund as a claim-officer who dealt with this matter, is an attorney by profession having been admitted in 2015. He had apparently practised as such until he joined the Fund in June 2021. He knows or expected to know better that neither the Fund nor himself can at such a late stage seek to assert that the plaintiff's claim is not "competent". It is just too late to raise a defence or justification or repudiation of some sort. The opportunity as they were entitled to have taken in terms sections 19(f) and 24(5) and (6) has been allowed to come and pass.

[82] The suggestion that the claims-team did not attend court on 14 March 2022 because he and the Fund *'assumed that those limited issues had been settled after receipt of the plaintiff's draft order and notices of acceptance'*, is not plausible. Mr Wakeford as an attorney since 2015 and whilst he is currently not practising, knows or is expected to know that you do not settle and then absent yourself from court and expect that the court will allow the matter to proceed and have an order made in the absence of the other party. The Practice Directive of this court which came into effect on 9 January 2020 is very clear. Any matter that is settled less than 7 clear court days

before the date of trial when costs of trial are already incurred, becomes the subject of enquiry for costs of trial occasioned by the late settlement. This is also contained in Form A which the Fund should have been part of. Furthermore, Mr Wakeford knows or is expected to know that in this division, a case is only removed from the roll when it has been settled in its entirety. In other words, matters on the Division's roll are so kept on the roll until finalised in their entirety.

[83] The “massive workload” referred to in paragraph 14 of Mr Wakeford's affidavit deposed to on 22 March 2022 and then say “...I have as a claims handler, I had to attend to other matters which had to be urgently administered to ensure that those other claims can also be promptly settled and finalized to the advantage of claimants”, boggles one's mind. The statement presupposes that this matter was not urgent deserving Fund's presence in court on 14 March 2022. Clearly, Mr Wakeford is mistaken in this regard. It is a peremptory provision that at the hearing of any trial matter, the court shall consider the issue of costs in rule 37(9)(a)(i)(ii). The provisions of this rule is referred in its fullest under paragraph [1] of this judgment. This too Mr Wakeford knows or should have known as an attorney since 2015. However the question remains whether Mr Wakeford and Ms Mogorosi should be ordered to pay out their own pockets the costs related to or connected to the late settlement as contemplated in rule 37A (12) (h). I touch further on this when I deal with the decision to do away with panel attorneys in respect of pending matters including the restructuring of the Fund and implementation thereof without sufficient capacity to deal with the volume of matters from the panel attorneys. It suffices for now to mention that seen in the context of the “*extreme pressure*” the claim-handlers had to bear with and conceded by Mr Letsoalo as it would appear later in paragraph [111] of this judgment, Mr Wakeford and Ms Mogorosi should not be burdened with costs order as contemplated in rule 37A(12)(h). The extreme pressure on the claim-handlers were occasioned by lack of proper planning in the face of the many files demanded from the panel attorneys by the CEO, management with the approval of the Board.

Some further facts in Hlatswayo matter

[84] Earlier in paragraphs [6] to [9] of this judgment, I briefly touched on some background facts relating to this matter. The matter was on trial on 7 March 2022 when

it was settled in its entirety. According to the Fund through its claim-handlers who had deposed to and filed affidavits as directed by the court, on 24 January 2022 this matter was allocated to one Ms Dorcas Mashila. On 26 January 2022 she requested the expert report, settlement proposal and or plaintiff's heads of argument to be provided. I want to pause for a moment and comment on the request by the Fund for settlement proposal and or plaintiff's written heads as indicated in paragraph 8 of Ms Wanneburg's affidavit deposed to on 17 April 2022. Ms Wanneburg is apparently a supervisor to Ms Mashila.

[85] Rule 37(6)(c) of the Uniform Rules requires that the minute of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom *inter alia*, that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto. The plaintiff is such 'a party-claiming relief'. The Fund did not participate in the pre-trial conference for reasons that are not convincing. The point is that asking for such settlement proposal and written heads of argument few days before the date of trial amounted to failure to a material degree to promote the effective disposal of the litigation as contemplated in rule 37(9)(a)(ii). Furthermore, this late request for settlement proposal and written heads of argument amounted to a conduct that has conducted unreasonably to frustrate the objectives of the judicial case management process as contemplated in rule 37A (12) (h). Such requests could have been made under sub-rules (8) and (9) of rule 37A had the Fund attended the convened pre-trial conference before the matter was certified trial ready.

[86] In paragraph 9 of her affidavit, Ms Wannenbourg seems to shift the blame for the delay to the plaintiff or her attorneys. The statement, "...*the heads of argument were not attached thereto, which were emailed to her about a month later*", fortifies this assumption. The statement does not help the Fund insofar as is intended to turn rule 37(6)(c) around. This is a statement made by Ms Wannenbourg with reference to her colleague who allegedly received the requested written heads of argument late from the plaintiff's attorneys. Rule 37(6)(c) requires the Fund to react to a request to make proposal for settlement. Sub-rule (9)(a) of rule 37A on the other hand requires the parties in addition to the minute referred to in sub-rule (7)(d)(ii) of rule 37A to deliver a detailed statement of issues which must include (i) issues that are not in dispute and,

(ii) issues in the case that are in dispute, describing the nature of the dispute and setting forth the parties' respective contentions in respect of each such issue. It is at this stage that a defendant can also ask its opponent, namely, the plaintiff to make a proposal for settlement. This could not have happened in the present case because the Fund's officials elected to abstain from the pre-trial conference convened by the plaintiff before the judicial case management conference. The Fund's officials also elected to ignore the judicial case management process the Division set for itself by not cooperating in the completion of Form A of the Division Practice Directive.

[87] The need to request and make proposal for settlement during pre-trial conference as contemplated in sub-rule (6)(c) of rule 37 are such issues the nature of which must be described as contemplated in sub-rule (9)(a)(ii) of rule 37A. The parties' respective contentions can be described as written heads of argument which the Fund only requested upon receipt of notice of trial for 7 March 2022 and long after the opportunity to talk about settlement during pre-trial conference and judicial case management conference had come and passed or ignored. Therefore, the late request for expert reports, settlement proposal and the plaintiff's heads of argument with the Fund doing nothing on its part to advance its investigative obligation at an early stage for the purpose of settling and before unnecessary costs of litigation are incurred, renders the object of the Act an exercise in futility. It is this kind of a conduct that is meant to be met with the displeasure of the court as contemplated in rule 37(9)(a)(i) and (ii) including rule 37A(12)(h). Whether the latter sub-rule should find application with reference to Ms Wannesburg and Ms Mashila is still the subject of discussion and evaluation later in this judgment.

[88] On 3 March 2022 Ms Wannenburg and Ms Mashila were reminded of the trial date of 7 March 2022. The 3rd March 2022 was on a Thursday before the following Monday being a trial date. According to Ms Wannenburg they "worked overtime during the weekend of 5 and 6 March 2022 finalising many different matters and Ms Mashila prepared a memorandum for settlement for this matter", Ms Wannenburg asserts. It is said that the memorandum was then approved on Sunday 6 March 2022. Then on Monday 7 March 2022 (date of trial) the offer to the plaintiff was made and accepted. This is telling because if this matter was properly attended to in time it could long have settled without incurring unnecessary trial costs. The speed at which the matter was

settled preceding Monday 7 March 2022 tells a story. Had the Fund attended to the matter in time, the matter could have been settled long before unnecessary trial costs were incurred.

[89] Ms Wannenburg in paragraph 12 of her affidavit deposed to on 17 April 2022 then makes a statement of justification as follows:

“Because of her hard work, (referring to Ms Mashila), the matter was settled favourably for the Defendant. I have been shown the plaintiff’s submissions for settlement from which can be seen that from the plaintiff’s perspective of an amount of R529 692 would be fair and reasonable compensation for general damages and loss of earnings, but Ms Mashila negotiated a settlement of R411 991.20 which is a saving of over R100 thousand”.

[90] The “hard work” for the claim officers should not only be displayed at the doorstep of the trial and when one is under very extreme pressure. They must be displayed from the date of the lodgement of the claim before the expiry of 60 and 120 days and before summons are issued if the Fund is truly driven to investigate, settle and pay before unnecessary costs of litigation are incurred. But working over the weekend and then be able to achieve that which Ms Mashila is said to have achieved and for saving R100 000 for the Fund as Ms Wannenburg alludes to in her affidavit and for having negotiated for a lesser amount, should be seen in context. Ms Masila waited until reminded on 3 March 2022 of the date of trial of 7 March 2022. This was after the date of trial was brought to the attention of the Fund in time on 26 November 2021 to do something in order to save costs of trial. The R100 000 saving which is said to have been achieved by Ms Mashila, means nothing as compared to the costs of trial and preparation thereof connected to or occasioned by the late settlement in this matter. Ms Mashila, Ms Masila or Mashile appears to be one and the same RAF official with her first name being “Dorcas”. The confusion is brought about by the Fund’s own affidavits filed.

[91] As to the reasons why the claim-officers did not attend or cause someone to attend to the pre-trial and judicial case management conferences or cooperate in the completion of Form A and attendance of trial on 7 and 8 March 2022, Ms Wannenburg states as follows:

- “15. During this time our offices were overwhelmed with matters and I must immediately apologize. I have reconsidered my affidavit and it was not an adequate response to this Court’s orders. I am terribly sorry. My failure to respond properly was not deliberate.
16. I feel completely dismayed about the fact that I did not properly respond to this Honourable Court’s orders.
17. We do not normally draft affidavits, but I can assure this Honourable Court that I have learned from this experience and that our team will use these supplementary affidavits as examples in the future.
18. I can only again apologize and hope that this Honourable Court will give me a second chance”.

[92] This is a humbling apology that has to be looked in the context of the challenges faced by claim-officers of the Fund distilled from the affidavits filed herein. But the extent of failures and an attempt to find fault on part of the plaintiff and her attorneys even where not justified, is worrisome. It suffices for now to mention that according to Ms Wannenburg she did not attend court on 7 March 2022 because her team including Ms Mashila had 112 matters on trial from 7 to 9 March 2022. Her team is not authorised to represent the Fund in court proceedings. Her explanation is that only the State Attorney is authorised in such matters. In paragraph 22 of her affidavit, Ms Wannenburg states that she attended to approximately 520 matters from January to 7 March 2022 which includes payment memorandums and normal memorandums for approval. From June 2021 till the end of August 2021 she was part of the determination team with only six officers reporting to her and all with a file count of about 1500 files. From about September 2021, she was moved to the long-term trials section with 4 officers and 1 intern to assist. She also received about 500 emails per day. She is currently working overtime from 16:00 to 18:00 and then while at home she frequently works overtime from 20:00 to 23:00 to attempt to catch up on the backlogs.

[93] No one with such limited claim-officers can humanly survive and become effective. But, one will always be guided by the facts of each case when faced with an enquiry in terms of rules 37(9)(a) and 37A (12)(h) and or (16). Again, the question is what is the root cause. I deal with this when I deal with the explanation and conduct

of the Chief Executive Officer of the Fund. One of the Fund's claim-officers who dealt with Hlatswayo case is Ms Maite Makola. In May 2021 she ended up having about 1500 matters in her portfolio. One of the files she was allocated to is Hlatswayo's file. It was not possible for her to attend to this matter whilst she was assisting other officers and at the time having to attend to many trial matters daily. Then in August 2021 she was moved to another department being the litigation department to deal with long-term trial matters. After September 2021 each officer was allocated his or her roll to deal with many matters which included newly lodged matters. In the process after September 2021 claim-officers were put in three new departments being settlement hub, short and long term trials. The officers were told that their old profiles no longer existed and that each officer had to work only on their new matters.

[94] In paragraph 8 of her affidavit, Ms Makola concludes on the topic as follows:

"8. From then onwards I no longer had any instructions to work on or to finalise the Hlatswayo matter".

[95] Ms Makola then records that she had been provided with the emails which were sent to her between June and July 2021 including with the emails inviting the Fund for pre-trial and case management conferences. But, she does not recall having seen the emails in question, neither does she recall if she had forwarded such emails to the State Attorney as they were so instructed to do regarding notices for pre-trial and case management conferences. She had also seen the emails of 26 November 2021 in terms of which the Fund was notified of the trial scheduled for 7 March 2022. This ends her explanation. Again, whether or not rule 37A(12)(h) should find application to these three officials, would be dependent on what a findings are made with regard to the role played by the CEO, the management and the Board as I do hereunder.

Connection between the conduct of CEO (Mr Letsoalo), the Board and the late settlements

[96] As a start, the Chief Executive Officer was directed to be present in these proceedings as at the time the direction was issued, it was not clear who was acting as an attorney on behalf of the Fund. The Chief Executive Officer of the Fund is appointed in terms of section 12(1) of the Act and as contemplated in sub-section 12(2)

thereof, he or she shall conduct the current business of the Fund and may in terms of paragraph (a) exercise power and shall perform the functions of the Fund as contemplated in section 4(1)(b)(c)(d), (2) and (3). He may also in terms of paragraph (b) of section 12(2) appoint, determine the conditions of employment of and dismiss the staff of the Fund, excluding members of staff on management staff. The claim handlers or officers are therefore part of the staff appointed as contemplated in subsection (2)(b) of section 12. Therefore, their conditions of employment are determined by the CEO. The buck stops with the CEO as to what happens to those members of the staff and the conditions of their employment. What these members of the staff should do, stops with the Chief Executive Officer of the Fund. For the purpose of these proceedings, such Chief Executive officer is Mr Letsoalo. He was entitled in terms of section 12(1)(e) as he did and drafted internal rules and directions in respect of the management of the Fund and made recommendations thereof to the Board for approval.

