IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

Reportable

Case No: 17518/2020
15876/2020
18239/2020

In the matter between:

Case no. 17518/2020

FOURIEFISMER INC. and TWO OTHERS	**APPLICANTS**
MAPONYA INC	**Intervening Party**

And

ROAD ACCIDENT FUND	**1st RESPONDENT**
THE CHAIRPERSON OF THE BOARD OF THE RAF	**2nd RESPONDNET**
THE CHIEF EXECUTIVE OFFICER OF THE RAF	**3rd RESPONDENT**
THE MINISTER OF TRANSPORT	**4th RESPONDENT**

Case no. 15876/2020

MABUNDA INC. and FORTY-TWO OTHERS	**APPLICANTS**

LAW SOCIETY OF SOUTH AFRICA **Intervening Party**

And

ROAD ACCIDENT FUND **RESPONDENT**

Case no. 18239/2020

DIALE MOGASHOA INC. **APPLICANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

Summary: Application in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 for an execution order pending a petition for leave to appeal; whether applicants for execution have proven exceptional circumstances section 18(1); whether applicants have proved that they will suffer irreparable harm and the respondent would not; additional order made to give effect to the courts order.

Heard: 3 July 2020

Delivered: 8 July 2020

JUDGMENT

Hughes J

Introduction

[1] The victorious applicants in each of the cases cited above seek leave to execute the order in my judgment delivered on 1 June 2020 and varied on 9 June 2020. Subsequent to the judgment the respondents sought leave to appeal on 3 June 2020 which was heard on 12 June 2020 and refused on 19 June 2020. On 20 June

2020 the applicants pursued their applications to execute in terms of section 18(3) of the Superior Courts Act 10 of 2013 (the Act), which are urgent by nature. I am informed that on 2 July 2020 the respondents' petition for leave to appeal was accepted by the Supreme Court of Appeal (SCA) having been launched on 30 June 2020. Thus, it is evident that the process for leave to appeal or appeal, is ongoing.

[2] The general consensus of the order sought by the applicants is leave be granted to execute the court order pending the final determination of any application for leave to appeal or appeal. Various ancillary orders were sought by the applicants in the *FourieFismer* and the *Diale* applications. The additional relief sought by *FourieFismer* is in effect confining the Road Accident Fund (RAF) to using only the panel attorneys who were on the panel as at 10 March 2020 if such legal services, in claims against the RAF are so required by it. Whilst in *Diale* the additional relief sought is interdicting the RAF from appointing and instructing other attorneys to render the services that the panel attorneys had rendered pending the adjudication of the tender RAF/2018/00054 (the tender) pending finalisation of the leave to appeal and appeals. In addition, in the *Diale* application they seek the withdrawal of the correspondence of 5 June 2020 wherein the RAF withdrew its instructions for *Diale* to represent the RAF.

[3] Thus, I firstly intend to deal with the primary relief sought and thereafter the ancillary relief as sought in *FourieFismer* and *Diale* applications.

The orders of 1 and 9 June 2020

[4] The order sought to be executed emanated from a review application where the applicants sought to review the decision of the RAF in respect of the cancellation of the tender and the request for the return of the RAF's files emanating from two correspondence of February 2020. Best I set out the relevant order sought to be executed, which I do hereunder:

[1] ‘The forms, service and time period prescribed by the Uniform Rules of Court are dispensed with and the applications are heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

[2] The Intervening Party is joined as the Fourth Applicant in the *FourieFismer* review application.

[3] The decision of the respondent communicated in a letter dated 18 February and 20 February 2020 demanding that the panel attorneys handover all unfinalized files in their possession to the respondent is reviewed and set aside.

[4] The decision of the respondent to cancel tender number RAF/2018/00054 on or about 26 February 2020 is reviewed and set aside.

[5] The panel attorneys on the RAF’s panel as at the date of the launch of the *FourieFismer* review application shall continue to serve on the RAF panel of attorneys.

[6] The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.

[7] This order shall operate for a period of six (6) months from this order.

[8] The Respondents are ordered to pay the costs of the review applications on a party and party scale, jointly and severally.

[9] Such costs are to include the costs of two counsel for each legal team where so employed.’

Intervention

[5] The Law Society of South Africa (the LSSA) sought to file, by way of handing up an unsigned application in terms of section 18 (3) of the Act, whilst it argued the application for leave to appeal of the RAF. This was rejected by this court. The LSSA seeks to enter the arena by way of seeking to intervene. This request was originally

opposed by the RAF and at the hearing the RAF released its opposition to the intervening application of LSSA.

[6] In the circumstances I am of the view that it is not necessary to interrogate this issue as there is no longer an opposition. Be that the case, the LSSA was an *amicus curia* in the main application and on that premise I am inclined to join the LSSA to these proceedings as in my view this is a necessity.

[7] The LSSA is therefore granted the right to intervene in the proceedings of the *Mabunda* case, with no order as to costs.

Condonation

[8] This court issued a directive to case manage the filing of papers in these applications. The answering affidavits of the respondents were filed one day late. They sought condonation in their answering affidavit for the late filing thereof. In both the *FourieFismer* and *Diale* applications the applicants opposed the condonation sought. I am of the view that this case is of importance to the parties and the general population of claimant's out there. It is trite that the grant of condonation lies within the discretion of the court and I am guided by the dicta of Holmes JA in *United Plant Hire (Pty) Ltd v Hills and Others*[1]:

'It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.'

[9] In this instance it is in the interest of justice that warrants the grant. In any event, the delay is not one which is substantial, that being only two days. In addition, a full explanation has been proffered by the respondents. The explanation being having employed a new team of attorneys and counsel they required time to bring them up to speed hence the delay especially so taking into account the voluminous

[1] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-F.

amount of papers in all these matters. In the premise the late filing of the respondents answering affidavits is condoned.

The Law

[10] It is trite that prior to section 18 of the Act, the repealed Rule 49(11) of the Uniform Rules of Court dispensed with the issue of execution of an order pending an appeal process. The common law position then mandated the court with a wide discretion on the basis of 'just and equitability' to grant or refuse an execution order sought. The Rule read as follows:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

[11] Thus