[97] Therefore, Mr Letsoalo's contention in paragraph 3 of his recent affidavit deposed to after the proceedings of 27 June 2022 to the effect that he "*was neither a party to either of the two cases to be heard, nor had I received notice of any relief to be sought against me personally*", has to be seen in the context of section 12 and rule 37A(12)(h) referred in paragraph [1] of this judgment and repeated elsewhere in this judgment.

[98] But the bitterness in Mr Letsoalo about the engagement and the order made by this court on 27 June 2022 and followed by the directive to restate the issues raised during the engagement, did not start in his recent affidavit which was not filed in time and for which he now asks for condonation. The tone of his letter has changed from the initial approach where he was appreciative as expressed in his earlier affidavits for the opportunity to state his case on behalf of the Fund regarding the enquiry under rule 37A (12)(h).

[99] The court did not get tempted to respond to the letter and deal with the objections raised by Mr Letsoalo. He was accordingly informed that the court will not respond thereto as it would be inappropriate to do so whilst seized with the matter. At the start of Mr Letsoalo's letter of 29 June 2022, he indicated that he was writing the

letter in his personal capacity. To the contrary, the letter was signed in his capacity as the Chief Executive Officer of the Fund. Still at this stage, the Fund was represented by Advocate Puckrin SC, instructed by Attorneys Mpoyana Ledwaba Inc.

[100] I find it perplexing that Mr Letsoalo who is legally represented in these proceedings can in paragraph 7 of his affidavit deposed to on 11 July 2022 suggest or move from the premise that this court has no jurisdictional basis to deal with the enquiry regard being to the facts of the present case and the principle applicable thereto simply because as he puts it:

“The RAF wish to reiterate that any issue relating to the previous panel of attorneys is sub judice and before the SCA. The papers before the SCA deal comprehensively with those issues and cannot, with great respect, be re-litigated herein especially whilst those issues are pending on appeal. The RAF however provides a broad overview on those topics, so as to provide a brief factual matrix to lend context to the answers sought. This Court will have noted the extensive attachments to the Hlatwayo counsel’s heads of argument which included some of the evidence that was filed in the pending FourieFismer matter before the SCA and also the founding affidavit that was filed in the application before the Full Court in the RAF v the LPC matter. The RAF respectfully requests that this affidavit be read therewith, as it has already been filed by the counsel acting for the Hlatwayo plaintiff before this Court in these proceedings”.

[101] Each case has to be decided on its merits or facts guided by the rules of court and the principle relevant thereto. In the present cases the applicable rules and the legislative frame-work have been alluded to earlier in this judgment. This court is not bound to wait for a case pending the SCA. In the present proceedings the issues are simply not the same as those in the SCA. We are dealing here with late settlements, the reasons or challenges faced by the claim handlers and the consequences thereof which resulted in the late settlements. We are in main dealing with an enquiry in terms of rule 37A(12)(h).

[102] Mr Letsoalo cannot exonerate himself from the salient facts of the present two cases. He got involved with the Fund as an acting Chief Executive Officer in 2019. In October 2019 he approached Legal Aid South Africa ‘to know and understand how the Legal Aid Board was able to move away from a model using the panel of attorneys

and in sourcing lawyers to handle litigation. The RAF discovered that its in-sourcing model had worked well for (referring to Legal Aid SA) and had considerably reduced its legal costs’.

[103] Just to pause for a moment and comment on this statement as captured in paragraph 58.1 of Mr Letsoalo’s affidavit. As in October 2019 he was fully aware that the red light was moving very fast towards the end of the contractual relationship between the Fund and its panel attorneys which was 31 May 2020. One imagines that the discussion in October 2019 with Legal Aid South Africa was an attempt to find something to replace the panel attorneys who were seized with on behalf of the Fund the many files of pending matters in the courts throughout the country.

[104] In paragraph 58.2 of his affidavit Mr Letsoalo makes a statement as follows:
“...The Legal Aid Board however had to amend their Act to be able to in-source. The RAF’s new management found that it must investigate the necessity of amending its legislation for that purpose which will take time. The RAF had to look at options that could bring relief in the short term whilst the possibility of amending legislation was being considered”.

[105] The statement speaks volumes. That is, Mr Letsoalo, the Fund’s management and the Board were fully aware time was of essence and that before the return of the many files from the panel attorneys on pending matters in our courts, a solution has to be found first. They were aware that much more time is needed to find workable and effective solution. The real question therefore is what did the RAF do to ensure that our courts are not brought to a stand-still at a great prejudice not only to the administration of justice affecting the claimants or litigants but also to the RAF itself. Mr Letsoalo and the Board knew that amending the RAF Act will take time and that cautious approach was needed.

[106] The idea and the process of consulting with the judiciary led by Mr Letsoalo was a necessary consideration. But, ultimately Mr Letsoalo, management and the Board ,had to take an informed decision without affecting the running of the courts and prejudicing the claimants whose matters are pending in the courts. As indicated in paragraph 58.4 of his affidavit, he was told largely the same thing by the judiciary.

Inter alia, lack of preparation by RAF, failure by RAF and the claimants to appoint experts in time, failure by the RAF to give instructions to settle on time, legal representatives of the RAF not being given instructions in time to settle and briefing of counsel by RAF on the morning of the trial.

[107] This should have been a mirror to reflect on and ensure that repeat of the same way of doing things or dealing with litigation or pending matters in the courts throughout the country, is avoided. Therefore, one would have expected that a system to avoid or not to exacerbate the mistakes would be designed and put in place and not blindly without something in place, demand the return of all files from panel attorneys. This would have ensured that the challenges Mr Letsoalo, his management team and the Board were informed of probably not only by the judiciary, but probably by the legal profession as well, were seriously considered and avoided. Anything short of this may not find protection in section 15(3) of the Act which provides that no member of the Board, or officer or employee of the Fund, or other person performing work for the Fund, shall be liable for anything done in good faith in the exercise of his or her powers or the performance of his or her functions or duties under or in terms of this Act.

[108] In terms of the RAF Act, claims should be investigated and settled swiftly. That is apparent in the 60 and 120 days' timelines set out in the Act from date of lodgement. In "good faith" as envisaged in section 15(3) or anything done in good faith would *inter alia*, mean "*an obligation to act reasonably and with fair dealing having regard to the interests of the other parties*".

[109] In paragraph 58.6 of his affidavit, Mr Letsoalo makes a statement as follows: "*It was clear that the problems faced by the RAF were largely due to its counter-productive legal strategy in terms of which only 2% of the claims were settled within 120 days and 98% go through litigation. The RAF then decided to adopt a different model, and to reduce legal costs. The intention was to settle 98% of claims within 120 days and only litigate on 2%. The RAF at that stage intended to immediately settle the majority of cases that were already on the roll from June 2020 onwards*".

[110] The concession is telling and if this dream was realistic, achievable and had come true, we would not have been in these proceedings and dealing with an enquiry

to determine who must be held liable in the form of costs order arising from late settlement of the two cases. An attempt to try and blame the panel attorneys for not having returned the files in time, has no merits and is not based on any factual basis regarding the two matters. Simply put, as on 1 June 2020 there was nothing in place to absorb the many files from the panel attorneys in respect of matters pending in our courts. Therefore, the statement that *“the RAF would only be able to do so should its previous panel of attorneys comply with their obligation (meaning to return the files) in terms of their SLAs, which the RAF could not have foreseen they would refuse to comply with”*, has to be rejected. The question is who was to deal with the many files as on 1 June 2020?

[111] Look at it this way: As in 2021 and 2022, the claim-officers are crying loud for help and for a system that is workable and achievable. Every claim-officer who had deposed to an affidavit alludes to a clear picture of chaos in the management of the Fund. Mr Letsoalo, seems to acknowledge this chaos. In paragraph 39 of his recent statement he makes a statement as follows:

“A previous employee who had resigned at the end of May 2021 had handled this matter until then. Ms Makola and Mr Mashatole gave evidence to provide their best explanation regarding their involvement in this matter. With great respect, they cannot be blamed for the failure of the RAF to appear at the judicial case management meeting or to attend to the pre-trial proceedings after the previous employee resigned in May 2021. At that stage, the RAF was under extreme pressure”. (My emphasis).

[112] True, the claim-officers should not be penalised with costs order for the unpreparedness of the employer who failed to ensure that there was effective and efficient plan or system in place to take over the files of pending matters which were previously handled by the panel attorneys whose mandate was terminated by effluxion of time on 31 May 2020. The resignation of several claim-handlers cannot in my view completely be divorced from working “under extreme pressure”. Similarly, the statement “employees were discharged for various (serious) misconduct which left the RAF with no alternative but to reassign matters to different claim officers”, boggles one’s mind. Did they resign or were they discharged because they could not bear the “extreme pressure” of work? This possibility or probability cannot be excluded. Mr

Letsoalo however, elected not to give more information regarding the “various (serious) misconduct” alluded to in paragraph 39 of his affidavit.

[113] What is more boggling is why did the Fund reassign pending trial matters to claim-officers when the claim officers aforesaid did not have the status of appearing in court. Let alone attending to pre-trial and judicial case management conferences. As I said earlier in this judgment, it was strange that in respect of all pre-trial and judicial conference notices, the claim officers were directed by the Fund to refer same to the State Attorney office because the claim-handlers had no authority to attend to the pre-trial and judicial conferences and to sign the minutes thereof. The next question is what about defending these matters in court during trials like it has happened in these two cases. Despite the notices of trial having been served on the Fund, the matters were still caused to be seized with the claim-officers who had no right to appear in court. What did the Fund expect the claim handlers to do with the trial matters? Settle at all costs or just simply abandon the matters and be absent from court on the date of trial? The point is that many matters are dealt with in the absence of the Fund during trial or only settled on the dates of trial or too late when the costs of litigation are unavoidable. This apparently is a trend throughout the country. Placing trial matters in the hands of claim handlers must have placed more pressure on them because they are almost forced to settle or absent themselves from court.

[114] The next question is who is to be blamed for this system in dealing with trial matters? The Fund represented by the Chief Executive Officer and the Board are to be blamed. You cannot take a huge responsibility and insisted that the files in possession of the panel attorneys as on 31 May 2020 should be returned with immediate effect without a plan in place to absorb those matters and deal with them effectively and efficiently. The Fund in absenting itself from trial, pre-trial and judicial case management conferences is the result of unworkable plan as on 1 June 2020. Ordering the claim-handlers to refer every matter pending in court to the State Attorney's Office for pre-trial and judicial case management conferences whilst knowing that a system has not been put in place in the State Attorney Office for such matters to be efficiently and effectively dealt with, is not acting in good faith to deserve a protection in section 15(3) of the Act.

[115] The statement, “... *failure to attend to the pre-trial or to attend the judicial case management meeting was not deliberate, and not mala fide*”, as set out in paragraph 41 of Mr Letsoalo with reference to the claim handlers, is correct. But that cannot be said of Mr Letsoalo and the Board. There can be no protection under section 15(3) for the CEO and the Board. I deal with section in some more detail later from paragraphs [179] of this judgment.

[116] The investigation by the Fund for mediation as an alternative to litigation where claims are incapable of prompt settlement as intimated in paragraph 58.8 of Mr Letsoalo is a good idea which needs the support of all parties involved. But it is another thing to allow cases being finalised in our courts in the absence of the Fund and in settling matters late when costs of litigation have already been incurred. Mediation as an alternative to litigation can only work if the Fund promotes it upon lodgement, before issue of summons or before an appearance to defend is delivered or immediately thereafter.

[117] One agrees and welcomes the idea by Mr Letsoalo that the Fund had recognised that not all matters will be settled within the 120 days as it intended to do, but that ‘such matters would however be few in the future if there was fully cooperation by all parties concerned’. Since the beginning of September 2022 one has experienced in this Division a dramatic progress in this regard particularly during the first judicial case management conferences that the Division has adopted by way of Practice Directive. Hopefully, this will be sustained with all parties being in attendance during pre-trial and judicial case management conferences. But the two cases here have to be decided on their own merits. In the present two cases, the conduct of the Fund, CEO and the Board is inexcusable and the provisions of rule 37(9)(a)(i) and (ii) and sub-rules 12(h) of rule 37A in particular the latter sub-rule, should find application against them.

[118] The context is this: On 5 December 2019 the interim Board of the RAF was replaced by a permanent Board. On 12 December 2019 the new Board received a presentation which included an overview of the affairs of the Fund, its financial status and challenges and the need for the development of a strategic plan for the future. This articulation appears in paragraph 58.1 of Mr Letsoalo’s affidavit. One assumes

that the presentation to the new Board members was made by Mr Letsoalo and or his team.

[119] The presentation to the Board is said to have led to further meetings and that on 31 January 2020 the new Board approved a new strategic plan and a new operating model. It is said 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. Having said this, Mr Letsoalo then in paragraph 58.18 of his affidavit states:

“Thereafter, in February 2020 the RAF filed a new notice requesting the panel attorneys to return the files and to comply with the terms of the SLA. On 20 February 2020, and after complaints about the time frames set out in its first notice, the RAF sent out a further notice 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 services level agreement in regard to reporting to the RAF on each matter”.

[120] One assumes that presentation to the new Board and approval thereof at beginning of 2020 was as contemplated in section 12(2)(c) read with section 11(1)(d) of the Act. The live question is what did the Fund have in place to take care of the returned files regarding matters still pending in courts. It looks like all what the Fund had was a wish list. That is *“to reduce legal costs to settle new claims within 120 days and to reduce the number of old claims”* as articulated in paragraph 58.17 of Mr Letsoalo’s affidavit. This wish list was approved by the Board without being satisfied that there was or there would be a plan in place effective from 1 June 2020 to meet the wish plan list once the files are returned as so demanded by the Fund. As I said, there is nothing wrong with the wish list. But there was everything wrong in proceeding and demanding for the immediate return of all the files without a plan in place to absorb the files and deal with them effectively and efficiently.

[121] It is one thing to say “importantly clause 14.4.7 of the service level agreement required the panel attorneys to ensure that each files contains an opinion on the merits of the case, an opinion on quantum, an analysis of the areas of dispute, the state of the pleadings, the current status of the matter, and any recommendation that the attorney may have”. But it is another thing to have this information with no one or sufficient claim officers to attend to the files with the necessary expertise and

necessary competencies. Time was also of essence as the claim-handlers would have needed the space and time to properly apply their minds thereto. The evidence placed before us in these proceedings is overwhelming and points to fact that the return of the files was demanded when there was no plan and sufficient “man or woman power” if one was to refer to it that way to deal with each and every file that is the subject of pending litigation.

[122] Mr Letsoalo in his affidavit seeks to suggest that the return of the files would have been in a systematic manner, had those firms of attorneys complied with their contractual terms allowing the RAF to first receive the matters with the earliest trial date. It is suggested, had this have happened the Fund would have been and able to settle those matters internally or with the assistance of the corporate panel attorneys, where necessary, and even counsel if the RAF’s internal staff and corporate panel attorneys needed further assistance. The suggestion on the first hearing of the enquiry was that corporate attorneys were in existence when the files were demanded. This contention was never repeated in any of the affidavits deposed to thereafter. I suspect that this is so because such an assertion during engagement with counsel for the Fund could not be supported by any credible evidence on affidavit or by cogent submission

[123] Clearly, as on 7 and 14 March 2022 the Fund was still in chaos and this cannot be attributed to the previous panel attorneys. In that period, the Fund was still not ready to put its plan in place as espoused in this judgment to deal with the cases as they were returned including new claims lodged and those still not sent to the State Attorney or other attorneys that might be sourced from outside State Attorney Office

[124] What is articulated in the claim officers’ affidavits filed in these proceedings have effectively thrown the Fund, CEO and the Board under the bus, something that in a way has been conceded by Mr Letsoalo as quoted in paragraph [111] of this judgment. That is, the claim-handlers “cannot be blamed for the failure of the RAF”, and “at that stage the RAF was under extreme pressure”.

[125] Being “under extreme pressure” was the RAF’s own makings in not having something tangible and workable as on 1 June 2020. That did not only persist up to May 2021, but it persisted for the purpose of these proceedings until 14 March 2022.

The request to participate in the pre-trial and case management conferences for the purpose of these proceedings took place long after 31 May 2020. Had the Fund have participated in the pre-trial and judicial case management conferences, after May 2020, the eleven issues identified in sub-rule (6) of rule 37 would have been discussed and the plaintiff as a party claiming relief would have requested the defendant as an opponent to make a settlement proposal as contemplated in rule 37(6)(c). In addition to the eleven listed issues listed in rule 37(6), the parties would have obliged during the pre-trial conference amongst themselves to consider the ten matters listed in rule 37A(10).

[126] If rules 37(6) and 37A(10) rules were adhered to, soliciting of admissions and making enquiries from and by the parties with a view to narrow issues or curtailing the need to lead unnecessary oral evidence as contemplated in paragraph (b) of the latter sub-rule (10), would have been canvassed and achieved. Furthermore, the time periods within which the parties propose that any matter outstanding in order to bring the case to trial readiness as contemplated in paragraph (c) of rule 37A (10), would have been set. The parties would further have been obliged to deliver an agreed minute of the proceedings at the pre-trial meeting held in terms of paragraph sub-rule (7)(c) of rule 37A. In the minute referred to in sub-rule (7)(d)(ii) of rule 37A the parties would have been obliged to particularise the parties' agreement or respective positions on each of the issues identified in sub-rule (10) as so provided in sub-rule (8) of rule 37A. For this, the parties would also have been obliged to particularise those issues identified in sub-rule (6) of rule 37. And to the extent that further steps remained to be taken to render the matter ready for trial or ready to be settled in time, explicitly identify such steps, and set out a timetable according to which the parties propose upon a mutually binding basis, that such further steps will be taken as contemplated in rule 37A(8).

[127] If all of the above had taken place, in all probabilities, these two matters would have been settled well in time and not on the date of trial or just too close to the date of trial with no opportunity to avoid the costs of preparation for trial and other related costs. Furthermore, had pre-trial conferences amongst the parties taken place and the Fund cooperated and participated meaningfully, the remaining issues still in dispute would have become the subject of the parties describing the nature of the

dispute and setting forth their respective contentions in respect of each such issues in “a detailed statement” as contemplated in sub-rule (9)(a)(ii) of rule 37A.

[128] “A detailed statement” describing the nature of the dispute and setting forth the respective contentions in respect of each disputed issue would have been almost like delivering written heads of argument which would have required each party to prepare for a pre-trial conference and judicial case management conferences as if the parties were preparing for trial. In terms of rule 37A(1)(e) the parties during pre-trial conference are required to provide a list of witnesses and in broad terms provide the nature of their evidence. This can only happen for the purpose of the pre-trial and case management conferences, if the parties or their legal representatives are properly prepared, complied with all rules of court and act professionally in expediting the matter towards trial and adjudication as contemplated in rule 37A(2)(c). The failure to attend the pre-trial and case management conferences in the present proceedings is clearly connected to the failure to have a workable plan in place to absorb the load of work upon the return of files which were dealt with by the panel attorneys. The failure was also occasioned by introducing a new plan in terms of which the claim officers were directed by the management headed by the CEO to refer all files for pre-trial and case management meetings to the State Attorney. This was done without having had a workable system and legal representatives employed and assigned by the Fund to the State Attorney Office to deal with RAF matters. Clearly, Mr Letsoalo and the Board had to be blamed for this chaos and this is directly connected to the late settlements in the two cases before us.

[129] Mr Ciliers SC on behalf of the CEO and the Board sought to suggest that there are no facts to show that the late settlements are connected to their conduct. There is no basis for this contention. It is the CEO and the Board who took the decision to demand for the return of the files from the panel attorneys without a system to immediately work on those files and to attend to the pre-trial and judicial case management conferences including trials in particular where matters could not be settled at the pre-trial and judicial case management meetings. In the present cases, the Fund did not only absent itself from the pre-trial and management conferences, but it also absented itself from trials to confirm the conclusion of agreements to settle

the two cases. Masilela case was settled partially too close to the date of trial and Hlatswayo matter was settled in its entirety on the date of trial.

[130] The claim officers who had deposed to the affidavits in these matters all pointed to a bus that had no direction. But, all overwhelmed by chaotic situation created by the management steered by the CEO and the Fund's Board. The claim handlers as they put it, their 'offices were overwhelmed with many matters'. For example, Ms Maite Matola one of the claim officers like all others in paragraphs 3 and 7 of her affidavit deposed to on 17 April 2022 puts it this way:

- “3. *In the middle of May 2021 I was requested to assist with the matters that were allocated to a previous claim handler that resigned. I already had about 1500 matters in my portfolio to attend to. I was then requested to assist in those offices although the office (referring to her office) had approximately 2000 files. One of the matters that I was allocated in addition to my old profile was Hlatswayo.*
4. *Due to the number of matters that were allocated to me after Ms Mphahlele resigned, it was not possible for me to work on each matter per day while attending to daily trials.*
5. *During this time I received a massive number of emails from around the country regarding matters.*
6. *At the end of August 2021, I was allocated to the new department at the defendant being the litigation department. I was allocated to long term trials.*
7. *Before September 2021 each officer had a specific profile on the claims view system and was allocated matters as and when they were lodged with the defendant. This could be identified by looking at the branch number in the claim number. Each officer was then responsible for his or her own matter however after September 2021 claims officers were put in three new departments being the settlement hub and short and long term trial. Officers were informed that their old profiles no longer exist and that each officer had to work only on their new matters.*
8. *From then onwards I no longer had any instructions to work on or to finalise the Hlatswayo matter.*
9. *I have been shown emails from the plaintiff's attorneys which were sent to my address during June and July 2021. Having read the emails now I can state*

that the emails provided an overview of the matter, stated that the matter was set down for case management on November 7th, 2021 and that the parties should hold a pre-trial conference. I have furthermore been shown that there was a proposed pre-trial minutes attached thereto.

10. *As stated above the previous officer resigned in the middle of May and thereafter my profile ballooned. I cannot recall seeing the above emails or responding thereto. Our instructions are that if we receive a notice for a pretrial or judicial case management meeting that we should sent to the notices to the offices of the State Attorney. I cannot recall whether I sent those emails to the State Attorney's office.*
11. *I have furthermore been shown emails which were sent to my address during or about September to November 2021 (after 1 no longer had instructions to work on this matter) stating that the judicial case management meeting was set down for 17 November 2021 and that the plaintiff's attorneys requested a pre-trial conference. The one email sent to my address on 26 November 2021 (that has been shown to me) inter alia indicated that the matter was certified trial ready for 7 March 2022. I have furthermore been shown an email that was sent to my address on 13 January 2022. The emails were sent to my address, but as the matter was no longer allocated to me, I would not have and as far as I can recall I did not take notice thereof as I was under the impression that it was not under my purview". (My emphasis).*

[131] Receipt of "a massive number of emails from around the country regarding matters", by one claim handler almost on daily basis after 31 May 2020 to date hereof can only be attributed to the followings: First, to the decision taken on 31 January 2020 when the Board approved a new strategic plan and a new operating model. Second, the decision taken by the Board in February 2020 when a new request was issued to the panel attorneys to return the Fund's files in their possession. These would have been matters pending in courts throughout the country. The demand to return the files without anything in place to make the new strategic plan and new operating model functional and actioned immediately to replace the panel attorneys, is deplorable and lacks conduct of acting in good faith. Third, the Fund through its Board and the CEO introduced a referral system of pre-trial and case management meetings to the State Attorney without a concrete plan for those matters to be brought

to the attention of the State Attorney and to ensure that claim handlers are clued to the facts of each matter so referred to enable the State Attorney to meaningfully participate in the pre-trial and case management conferences. Reassignment of claim-handlers without proper hand over system in place could only have served to worsen the situation.

[132] Non-participation by the Fund or on its behalf in the pre-trial conferences is the main cause of settlements on the dates of trial or too close to the dates of trial when high costs of preparation for trial have become unavoidable. If the pre-trial conferences were held amongst the parties, they would have engaged each other and record their engagements in the minutes as contemplated in sub-rule (8) read with sub-rules (7)(d)(ii) of rule 37A. In addition, a detailed statement showing respective contentions almost like written heads of argument would have been filed as contemplated in sub-rule (9) of rule 37A.

[133] The Fund however for reasons articulated by the claim handlers in these proceedings could not attend to the pre-trial, case management conferences and trials. The plaintiffs in these two cases were accordingly in terms of the Practice Directive of this Division read with the Consolidated Covid-19 Directive applicable at the time, entitled to approach the court to certify their matters trial ready. The two cases were accordingly certified trial ready and enrolled for hearing by completion of Form A3 without the Fund. As indicated earlier in this judgment, the process of referring the pre-trial and case management conferences to the State Attorney office, but leaving trial matters to be dealt with by the claim-handlers as if they are lawyers, just simply boggles one's mind.

[134] Instructions to refer notices for the pre-trial and judicial case management conferences to the State Attorney and referral to the claim-handlers of the notices of set down for trials, are the procedures or processes imposed on the claim officers by the CEO, his management and or the Board. The procedure or process is resulting in many matters being finalised in the absence of the Fund as contemplated in rule 38(2) read with rule 39(1) of the Uniform Rules of Court. It has also caused matters being settled at the doorsteps of the court when huge costs of litigation are irretrievable.

[135] If you truly want to settle matters through claim-handlers, you do not wait for a notice of set down to be served and then direct the claim-handlers to deal with the cases to strive to reach settlement almost like at all costs by asking for information or documentation at that very late stage. The Fund is expected to use its powers to object to the validity of the claim within 60 days from date of lodgement. If more information is requested and is not provided, the Fund can within 120 days from date of lodgement repudiate the claim which repudiation could be used as the basis to file a special plea should the claimant issue summons.

[136] Furthermore, the Fund if it so wishes to negotiate for settlement or for information after the issuing of the summons and upon the close of the pleadings, it can insist on or resort to discovery notices in terms of rule 35, and thereafter resort to engagement during meaningful pre-trial meetings instead of absenting itself therefrom. During the pre-trial conference, the Fund would be expected as is so enjoined to do in terms of rule 37(6)(c) to make a proposal for settlement. During this stage, the claim-handlers together with the Fund's lawyers, could still actively be involved than to throw claim-handlers in the litigation battle at a trial stage to seek settlement. I now turn to deal with some other specific assertions made by the Chief Executive Officer in these proceedings.

CEO's further assertions in his affidavit deposed to on 18 April 2022

[137] It is necessary to deal with some assertions to give context as to why what initially appeared to have been a simple costs enquiry as contemplated in rules 37(9)(a)(i) and (ii) and rule 37A(12)(h) and (16), became too wide to deal with other issues relevant thereto. As it would appear later, the late settlements of many matters against the Fund and finalisation of matters in the absence of the Fund is not only common to this Division and not only in these two matters. It is a wide spread occurrence which unnecessarily clock the courts' rolls country wide and thus putting tremendous pressure on the courts to deal with the default hearings against the Fund.

[138] I have already dealt in this judgment with some of the causes of all these problems. Subsequent to the affidavits initially filed by the claim-officers, a further directive quoted in paragraph [10] of this judgment was issued. This led to Mr Letsoalo

filing an affidavit deposed to on 18 April 2022. He did so in his capacity as the CEO of the Fund. As a start, he expressed his appreciation for “the extension granted by the court to the Fund to collate further information in an attempt to be of better assistance in these important issues”, as Mr Letsoalo puts it. He was referring to the issues raised in the directive of 15 March 2022 quoted in paragraph [10] of this judgment. Then under the heading “THE ROAD ACCIDENT FUND’S PROGRESS”, he started by indicating that the Fund is focusing on specific issues to ensure that matters are settled earlier and less expensively.

[139] Settlement of claims against the Fund earlier and less expensively as Mr Letsoalo puts it, is indeed the mandate of the Fund in terms of the Act. But whether or not that is what is happening in practice, is still to be seen. The settlement of matters earlier and less expensively “*by impressing upon attorneys and claimants the importance of filing all necessary documents as early as possible, especially during the lodgement phase*”, as so stated by Mr Letsoalo, can only be realised in real time if more and properly trained staff are employed and the Fund does not stay away from the pre-trial and case management conferences. The core function of the Fund is to investigate the claims lodged with it and settle unless the claim is a hopeless one. This requires competent and motivated claim-handlers to comply fully with the provisions of the Act. Any failure to heed to this, will amount to acting contrary to the imperative of the Act. This has happened in the two cases before us. All is mainly blamed on the new operational model introduced and implemented by the Fund almost like in vacuum. Almost all the claim-handlers who had filed affidavits complained about extreme pressure of work, limited claim-handlers, reassignment to other departments without proper safeguard for proper handover of the files and briefing thereof and allocating files late to the claim-handlers including those files which have been reallocated.

[140] One should even be more worried whether the statement by Mr Letsoalo in paragraph 12.4 of his affidavit deposed to on 18 April 2022 will ever see the daylight of real sustained implementation of some of his assertions or plans seen in the context of the recent announced intention by the Fund to scale down its ailing workforce. In paragraph 12. of his affidavit he makes the statement as follows:

“12. The defendant is focusing on inter alia, the following issues to ensure that matters are settled earlier and less expensively:

- 12.1 By impressing upon attorneys and claimants the importance of filing all necessary documents as early as possible, especially during the lodgement phase;*
- 12.2 By improving the Defendant’s bulk settlement drive throughout the country;*
- 12.3 By reorganizing the Defendant’s claim department into a settlement hub and short and long term trials departments to assemble matters into specialised groups;*
- 12.4 By involving the State Attorney’s offices, and appointing more staff to assist”.*

[141] If it is true that the Fund is in the process of scaling down its staff compliment, this will be contrary to the promise he made in paragraph 12. of his affidavit deposed to on 18 April 2022 as quoted above. All the claim officers who had filed affidavits in these two cases are crying for more staff and the need for more trained claim officers with the necessary competencies required to ensure that the ever overflowing pending litigations including new matters lodged against the Fund, are effectively and expeditiously dealt with. This is the responsibility of the CEO, his management team and the Board to pull the bull by the horns taking into account the fact that in terms of section 12(2)(a), CEO shall conduct the current business of the Fund and he or she may exercise the powers and shall perform the functions of the Fund mentioned in section 4(1)(b)(c) (d),(2) and (3). He may therefore in terms of section 4(1)(b) appoint, determine the conditions of employment of the staff and may dismiss the staff of the Fund, excluding members of the staff on management level. In terms of section 4(1)(c) referred to in section 12(2)(a), the CEO shall have the powers and shall perform functions including the management and utilisation of the many of the Fund for the purposes connected with or resulting from the exercise of his powers or performance his duties under the Act.

[142] During the events leading to 31 May 2020 and those preceding 7 and 14 March 2022 being the trial dates of these two matters respectively, it was the responsibility of CEO not only to ensure that cases are investigated and settled expeditiously to

avoid the ballooning of costs of litigation as contemplated in section 4(1)(b), but, it was also his responsibility to ensure that the management and utilisation of the money of the Fund, are for purposes connected with or resulting from the exercise of his power or the performance of his duties as contemplated in section 4(1)(c) read with section 12(2)(a) of the Act.

[143] It was therefore the responsibility of the Board as provided for in section 12(2) to ensure that the CEO conducts the current business of the Fund properly and in accordance with the imperative in the Act. In particular, to ensure that the funds of the Fund are utilised and managed for the purposes connected with or resulting from the exercise of its powers or the performances of duties in terms of the Act. The Board also has the responsibility over the CEO because in terms of section 11(1), the Board shall exercise overall authority and control over the financial position, operation and management of the Fund. And, may in terms of section 11(1)(h) delegate or assign to the CEO and or any member of the staff of the Fund any power or duty of the Board as it may deem fit. When it does so, the Board shall not divest itself of any power or duty so delegated or assigned. The Board may also amend or withdraw any decision made by virtue of such delegation or assignment. The buck therefore stops with the Board and the CEO for whatever wrong happens within the Fund regarding the powers and functions of the Fund performed through them in terms of the Act. Just to restate the point, the Board in terms section 11 (1)(d) may inter alia, approve internal rules and directions in respect of the management of the Fund. Therefore, the approval by the Board of the new strategic plan and a new operating model at beginning of 2020 without anything concrete to absorb the work of the panel attorneys from 1 June 2020, is inexcusable as this has a direct bearing on the enquiry under consideration.

[144] In paragraph 13 of his affidavit deposed to on 18 April 2022, Mr Letsoalo seeks to blame the claimants or their attorneys as posing the biggest problems for the Fund by asserting as follows: (a) that claims are lodged initially and wholly inadequately; (b) that when claims are lodged, they are lodged without proper or substantiating documents; (c) that accident reports, hospital records or expert reports are missing, or hastily completed, making it impossible to properly assess the claims submitted and; (d) that claims are lodged for inflated amounts, or even fraudulently, which is alleged

to necessitates that the RAF put systems in place to verify allegations made, which take time and resources away from valid and competent claims.

[145] The Fund, CEO and the Board cannot now raise this as the reason for the late settlements that occurred in these two cases and in many matters that are finalised nation-wide in the absence of the Fund. As indicated previously and repeatedly in this judgment, demands for the return of the files from the panel attorneys without concrete plan in place devils the submission which is now made by the CEO. I do not find it necessary to repeat myself. It suffices to mention that failure to utilise the procedural safety valve upon lodgement in case or failure to complete the prescribed form properly, failure to meet the threshold for substantial compliance and failure to furnish information or documentation upon request before the expiry of 120 days, is all due to the inability of the Fund through the Board and its CEO to deal efficiently and effectively through claim-handlers or whoever is seized with RAF matters pending in our courts.

[146] The Fund through claim-officers failed, refused and or neglected to participate in the pre-trial, case management conferences and trials. This cannot genuinely be pushed back to and blamed on the claim handlers who are faced with imposed unworkable procedure, policy and or system employed by the Fund through the CEO and the Board since 1 June 2020. To let the claim-handlers bear the brand and the displeasure of this court in the form of costs order, would not be appropriate in the circumstances. It is this unworkable procedure or plan which in my view, resulted in the late settlements regarding the two cases before us. The Board and CEO cannot therefore escape liability for costs connected to or occasioned by the late settlements. I deal later in these proceedings with the suggestion that it cannot be said the CEO and the Board did not act in good faith as so argued by Mr Clliers SC.

[147] The suggestion that incomplete information or documentation was provided to the Fund in the two cases has to be seen in context. As regards Masilela case, the Fund helped the claimant in the lodgement of the claim as the Fund is entitled and obliged to do. It is therefore not expected that it will invalidate the claim that it has itself helped the claimant to lodge unless there are facts to show that the claimant was unreasonable and uncooperative in helping the Fund to procure information required.

It must be a cheaper and easier process to deal with direct lodgement of claims. In direct lodgement of claims, it must become the responsibility of the Fund to ensure that prescribed form is properly completed and that the claimants most of whom are indigent, uneducated and vulnerable, are assisted in getting the necessary information or documentation.

[148] The statement that ‘the defendant’s validation and verification department has no alternative but to reject claims at lodgement phase when the claim is filed incompletely and without proper substantiation’, is not what had happened in the two cases and it does not happen in most cases. Simply put, the Fund does not investigate upon lodgements. It does not make follow-ups and very seldom it utilises the safety valve of the 60 days and 120 days’ period prescribed in section 24(5) and (6) read with section 19(f) of the Act. As indicated earlier in this judgment, the suggestion that the claim of Masilela was rejected is refuted by the facts of the case. Similarly, as regards to Hlatswayo case, neither objection to the validity of the claim was noted nor was repudiation raised in the plea.

[149] The statement, *‘in many instances, I am told, the officers are placed under the impression that the matter is suspended pending the filing of further documents by the plaintiff. I am told that whilst the RAF’s officers are under that impression, some attorneys enrol the matters for default judgment, not informing the court that the defendant had requested further information or documentation’*, is worrisome. In fact, insofar as Mr Letsoalo does not seem to see anything wrong with what was conveyed to him, he exposes himself and the Board. It is the responsibility of the CEO, the management team and the Board to train and guide the claim officers about the process to be followed when the prescribed form is not properly and completely filled in. To agree with what was conveyed to the CEO by the claim officers as quoted above regarding the presumption of suspension of any action pending the filing of further documents without formally objecting to the validity of the claim within 60 days and without formally repudiating the claim for failure to provide information and documentation before the expiry of 120 days, should be of a great concern. It raises the question whether the legislative frame work is understood and properly applied or implemented by the Fund through its functionaries. Mr Letsoalo as the CEO of the Fund, is in terms of section 12(b) expected to be a person who is suitably qualified

and experienced to manage the day to day affairs of the Fund. He is therefore supposed to know that litigation is not suspended until you have invoked the provisions of section 24(6) read with section 19(f).

[150] Furthermore, to agree and endorse the impression that '*some attorneys enrol the matters for default judgment, not informing the court that the defendant had requested further information or documentation*', is also misguided, uninformed and raises the question whether the CEO, management and the Board had an appreciation of the provisions of the Act some of which I have referred to in these proceedings as "safety valve" found in sections 24 read with section 19(f). Courts are guided by what is placed before them. If no objection to the validity of the claim as prescribed is lodged and if no plea of repudiation is delivered and the Fund absents itself from court proceedings after having been duly informed of the date of hearing, except for cases where no notice of intention to defend has been delivered, the "attorneys" who are enrolling matters "for default judgment" have no obligation to inform the court of the request for further information or documentation that is out of time. In terms of rule 31(4) of the Uniform Rules of Court, no notice of set down need be given to any party in default of delivery of notice of intention to defend. Furthermore, if information or documentation is requested and not provided within the 120 days, the Fund would also be entitled to file a repudiation by way of special plea, should summons be issued without providing the necessary and requested information or documentation.

[151] One is deeply worried whether Mr Letsoalo as the CEO of the Fund has taken an opportunity to acquaint himself with the rules of court or to be educated thereon. Rule 39(1) provides that if, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he or she has discharged such burden provided that where the claim is for a debt or liquidation demand, no evidence shall be necessary unless the court otherwise orders. It is not the duty of the court to police and enquire from the plaintiffs in the absence of the defendant whether or not '*the defendant had requested further information or documentation*'. All what the court has to do when a defendant is not in attendance of trial is to satisfy itself that there has been a proper service of the notice of set down except where rule 31(4) applies. The plaintiff does not have any obligation to tell the

court anything in this regard unless it clearly appears from the plea of the absent defendant. From there the plaintiff will then in the absence of the defendant tender evidence to proof his or her case.

[152] In terms of rule 31(2)(a) whenever in an action, the claim or if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it seems meet. As could be deduced from this rule, all what the court has to do is to satisfy itself that notice of set down has been served on the defendant except where the defendant failed to file notice of appearance to defend the action as provided for in sub-rule (4) of rule 31. That is, the proceedings referred to in sub-rules (2) and (3) shall be set down for hearing upon not less than five days' notice to the party in default: provided that no notice of set down need to be given to any party in default of delivery of notice of intention to defend. The courts are not gate keepers for the defendant (the Fund) which absents itself from trials and participation in case management processes as provided in this Division' Directive with no legal cause or acceptable reasons.

[153] In this Division, it is not correct that "in many instances the plaintiff's attorney would then already have requested a pre-trial only to enable them to enrol the matter for trial to put pressure on the claim-handlers". All matters on our civil roll are judicially case managed. Enrolment of matters on the first case management roll is done by completion of Form A referred to earlier in this judgment. In Form A parties set the time-lines for themselves as indicated earlier in this judgment in order for the matter to proceed to the second case management roll to determine trial readiness unless the parties have already held compliant meaningful pre-trial conferences as required in the rules.

[154] Very often before September 2022 the Fund will just simply not participate in the completion of Form A. Therefore, the allegation of the enrolment of the matters for trial in order to put pressure on the claim officers, has to be seen in context. All matters enrolled for trial are preceded by certification by the judicial case management judge and it gets so enrolled for trial by completion of Form 3 and after the parties having

participated in the pre-trial processes. In these two cases, the Fund did not participate in the pre-trial and judicial case management processes and were accordingly certified trial ready without such participation. We now know from the claim-handlers why the Fund did not participate in these two matters as articulated in this judgment.

[155] Referral of matters to settle as alluded to in paragraph 23 of Mr Letsoalo's affidavit deposed to on 18 April 2022 as part of the Fund's policy introduced from 1 June 2020. In my view, where 'all information is available', will only become a successful policy when the Fund has the capacity and competent officers with necessary experience to investigate upon lodgement and participate in the pre-trial and case management conferences with specific time-lines being imposed on each other as so provided in rule 37A. In the present proceedings, the pressure of work the claim-handlers had to bear with as alluded to herein, made it impossible for the claim-handlers even to ask for more information and or documentation earlier than on the date trial date or too close to the date of trial.

[156] It is correct as indicated in paragraph 31 of Mr Letsoalo's affidavit that *'the amount of legal costs the defendant would have to pay if claims were properly lodged long before summons is issued would be immense. The benefit thereof would ultimately redound claimants and the administration of justice...'* But it is another thing for the Fund not to use the weapon available to it if it feels the claim is not properly lodged or if it feels the claimant is not cooperative and refuses or fails to furnish information and documentation requested before the summons are issued.

[157] That weapon is founded on section 19(f)(ii) which provides that the Fund shall not be obliged to compensate any person in terms of section 17 for any loss or damage if the third party refuses or fails to furnish the Fund with copies of all statements and documents relating to the accident that gave rise to the claim concerned within reasonable period after having come into possession thereof.

[158] At the risk of repetition, section 24(6) provides that no claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent – (a) before the expiry of period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in sub-section

(1); and (b) before all requirements contemplated in section 19(f) have been complied with; provided that if the Fund or agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be.

[159] “May at any time after such repudiation serve summons on the Fund or the agent, as the case may be” in section 24(6)(b), does not prevent the Fund from filing a special plea for non-compliance with the provisions of section 24(6)(b) read with section 19(f)(ii). This is as I see it, a safety valve stopping any claimant in his or her track from issuing summons without having complied with the request for further information or documentation to enable the Fund to consider settlement before unnecessary costs of litigation are incurred by going into a protracted trial. However, this can only happen if the Fund adopts a procedure or system or operating policy that is efficient and effective and at the same time employ competent and sufficient staff to meet the 120 days before summons are issued and this has to be done as contemplated in section 19(f)(ii) read with section 24(6). The Fund very often like it has happened in these two cases, does not become proactive. It waits until it is just too late as it has happened in these proceedings.

[160] Therefore the statement in paragraph 34 of the affidavit by Mr Letsoalo deposed to on 18 April 2022 has to be seen in the context. Non-enforcement of the provisions of section 19(f)(ii) read with section 24(6) and staying away from meaningful pre-trial, case management conferences, is the issue exacerbated by bad planning on the part of the CEO, management and the Board. Settlement hub department which is said *‘to focus on matters where all necessary documents have been made available and that there are usually matters where the claim was rejected, summons issued, and thereafter more documentation was made available’*, will continue to be the focus and cause of delay and late settlements if the objection is not raised in time and repudiation is not resorted to as in section 24(6) read with section 19(f)(ii).

[161] What is referred to as the “bulk settlement discussion” will only be realised if parties meaningfully participate in the pre-trial conferences well in time before the dates of trial. But this did not happen in the present cases. Mr Letsoalo puts it in paragraph 42 of his affidavit deposed to on 18 April 2022 this way:

“The number of matters that they have attend to is however immense. Each officer has to attend to about 12 to 15 trials per day. The pressure thereof on them personally and on their personal lives is significant. And I can only commend them for their efforts in making progress during different circumstances”.

[162] True, and this take us back to the decision which was taken by the Board and or CEO of the Fund during February 2020 when fresh demand was made for the return of the files from panel attorneys. This was done without having any workable plan and a system in place to ensure that as those many files were returned, they would be attended to by people with skills and competencies to deal with trial matters and attendance of pre-trial and case management conferences. The two cases are such matters which were returned after 31 May 2020. The concession made in paragraph 42 of Mr Letsoalo’s affidavit as quoted above, is telling. The CEO and the Board must bear the brunt and not the claim-officers. It is even more disturbing that officers who have no authority to sign pre-trial minute, were or are assigned to deal with trial matters in what is referred to as “settlement hub department”. This is almost like settling at all costs. This is just a recipe for disaster and it is of no surprise that in the present two cases proposals for settlement were made under extreme rush and very late.

[163] According to Mr Letsoalo, the office of the State Attorney was only informed in June/July 2021 that it had been registered with the Legal Practice Council and that it could start signing pleadings and attending court on behalf of the Fund. In these two matters the office of the State Attorney did not participate at the pre-trial and case management conferences including on the trial dates of March 2022. This is unacceptable because clearly as during March 2022 nothing was in place to effectively take over the matters pending in our courts. It is very clear that there were no legal representatives in the State Attorney Office to deal with RAF matters.

[164] In paragraph 49 of his affidavit, Mr Letsoalo referred to copies of the advertisements for those positions he referred to in paragraph 48 of his affidavit. For this, he says the Fund hopes to appoint more staff in the offices of the State Attorney soon. Those vacancies set to be filled included the offices of the State Attorney around the country and in Mbombela. These assertions make it very clear that as on 7 and 14 March 2022 there was nothing concrete put in place to ensure that the two matters

and all other matters countrywide were attended to and disposed of effectively and efficiently without burdening the courts as gate keepers for the Fund like dealing with trial matters in the Fund's absence.

[165] It is clear from the assertions made by Mr Letsoalo in his affidavit deposed to on 18 April 2022, that he cannot distance himself together with the Board from the late settlements in these two cases. In fact, by having nothing in place to take over the files returned by the panel attorneys and deal with them effectively and expeditiously, the CEO and the Board should be found to be the cause of the late settlements and thus putting the Fund at the risk of having to pay trial costs occasioned unnecessarily. They cannot hide behind the protection in section 15(3) referred to earlier in this judgment and considered in detail from paragraph [179] hereunder.

Assertions made by the CEO in affidavit deposed to on 20 June 2022

[166] Having indicated in the affidavit of 20 June 2022 that he was deposing to the affidavit on the advice of the Fund's legal representations, Mr Letsoalo then proceeded in paragraph 4.1 thereof and made a proposal on behalf of the Fund as follows:

- “4.1 That the Honourable Judge President should consider issuing a directive that a plaintiff may not apply for any pre-trial procedure stage where an affidavit is made by the plaintiff's attorney confirming that all of the plaintiff's documentation is complete and in order sufficient for the needs of the immediate finalization of the dispute.*
- 4.2 The Judge President is asked to consider issuing a directive in that form by the RAF and that the RAF be given a period of six months to report back to this Court on the effect of the directive”.*

[167] This affidavit was deposed to, few days before the hearing of 27 June 2022. One has to be worried if a legal practitioner can advise client to make this kind of statement in the face of a legislative frame-work, it's imperative and purpose. Look at it this way: Sections 19 and 24 of the Act is to ensure that the plaintiff's documentation is complete. Secondly, once the pleadings are closed, discovery notices in terms of

rule 35 kicks in. Thirdly, pre-trial procedure is strictly regulated in terms of rules 37(6) and 37A (10),(7),(8) and (9). The procedure is extensively dealt with elsewhere in this judgment. Furthermore, the Practice Directive issued by this Division effective from 9 January 2020 is very clear on judicial case management. What Mr Letsoalo is asking the Judge President to do is effectively to ignore the rules of court and the Divisions' Practice Directive issued on 9 January 2020 with all its amendments and or additions since 9 January 2020. The proposal by Mr Letsoalo on behalf of the Fund as I see it, is extremely inappropriate. The court is being asked to be a gate-keeper for the Fund in its absence. This will however not be used against him for the purpose of deciding on the question of costs occasioned by the late settlements.

[168] There is another worrying aspect to consider which arises from Mr Letsoalo's affidavit. In paragraph 7 of his affidavit he alludes to the fact that 'the RAF's policy is based on a five-year strategy, set out in the RAF's first affidavit. We are currently half way to the third year. The explanation for non-compliance with the directives of this division and effectively with the rules of court is apparently this as Mr Letsoalo puts in his affidavit: 'RAF's major problem with compliance with the directives is that the RAF was not permitted to comment thereon - its response would inter alia, have pointed out the resources considerations'. Mr Letsoalo should be mindful of the fact that the resource considerations are outside the ambit of the judiciary as the third arm of government. Cases are placed before the courts and are so decided on the facts of each case and the law or procedure in terms of the rules of court applicable thereto. The fact that the RAF's policy is based on a five-year strategy and courts are still experiencing absenteeism of the Fund at pre-trial and case management conferences including trials, is of a great concern, particularly being at half way through the third year. Nothing tangible is realised, except for the forced attendance introduced by this Division at the beginning of September 2022. I deal later with this forced procedure the Division has resorted to.

[169] The concession in paragraph 9 of Mr Letsoalo's affidavit to the effect that *'the RAF acknowledges that the system being implemented is not perfect. In the process of executing it, there are instances of mismanagement which are still being discovered, however same are corrected on daily basis to ensure that the system functions*

optimally and more importantly to prevent a recurrence of the events of the past which were riddled by mismanagement and instances of corruption’, is actually telling.

[170] Failure to object formally and in time to the lodgement of claims or repudiate in time, failure to participate in the pre-trial and judicial case management conferences including trials, are all part of such mismanagement conceded by Mr Letsoalo and he should see himself, the management and the Board as the cause of such mismanagement post 31 May 2020. This has been exacerbated by the fact that since 1 June 2020 nothing workable was put in place to absorb the many cases from the panel attorneys. The management, CEO and or the Board has to be blamed for these failures which resulted in unnecessary costs of litigation occasioned by or connected to the late settlements in these two matters. The chaos resulting in the late settlements and default judgments that are granted against the Fund throughout every high court, has nothing to do with ‘*the real chaos*’ Davis J referred to in his judgment as quoted in part by Mr Letsoalo in paragraph 8 of his affidavit under discussion.

[171] As indicated by Mr Letsoalo, lodgement of claims in a prescribed manner and substantially meeting the statutory requirements, is intended to enable the Fund to investigate and settle. The Fund in the present cases did not do much until the summons were issued and even thereafter, the Fund took a non-committed effort to investigate and settle. It moves from the premises that if the plaintiffs do not make follow-ups, is none of the Fund’s business. This attitude appears clearly from the assertions not only made by the claim-handlers who filed affidavits in these proceedings, but also from those assertions made by the CEO.

[172] Failure to object within 60 days and failure to ask for information, documentation and repudiate within 120 days is not only non-compliance with the statutory imperative, but it also causes and encourages litigation to progress towards at a snail pace trial instead of arresting it at an early stage before unnecessary costs of litigation are incurred. The suggestion in paragraph 28 of his affidavit deposed to on 20 June 2022 shows blame shifting attitude without reflecting properly on the Fund’s failures during his tenure.

[173] True, as indicated in paragraph 27 of his affidavit, *'it was the legislative's intention with the statutory bar on litigation against the RAF for the 120 days' period to ensure the RAF would only litigate matters where a claimant was being unreasonable after the RAF was able to consider its liability in a claim'*. However, it's the Fund which must be proactive to enforce what Mr Letsoalo refers to as "statutory bar" or "legislative's intention." This can only be done by observing the 60 days or 120 days' time-line. Therefore, if things are "circumvented when the lodgement does not enable the RAF to accurately assess whether or not it is the risk of litigation", as Mr Letsoalo puts it in his affidavit, that must be placed at the Fund's front door for failure to enforce the law in sections 19(f)(ii) and 24(5) and (6). Mr Letsoalo's assertions in paragraph 28 of his affidavit should therefore be seen in context. The CEO, the Board and the Fund have the responsibility to ensure that the legislative framework is properly and fully adhered to and implemented. The blame shifting without enforcing the law is worrisome and inexcusable.

[174] As regards the default judgments that are crippling the court's rolls, concession is made that "there are still *some* summons that are unfortunately missed". "Some summons", perhaps is under statement. There are many such matters in this division. Whilst this subject may not be relevant to an extent and to the enquiry in these proceedings, the issue is mentioned to show the extent to which our courts are unnecessarily burdened with undefended matters on the trial rolls. That shows a system that is not properly and effectively functional during Mr Letsoalo's tenure.

[175] As at the time Mr Letsoalo deposed to his second affidavit on 20 June 2022, Mpumalanga Division as far as the Division is aware, was allocated only two RAF attorneys assigned to State Attorney Office in Mbombela. In other words, since 1 June 2020 no attorney was allocated or assigned to deal with Mpumalanga High Court rolls both at the main and local seats in Mbombela and Middelburg respectively. This has been a recipe for disaster as it has been experienced by the Division throughout until 7 and 14 March 2022 and thereafter. It signifies the disastrous situation created by lack of proper planning before and since 1 June 2020. Despite time being of essence, this did not appear to have meant anything to the CEO, management and the Board. There are five to six trial rolls running during every trial week. Therefore, as on 20 June 2022 when Mr Letsoalo deposed to his second affidavit, there were just no

sufficient legal practitioners to deal with the Fund's matters in this Division and this cannot be blamed on the claim-officers.

[176] In paragraph 74 of his affidavit, Mr Letsoalo talks about the important roles which are played by court monitors. As he puts it:

"The court monitors obtain copies of the court rolls in advance and that in many instances the notices of set down are emailed to addresses which may have gone unnoticed and the notices of set down might not have been captured on the RAF's system causing trial dates to be dismissed. With the court monitor's assistance, the matters that may have been missed, or that appear on a roll incorrectly, are registered and administered by the RAF. The court monitors have been especially important to immediately make inroads to quell applications for default judgment that may have gone unnoticed on the RAF's systems for various reasons. The RAF has further more appointed in-house assessors to assist with inter alia loss of support claims".

These assertions are welcomed and I will deal later with what we have recently experienced as a Division in this regard. Despite all of this, one must still be focused on the facts of the enquiry before us.

[177] As on 7 and 14 March 2022 when the two cases were respectively on the trial rolls, there was no RAF court monitor or monitors. The pre-trial and case management notices which could have facilitated earlier settlements without incurring costs connected with trial and preparation thereof, went unnoticed or not responded to because of conceded extreme pressure of work the claim officers had to bear. This is the fault of the Fund Management, CEO and the Board by not having something workable and tangible as on 1 June 2020. As a result, they cannot escape liability for late settlements of the two cases before us.

[178] In paragraph 96 of his affidavit Mr Letsoalo alludes to the fact that some matters are settled late on the dates of trial due to the information being discovered late, matters being enrolled prematurely, the RAF staff not being able to appear in matters timeously due to *inter alia*, the backlog and in some instances attorneys being unreasonable. Well, this assertion has to be considered in the context of the facts of in the present cases. The Fund ignored and did not attend to the notices for pre-trial conference to facilitate for judicial case management process in place. There was no

attendance for reasons already alluded to in this judgment. As already indicated, failure to enforce the legislative frame-work in sections 19(f)(ii) and 24(5) and (6) can only be attributable to the management, CEO and the Board. I now turn to deal with another topic prompted by the submission made on behalf of Mr Letsoalo and the Board.

Not acting in good faith as contemplated in section 15(3) of the Act

[179] In terms section 15(3) of the Act, no member of the Board or officer or employee of the Fund, or other person performing work for the Fund, shall be liable for anything done in good faith in the exercise of his or her powers or the performance of his or her functions or duties under or in terms of the Act. According to **Merriam-Webster Dictionary**, acting in good faith or doing something in good faith means “in an honest and proper way”. Acting in good faith is also described as “an obligation to act reasonably and with fair dealing having regard to the interests of the other party”.

[180] In the matter of **Bokhuizen v Napier 2007 (5) CC SA 323**, it was pointed out that in dealing with “in good faith”, the concepts of fairness and reasonableness cannot be isolated from the public policy. In my view, dealing with the public funds, like in the present two cases, or in any other matter where public funds are involved, there is a need to act fairly and reasonably or properly. **Nqcobo J at 70C of Bokhuizen** case held:

“While it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline enforcement of a clause, if it would result in unfairness or would be unreasonable”.

[181] The conduct of the CEO, the Board and or Management at the time the files were demanded from panel attorneys regarding matters still pending in our courts nationwide when the Fund did not have the capacity to deal with those matters, was unreasonable and clearly unfair. At that time, the Fund had no replacement of the panel attorneys to deal with the matters still live and pending in our courts. There were no attorneys in place to deal with the pre-trial, case management conferences including trial rolls. Furthermore, there were no enough officers within the Fund’s

establishment to deal with these two cases and other many cases to discuss and reach settlements without incurring further costs of litigation towards trials or preparation thereof.

[182] As Mr Cilliers SC on behalf of CEO and the Board puts it, personal liability for costs occasioned or connected to late settlements on the date of trial or close to the date of trial, has to be limited to the facts of the present two cases. He was correct in submitting that to find against the CEO and Board, this court will have to find that *‘the specific conduct of the CEO and the Board complained of caused the delay attributable to the late settlement’*. That conduct in my view, has been proved and dealt extensively in this judgment and has correctly been conceded by Mr Letsoalo in one of his affidavits. And, at the risk of repetition, he stated:

“A previous employee who had resigned at the end of May 2021 had handled this matter (referring to Hlatswayo matter) gave evidence (referring to evidence on affidavit) to provide their best explanation regarding their involvement in this matter. With great respect, they cannot be blamed for the failure of the RAF to appear at the judicial case management meeting or to attend to the pre-trial proceedings after previous employee resigned in May 2021. At that stage, the Fund was under extreme pressure”.

[183] The next question is who caused the Fund to be ‘under extreme pressure’. Put differently, who was managing the Fund at that stage? Or who in terms of the legislative frame-work was in charge and control of the Fund? What conduct by those in charge of the Fund contributed to the extreme pressure of the Fund and on the employees? All these questions point at the CEO and the Board as they were and are still in charge of the Fund in terms of section 11(1) and in terms of which the Board subject to the powers of the Minister, exercises authority and control over the financial position, operation and management of the Fund. As indicated earlier in this judgment, in terms of section 12(1)(b)(i), the CEO of the Fund shall be the person who is suitably qualified and experienced to manage the day to day affairs of the Fund. He is therefore expected to know better on the implementation of the provisions of the Act.

[184] At the risk of further repetition, in terms of section 12(2), the CEO shall conduct the current business of the Fund subject to the directions of the Board. The CEO may

in terms of section 12(2)(a) exercise the powers and shall perform the functions of the Fund mentioned in section 4(1)(b)(c)(d), (2) and (3). In terms of section 12(2)(b) he or she appoints, determine the conditions of employment of and dismiss staff of the Fund, excluding members of the staff on management level. Therefore, whatever the CEO does, the Board is involved. Failure of the Fund referred to by Mr Letsoalo in paragraph [182] and elsewhere in this judgment, are failures of the Board and CEO. It is not fair nor reasonable to proceed to demand all files previously handled by panel attorneys without a system in place to absolve and deal diligently and effectively with those files. The conduct as detailed and repeated in this judgment cannot find protection under section 15(3). Both the Board and CEO are found not to have acted in good faith. They should therefore be found liable for costs on punitive scale connected to or occasioned by the late settlements in these two matters. The CEO to pay such costs out of his own pocket as contemplated in rule 37A(12)(h) jointly and severally with the Board, the one paying the other to be absolved. I now turn to deal with another issue.

Mr Letsoalo letter dated 29 June 2022

[185] Immediately after the proceedings of 27 June 2022, Mr Letsoalo addressed a letter dated 29 June 2022 to the Judge President. The subject matter of the letter is: "CLARITY REGARDING PROCEEDINGS AND PROCEDURES FOLLOWED". This letter is quoted in full in paragraph [98] of this judgment. The response by the Judge President on behalf of the full court was refusal to comment as the court did not want to cloud issues by dealing with the questions and the complaints or clarity sought in the letter pre-maturely.

[186] On 27 June 2022 Mr Letsoalo was in attendance at court. The proceedings of that day were conducted virtually. He was seated next to the Senior Counsel on behalf of the Fund instructed by Mponyane Ledwaba Inc. From time to time during the proceedings he conferred with Counsel for the Fund. At one stage during the proceedings counsel for RAF indicated to the court that Mr Letsoalo wanted to address the court personally. This request was declined as the court took the view that it would be inappropriate to allow him to speak when the Fund is legally represented. To have allowed him to speak would have turned the proceedings into something else. The

court engaged counsel for the Fund extensively on what was put in place as a plan to deal with matters pending in the courts post the 31 May 2020. In addition, issues were recaptured and raised as indicated in paragraph [15] of this judgment. This seemingly did not go well with Mr Letsoalo.

[187] As a start, whilst in the first paragraph of his letter he stated that he wrote the letter in his personal capacity, and without prejudice, he still found it necessary to sign the letter as “*Chief Executive Officer - Road Accident Fund*”. Mr Letsoalo was fully aware that it was inappropriate of him to write the letter as he did, but still he did very daringly by inter alia, putting it this way:

“I have taken this unprecedented decision of penning this clarity... after much introspection and various consultations with some distinguished members of the legal profession”.

[188] I assume that counsel who appeared for the Fund including the instructing attorneys of record would have been one of the “distinguished members of the legal profession” he consulted with. I suspect, Mr Letsoalo would have been told that his “unprecedented decision” was inappropriate to be conveyed to the court. Probably, no lawyer was willing and correctly so in my view, to be part of the “unprecedented decision” by Mr Letsoalo. One wonders whether the Board under whom he performs his functions and the Minister were briefed on this “unprecedented decision”. And, if he did I suspect the Board and the Minister elected to distance themselves from his stance of penning the letter quoted in paragraph [14] of this judgment.

[189] His attempts “*to consult with a view to get himself in his personal capacity to represent him in the now joint matter of Hlatwayo and Masilela against the Road Accident Fund*” as stated in his letter, should be seen in the context of the ultimate 7 questions he posed to this court expecting that the court will heed thereto. This court did not get tempted to respond as the risk of clouding the proceedings of the enquiry and other relevant issues raised by this court subsequent to the proceedings of 27 June 2022, would have been immense.

[190] One can understand why Counsel who represented the Fund in these proceedings did not also represent the CEO and the Board. This must have been on

ethical considerations. I now find it necessary to educate Mr Letsoalo on the rules of court and the application or implementation thereof. Rule 39(9)(a)(i)(ii) referred to by footnote in paragraph [1] of this judgment is instructive. Sadly, it is a rule that is seldom resorted to. The rule is very clear and is peremptory. First, the Fund is a “party” in these proceedings. And therefore, if it fails to attend a pre-trial conference and or if to a material degree it fails to promote the effective disposal of the litigation, the court may make a special order as to costs. As indicated in this judgment, the CEO and the Board are both the steering for the Fund. The Fund functions through them. Having found that their conduct, that is, that of the Board and the CEO is wanting, the shield provided to them in terms of section 15(3) of the Act has by their conduct been lifted.

[191] The Fund failed to attend the pre-trial conferences that were convened by the plaintiffs’ attorneys in these two matters for reasons that can only be due to the unworkable and unrealistic management policy imposed on the officials of the Fund. This resulted in the late settlements and thus failed to a material degree to promote the effective disposal of the litigation in these two matters. Coming to failure to participate in the judicial case management process, the Practice Directive dated 9 January 2020 is very clear. That is, all matters on this Division’s rolls, are case managed and therefore these two cases were subject to judicial case management process.

[192] The object of case management through judicial intervention is clearly spelled out in sub-rule (2)(a) of rule 37A which provides that judicial case management through judicial intervention shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. The process of judicial intervention shall in terms of rule 37A(2)(c) be construed and applied in accordance with the principle that, notwithstanding the provisions of rule 37A providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of courts, and act professionally in expediting the matters towards trial and adjudication.

[193] In the present two matters, the Fund through its CEO and the Board elected to dispose of their legal representatives who were dealing with these matters since

summons were served. In doing so it became the responsibility of the CEO and the Board to ensure that the Fund prepare properly for these two cases and all other pending matters in our courts and comply with all rules of court in a manner that expedites the matter either towards early settlement or towards readiness for trial and adjudication.

[194] Rule 37A introduced teeth for the court to bite. Sub-rule (12)(h) thereof provides as follows:

“The case management judge may at a case management conference, make an order as to costs, including an order de bonis propriis against the parties’ legal representatives or any other person whose conduct has conducted unreasonably to frustrate the objective of the judicial case management process”. (My emphasis).

[195] This sub-rule (12)(h) is not directed at the parties to a litigation. It is instead, aimed at the parties’ legal representatives or any person whose ‘conduct has conducted unreasonably to frustrate the objectives of the judicial case management process’. The CEO (Mr Letsoalo) and the Board, are such “any other persons”. Therefore, Mr Letsoalo is mistaken to think that he is beyond reach in this enquiry for costs connected to or occasioned by the late settlements. The procedure that he seeks clarity on as posed in paragraph 4 of his letter, is therefore hereby provided as set out above.

[196] Mr Cilliers SC on behalf of the CEO and the Board submitted that sub-rule (12)(h) of rule 37A is not applicable in the present proceedings because these proceeding are not presided over by a “case management judge” during case management process referred to in the sub-rule. You need to ignore the context in rule 37A in order to come to this conclusion by Mr Cilliers. First, in terms of rule 37(9)(a)(i)(ii) referred to above, the trial court is bound to consider at the hearing of the matter whether or not to make special order as to costs. Second, the trial court is not precluded from considering the issue of ‘any order as to costs’ seen in the context of sub-rule (13) which provides that the record of the case management conference, including the minutes submitted by the parties to the case management judge, any directions issued by the judge and the judge’s record of the issues to be tried in the

action, but excluding any settlement discussions and offers, shall be included in the court file to be placed before the trial judge.

[197] This court after referral to it by the trial court to deal with the issue of costs arising from late settlements and non-attendance and participation by the Fund in the pre-trial and case management conferences, is entitled to deal with the enquiry as contemplated in rule 37A(12)(h). These two cases were settled late, one few days before the date of trial and the other on the date of trial.

[198] The trial court in order not to be burdened during trial weeks of 7 and 14 March 2022 respectively with an enquiry as to costs occasioned by late settlements of these matters, respectively referred the matters respectively to the Judge President who after having issued the initial directive and after the parties having filed affidavits as so directed, constituted full court to deal with the enquiry. Sub-rule (14) fortifies my findings that there is no merit to the suggestion that this court cannot invoke rule 37A(12)(h). Sub-rule (14), disposes of the submission by Mr Cilliers that sub-rule (12)(h) can only be enforced by a case management judge. Sub-rule (14) provides that the trial judge shall be entitled to have regard to the documents referred to in sub-rule (13) in regard to the conduct of the trial including the determination of any application for postponement and issues of costs. This should bring the submission by Mr Cilliers SC to rest. (My emphasis).

[199] This then brings me to sub-rule (16). This is aimed at the parties in matters subject to judicial case management. In terms of the sub-rule (16), any failure by a party to adhere to the principles and requirements of rule 37A may be penalised by way of an adverse costs order. With this explanation on all these procedural aspects, hopefully Mr Letsoalo will now understand why this enquiry regarding costs occasioned by the late settlement including all issues raised by this court, is necessary and that issues raised are appropriately based on the rules of court and the law to which this court is entitled to apply guided by the facts of the present proceedings. Just before I move off from the rules of court, there is another rule which I find worth mentioning for the benefit of the parties and Mr Letsoalo seen in the context of his “unprecedented decision” expressed in his letter quoted in paragraph [14] of this judgment.

Piercing through the veil of confidentiality in terms of rule 37A(11)

[200] There is a belief that during in particular during judicial case management conferences before a case management judge in terms of rule 37A, parties cannot be engaged, subjected to and be pierced through their settlement discussions. It is often said such settlement discussions are confidential or privileged. One must commend the drafters of rule 37A for dispelling this thinking and also dispelling these strong views often held by the parties or parties' legal proceedings in court proceedings.

[201] Rule 37A(11) provides as follows:

“Without limiting the scope of judicial engagement at a case management conference, the case management judge shall-

- (a) explore settlement on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation;*
- (b) endeavour to promote an agreement on limiting the number of witnesses that will be called at the trial, eliminating pointless repetition or evidence covering facts already admitted, and*
- (c) identify the issue to be tried in the action”.*

[202] “Without limiting the scope of judicial engagement” in sub-rule (11) appears to be intrusive. It is a necessary provision that seeks to ensure that a case management judge during judicial case management engagement at a case management conference, is not constrained. For the case management judge to be able to “explore settlement on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation”, as provided for in sub-rule(11)(a), you need the authority to be intrusive as the drafters of rule 37A deemed it fit. The rule is made to be peremptory in this regard.

[203] This authority, seen in context, is appropriately bestowed with the necessary safety valve located in sub-rule (15) which provides that ‘unless the parties agree thereto in writing, the case management judge and the trial court judge shall not be the same person. Furthermore, sub-rule (13) inter alia, excludes ‘*any settlements discussions and offers...included in the court file*’ from being placed before the trial

judge. This makes sense because the case management judge is not meant to be constrained. A case management judge during case management conference must engage the parties on all of the ten issues identified in rule 37A(10) and the eleven issues identified in rule 37(6). All these issues are supposed to appear in the pre-trial minute document referred to in rule 37A(7)(d)(ii). In so doing judicial case management judge must be satisfied that the content of the minute document is complies with the imperatives in sub-rules (8) and (9) of rule 37A referred to earlier in this judgment.

[204] During judicial case management conference as contemplated in rule 37A(11)(a), the judicial case management judge shall also tap into the question whether the case has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred. This is important engagement because very often rule 41A is not utilised effectively and properly. The imperative in rule 41A is 'to provide for the settlement of cases by attempts to mediate before a case proceeds to be heard in court. The rule is intended to incorporate an effective, less adversarial resolution mechanism that the litigating parties must consider in order to resolve their dispute'. The Rules Board in introducing rule 41A must have been mindful of the fact that the parties to a litigation seek a speedy resolution of their disputes and that when matters are delayed, they result in postponements and costs and thus causing prejudice to the litigants.

[205] Rule 41A has a pause button to save costs. That is, once parties agree to go for mediation, the process of exchange of pleadings, is paused. I mention rule 41A for the following reasons: It is ignored and not properly utilised by the parties. Instead, in litigation and very often, the parties just simply and without much ado complete a form stating that the litigation is not capable of being mediated. The engagement and the peremptory provisions imposed on the case management judge, to explore settlement on all or some of the issues identified in rule 37A and rule 37(6) and enquiring whether the parties have considered voluntary mediation as provided for in rule 37A(11), in my view, is meant also to ensure that rule 41A is not made academic. Therefore, during engagement by the judicial case management judge, the parties ought to be encouraged to resort to resolve their disputes through mediation process in order to save further costs of litigation and expedite resolution or finalisation of their disputes.

I mention all of this to emphasize the point that any party who does not participate in the pre-trial conferences and judicial case management conference before a judge, can correctly be described as a party or person whose conduct is conducted unreasonably to frustrate the objectives of judicial case management process as contemplated in rule 37A(12)(h). Before the parties could appear before a case management judge for case management conference, the parties in terms of rule 37A(7)(c), must have held a pre-trial meeting at which the issues identified in sub-rule (10) in relation to the conduct and trial of the action, must have been considered. This imperative must be seen in the context of rule 37A(2)(c) in terms of which the parties and their lawyers are required to prepare properly, comply with all rules of court and to act professionally in expediting the matter towards trial and adjudication. This again means that any party who fails to participate in the pre-trial and judicial case management conferences respectively, makes himself to be the subject of an enquiry in terms of rule 37A(12)(h) and (16) including rule 37(9)(a). The engagement by the case management judge and piercing through “confidentiality” principle as an often made argument regarding settlement discussions or offers, must therefore be seen in the context of the enormous power which a case management judge has in terms of rule 37A(11) read with the safety valves in sub-rules (13) and (15) referred to in paragraph [203] above.

Mr Letsoalo’s reluctance to deal in these proceedings with termination of panel attorneys services

[206] The termination or non-extension of the panel attorneys’ services were raised in context. The context was, what was in place as a plan to absorb the work that was done by the panel attorneys? Since 1 June 2020 this Division and other Divisions continued to experience increase of non-participation by the Fund in the pre-trial conferences, including judicial case management conferences. The courts also experienced increase in the default judgments being granted against the Fund and very often putting the courts under extreme pressure as they have to be more careful and vigilant regarding evidence led and the medical reports and other reports used in the default judgments proceedings. In the present two cases, the Fund did not show-up during the pre-trial, judicial case management conference by completion of Form

A and neither did the Fund show-up during the dates on which the two cases were on the trial rolls respectively.

[207] Despite this context, Mr Letsoalo in his affidavit elected to move from the premise that the RAF would manifestly be prejudiced to deal with the issues in these proceedings as that would amount to repeating those issues in **Fourie-Fisher v RAF**. First, the fact that some issues in the present cases are pending in the SCA, is not good enough for this court not to deal with those issues raised in these proceedings. More so that the issues at hand is about costs and what caused the late settlements in the two cases. The enquiry therefore is about who is to be blamed for such late settlements and whether or not rule 37A(12)(h) and (16) read with rule 37(9)(a) should find application. The real question is whether it would be appropriate to make an order as to costs against any person. Each case is decided on its facts, rules and or the law applicable thereto.

[208] However, Mr Letsoalo in his affidavit dealt with what he refers to as a broad overview of the issues raised by the court after the proceedings of 27 June 2022. A long story is given as to what consultative process was envisaged, undertaken and in some instance undertakings made by panel attorneys from October 2019 to 31 January 2020 when the Board adopted a new strategic plan and a new operating model. Subsequent thereto, a new notice was issued in February 2020 demanding that the panel attorneys return the files. The demand was so made without anything in place to substitute the panel attorneys with regard to matters still pending in the courts throughout the country.

[209] It is very clear from Mr Letsoalo's "broad overview" as per his affidavit and already dealt with somewhere in this judgment that there was nothing in place to ensure that pre-trial and judicial meetings and trials were attended to effective from 1 June 2020. As on 7 and 14 March 2022 there was still nothing and thus non-appearance at pre-trial and case management meetings, including appearances at trials. The reluctance by Mr Letsoalo to deal with any issue regarding the plan for immediate implementation as on 1 June 2020, is clearly derived from the fact that there was no such workable plan in place. That had the potential not only to throw the Fund into chaos, but also to bring the court rolls to a halt and chaos as it has happened

or and continue to be experienced in other Divisions. The two cases were not saved from such chaos.

[210] The frustrations brought about by this chaos can be seen from the directives issued by various divisions including this Division. The Pretoria Society of Advocates which was admitted as a friend of the court on the invitation of this court submitted extensive overview of such chaos in the Gauteng Division. This Division was effectively forced from September 2022 to implement a system of forcing the Fund to be in attendance in all pre-trial and judicial case management conferences including the trials. The benefit of this is remarkable as it will appear later in this judgment. If the Fund had a workable plan effective from 1 June 2020, there would not have been a need for various Divisions to ponder on how to arrest the chaos caused by the Fund through its mismanagement occasioned by its CEO and the Board, in particular the decision taken on 31 January 2020 and in February 2020 without a plan for immediate implementation. Mr Letsoalo's reluctance to deal with extensively with issues raised in the directive quoted in paragraphs [10], [13] and those referred to in paragraph [15] of this judgment, should therefore be seen in context. In particular, the unworkable operating model adopted by the Board on 31 January 2020. On 27 June 2022 counsel for the Fund was engaged on the issues raised and quoted in paragraph [10] of this judgment. Counsel for the Fund was not able to sufficiently deal with the existence or otherwise of an effective plan to deal with the files that were demanded from panel attorneys upon the latter's services having been terminated by effluxion of time on 31 May 2020. The order quoted in paragraph [13] of this judgment followed by brief explanatory directive referred to in paragraph [15] of this judgment was made to provide an opportunity to the CEO, the Board or the Fund to deal fully with the court concerns about the lack of a plan in place to absorb and to deal effectively with the returned and new files from 1 June 2020.

Attempts to blame the chaos on Fund's budgetary constraints

[211] Counsel for the CEO and the Board sought to blame the non-participation of the Fund during pre-trial and judicial case conferences on the financial considerations or financial woes of the Fund. But, this is not what Mr Letsoalo sought to raise as a

defence or justification when he dealt with the reasons for non-participation in the pre-trial and judicial case management meetings.

[212] His articulation in paragraphs 39 and 40 of his third affidavit can be summed up as follows: The claim handlers should not be blamed for non-appearance at the pre-trial and case management convened meetings because they were under extreme pressure. Employees were discharged for various misconduct and some of them resigned. Matters were re-assigned to different claim officers. Some of these claim-handlers were assigned to deal with many matters. For non-attendance of pre-trial conferences, Mr Letsoalo does not raise lack of funding as the reasons for the late settlement in these two matters which were scheduled for trial on 7 and 14 March 2022 respectively.

[213] Lack of funds defence would mean that as at the time when Mr Letsoalo, his management team and the Board consistently demanded the return of the files from panel attorneys, they knew or ought to have known that there were no enough claim officers and other officers to deal with those matters due to budgetary constraints. In any event, the dismissed and or resigned employees ought to have been urgently replaced. But on the facts of the two cases it looks like that was not done. If employees were dismissed or resigned on created and funded posts, immediate recruitment since 1 June 2020 to March 2022 should have taken place and the vacated posts should have been filled. Everything was actually caused by lack of planning at the time when the files were demanded from the panel of attorneys. One wonders as to what is going to happen to the RAF if indeed the notice to retrench thousands of its employees was to become a reality. Every court will further be thrown into a disarray.

The Fund's obligation to investigate and settle claims and utilisation of its funds

[214] As indicated in paragraph [15] of this judgment several issues were raised with reference to the provisions of the Act in particular on the duty to investigate and settle claims with the Fund. Improper utilisation of the monies of the Fund should become a matter of grave concern to every taxpayer. After having read the affidavits deposited to by various claim handlers in these proceedings including the initial affidavits deposited to by Mr Letsoalo, the issue whether the monies are used for the purpose for which

the Act envisages, became apparent. Speaking about lack of funds, one's attention is immediately drawn to section 4(1)(b) and (c). In terms section 4(1)(b), the powers and functions of the Fund shall include the investigation and settling subject to the Act of the claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of owner or the driver thereof, or identity of both the driver and owner thereof has been established. This will be meeting the object of the Act which in terms of section 3 is to pay compensation for the loss or damage wrongfully caused by the driving of a motor vehicle. Furthermore, in terms of section 4(1)(c) of the Act, it is the duty of the Fund to manage and utilise the money of the Fund for the purpose connected with or resulting from the power or the performance of its duty. This duty is performed through the CEO of the Fund under the watchful eye of the Board.

[215] The CEO and the Board must therefore ensure that there is a strict compliance with the legislative imperative regarding the utilisation of the monies of Fund. To achieve the object of the Act in a cheaper and efficient way, the Fund has to investigate, settle and pay without being entangled in unnecessary protracted litigation. This can be done by resorting to sections 19(f) and 24(5) (6) of the Act to ensure that matters capable of being settled do not spill over to litigation started by the issuing and service of the summons. The Fund did not resort to sections 19(f) and 24(5) and (6) in the two cases before us. Often the Fund only starts reacting very late and in many cases it does not participate in the conferences as we have seen in a number of default judgment requests. This appears to be nationwide as it appears from the collation of information provided in these proceedings by the Pretoria Society of Advocates.

[216] To allow matters capable of being settled to reach the stage of trial and then only to be settled on the dates of trial or late defeats the Act's object to investigate, settle and pay compensation. This has a huge negative impact on the use of the monies of the Fund. Mr Letsoalo for example in paragraph 71.1 to 71.2 of his affidavit deposed to on 18 April 2022, alludes to the fact that in 2005 there were 185 773 claims lodged which resulted in legal costs of R941 million. In 2018 there were only 92 101 claims but the legal costs rocketed to R88 billion. In 2019 the legal costs increased to R10,6 billion. This ballooning of legal costs can only be attributed to not enforcing and

or complying with the law as provided for in sections 19(f) and 24(5) and (6) of the Act. Unfortunately, although Mr Letsoalo elected not to provide the extent of such legal costs during his tenure, we see more of this repeat where many matters are settled on the dates of trial regarding matters which should never have been defended. The trend actually in my view, escalated post 31 May 2020 when pre-trial and case management conferences became filled with non-participation and absenteeism by the Fund all of which can only be attributed to the absence of a workable and a better plan from 1 June 2020. This resulted in many late settlements like it has happened in the two cases. Defaults judgements are also daily occurrences. The buck stops with the CEO, his management and the Board. Spending so much money on legal costs can only be described as a failure to manage and utilise the money of the Fund for the purposes of the Act. Section 7 of the Act is instructive. That is, the funds and facilities of the Fund shall be used exclusively to achieve, exercise and perform the object, powers and functions of the Fund. The power to commence, conduct or defend legal proceedings in connection with claims lodged against the Fund as contemplated in section 8(1)(b), should therefore be on merits and in exceptional circumstances, particularly seen in the context of the power and functions of the Fund in terms of section 4(1)(b) and (c) referred to earlier in this judgment. Therefore, the assertion of lack of funds cannot be a justification to avert an order of costs occasioned or connected to the late settlement in these two cases.

Forcing the Fund through poking and case management system in terms of the Division's Practice Directive to participate in the pre-trial and case management meetings

[217] It will be remiss not to mention the positive impact resulting from forcing the Fund to no longer be a by-stander in litigation against it. The Division designed' s form invoked a poking system crafted as follows:

1. *"Be pleased to take notice that this matter has not been certified trial ready.*
2. *Be pleased to take further notice that this matter has been poked and enrolled on the first judicial case management conference roll for at 08h45.*
3. *Parties are hereby directed to complete the amended Form A of the Practice Directive dated 9 January 2020 and file same together with set of court papers by not later than 12h00 on...*

4. *Be pleased to take further notice that physical attendance of the judicial case management conference is compulsory and will be held at civil court number before judge.....*

By Court Registrar / Assistant Registrar/ Registrar clerk

Name.....”

Signature.....

Date.....”

[218] The notice was issued after the Division had obtained the email addresses of the two attorneys and now more employed by the RAF and assigned to work under the umbrella of the State Attorney- Mbombela with right of appearance in the High Court. The poking notice is issued randomly by the registrar’s office to stop the Fund in its tracks for not participating in the pre-trial and case management conferences including its absence. This has seen parties now invoking paragraph 2.8 of the Division’s Practice Directive which provides that ‘any action matter may be placed on the first case management roll by the parties upon delivery of an appearance to defend or upon poking system initiated by the registrar office as contemplated in paragraph 28 of the Directive. Paragraph 2.9 of the Directive on the other side provides that placing of the matter on the first case management conference roll as envisaged in paragraph 2.8 above, shall be by the parties or parties’ legal representatives and shall be so done by completing Form A to this Practice Directive. During the first such case management conferences conducted physically since September 2022, the Division has seen many matters about 50% been settled in their entirety during the first case management conferences. It is expected that during the second case management conferences which are used for trial readiness certification during engagement as contemplated in rule 37A(11), more than 70% of such matters on the second case management rolls would be settled. This will significantly reduce RAF matters on the congested trial rolls. By so doing, the objective of the case management process envisaged in rule 37A(2)(a) referred to elsewhere in this judgment, will be realised.

[219] In all of the judicial case management meetings conducted from September 2022, the Fund was represented by the RAF legal representatives assigned to the

State Attorney Office in Mbombela and its litigation monitor is often in attendance throughout. If this is the way to go by, the Fund will be able to settle many matters in time without incurring the costs of trials, something that can result in huge legal costs savings. One can only hope that this success will be sustained and that it was not driven by this judgment pending on the issue of costs occasioned by late settlements in these two matters.

[220] However costs of litigation will always be there for as long as the Fund does not become proactive and efficient in dealing with the claims at the lodgement stage and where appropriate enforce its power in terms of sections 19(f) and 24(6) of the Act. This can only be achieved by having well trained and enough claim handlers assisted by legally trained officers within the Fund to deal with the claims if they are lodged. Only then will the costs of litigation be avoided and or minimised.

Rules of court and case law on costs orders

[221] Rule 37(9)(a) read with sub-rules (12)(h) and(16) of rule 37A referred to in paragraph [1] above and repeated elsewhere in this judgment deal with the issue of costs occasioned by failure to attend and conduct the pre-trial and judicial case management conferences, failure to a material degree to promote the effective disposal of the litigation, by conduct that conduces unreasonably to frustrate the objective of the judicial case management process and failure to adhere to the principles and requirements of judicial case management process. Such failures by the CEO and the Board have been dealt with extensively in this judgment. The CEO and the Board cannot escape an order for costs being made against them.

[222] On behalf of the plaintiffs in these proceedings, no relief in the form of an order for costs against the claim handlers, CEO and the Board has been sought. However, that does not dispose this court's discretionary authority or power in relation to an appropriate order as to costs connected to or occasioned by the late settlements in these two cases. Rule 37A, in particular sub-rule (12)(h) for the purpose of the enquiry herein came into effect during 2019. By that time or immediately thereafter, the current CEO was or got involved with the Fund in an acting capacity and therefore the enquiry

as to costs occasioned by the late settlements should not come as a surprise to him and the Board.

[223] The constitutional court in the matter of **Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 CC** had an occasion to deal with punitive costs order in a matter concerning a constitutional issue. At paras 20 and 24 and of relevance, the following were stated:

“It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken...

The general approach of this court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immune it against an adverse costs award”.

[224] Starting with the latter paragraph quoted above, it was ‘*manifestly inappropriate*’ of the CEO, the Board and the Fund to demand the return of all the files from panel attorneys, when the Fund did not have the capacity to deal with such pending matters in our courts. The two cases were the subject of such demands. Secondly, it was failure of the CEO having dismissed some officials or claim-handlers not to immediately cause those posts to be filled. Strictly for the purpose of the enquiry herein, it was unreasonable to introduce a system where officials or claim-handlers are to be reassigned to other departments within the Fund compliment without having ensured that proper hand over takes place. It was inappropriate for the CEO, his management and the Board to assign trial matters with notices of set down to the claim-handlers whilst knowing that they cannot appear in court and whilst knowing that they work under extreme pressure and do not have sufficient time to consider settlements in time just as it has happened in the two matters. This resulted in late settlements and the costs of which are the subject of this enquiry. As indicated in **Biowatch** case, the CEO, the Board and the Fund cannot expect that the worthiness of their explanation if any, will immunise them against an adverse costs order. None of the plaintiffs had asked for punitive or adverse costs order despite the concerns

raised during oral argument. The fact that none of the parties is asking for cost order to be made, does not deflate the displeasure and discretionary authority of this court taking into account the imperative in the rules of court referred to in paragraphs [1], [215] above and elsewhere in the body of this judgment.

CEO serving at the pleasure of the Minister and the Board

[225] In terms of section 12(1)(a) the CEO shall upon recommendation by the Board be appointed by the Minister on such terms and conditions as the Board may determine. The CEO therefore, serves at the pleasure of the Minister and the Board. The Minister has therefore an interest in some of the findings made in this judgment. This judgment should therefore be brought to the attention of the Minister. The Fund is meant to avoid any legal proceedings against it. The legislative provisions in sections 3, 4, (1)(b), (c) and (d), (2) and (3), 12(2)(a) and (b), 19(f) and 24(5) and (6) in my view, speak to this. It must have been the intention of the legislature that commencing or defending legal proceedings as contemplated in section 15(1)(g), has to be in exceptional circumstances. As correctly conceded by the CEO in one of his affidavits filed, a litigation ought to be avoided. Litigating instead of investigating, settling and paying without unnecessary protracted litigation, causes billions of rands in legal fees. It is unsustainable to deal with the monies of the Fund by defending every matter where summons have been issued and only to settle after huge legal costs shall have been incurred at the doorsteps of the courts like it has happened in these two matters.

[226] In fact, the institution of summons after lodgement ought to be avoided. This can only be done if the Fund acts proactively upon lodgement to ensure that summons are not issued or if they are issued, that the Fund will justifiably be entitled to file a special plea seen in the context of sections 19(f) and 24(6) of the Act. One still awaits to see the safety valve or shield in these sections being applied and implemented as discussed in this judgment.

[227] Consequently an order is hereby made as follows:

227.1 The CEO (Mr Letsoalo) and the Board are hereby directed to pay out of their own pockets, jointly and severally the one paying the other to be absolved, the costs connected to and occasioned by the late settlement in each matter.

227.2 The costs referred to in paragraph 227.1 shall include the costs to date connected to or associated with the enquiry proceedings herein.

227.3 The costs occasioned by or connected to the late settlements herein shall include costs of two counsel where applicable.

227.4 The Chief Executive Officer of the Fund, Mr Letsoalo, is hereby directed to bring this judgment to the attention of the Minister of Transport and the Board by not later than Thursday 26 January 2023 and confirm to the Registrar of this court by not later than Friday 27 January 2023 that same has been done.

227.5 In the event a contingency fee agreement has been concluded between each of the plaintiffs and their respective attorneys, the Fund shall only pay in terms of the settlement agreement upon an order having been granted in terms of section 4(3) of the Contingency Fee Act.

227.6 In the event it is suggested that no contingency fee agreement has been concluded between the attorney and client in any of the two matters, it is hereby ordered that payment shall only be made by the Fund upon compliance with paragraph 15.11.4.1 of this Division Practice Directive and upon the court in chambers being satisfied that the fee agreement in question is valid and enforceable in law and that it is not a contingency fee agreement which does not comply with the provisions of the Act.



LEGODI JP

Judge President of the High Court

DATE OF JUDGMENT : 21 September 2022

DATE OF JUDGMENT : 24 January 2023

FOR THE PLAINTIFF IN CASE NO 1741/2019: M MASILELA VS RAF

ADV : F H H KEHRHAHN SC / ADV M PIENAAR
INSTRUCTED BY : MAHLALELA ATTORNEYS
: Office 13, Ground Floor
Caltex Building, 32 Bell Street
Mbombela
TEL: 073 670 0755
REF: MVA/MASILELA MM/PM/06/2019
EMAIL: siya@mahlalelaattorneys.co.za

FOR THE PLAINTIFF IN CASE NO 3242/2019 D E HLATSWAYO VS RAF

ADV GEACH SC / ADV A CROSS
INSTRUCTED BY : PIETER NEL ATTORNEYS INCORPORATED
5th Floor, Bester Brown Building
10 Paul Kruger Street
Nelspruit
Tel: 013 755 3036
Ref HLA24/0001/H119
Emails: cornelia@pieternelattorneys.co.za /
pinky@pieternelattorneys.co.za

FOR THE DEFENDANT: RAF

ADV: PUCKRIN SC / ADV SCHOEMAN
INSTRUCTED BY : MPONYANA LEDWABA INCORPORATED
194 Blackwood Street
Arcadia, Pretoria
C/O T P RADEBE ATTORNEYS
Office Number 10, 1st Floor
BFS Building
224 Bester Street
Mbombela
Tel: 012 346 4096
Ref: MR LEDWABA/MADIBA
Email: tpradebeattorneys03@gmail.com

FOR SALPC

ADV T C TSHAVHUNGWA
INSTRUCTED BY : DAMONS MAGARDIE RICHARDSON ATTORNEYS
24 Eighteenth Street (cnr Hazelwood Road)

Hazelwood, Pretoria
Ref: LAW13/0001/slm/mm
Tel: 012 346 6202
Email: mari@dmrlaw.co.za & service@dmrlaw.co.za
C/O HOUGH & BREMNER ATTORNEYS
H & B Law Chambers
30 Van Rensburg Street
NELSPRUIT
Tel: 202 / 013 752 3177
Ref: Mr Coetzee Smith
Email: coetzee@houghbremner.co.za &
annetjie@houghbremner.co.za

FOR PRETORIA SOCIETY OF ADVOCATES

ADV J F GROBLER S C

: Pretoria Society of Advocates
: 220 Madiba Street
Pretoria Central
Tel: 012 303 7400
Email: manager@ptabar.co.za / grobler@law.co.za

FOR GENERAL BAR COUNCIL OF SOUTH AFRICA

: 8a Protea Place
Grindrod Towers
Sandton
Tel: 011 459 1860
Email: info@gcbsa.co.za /
khanyisile.ndaba@gcbsa.co.za

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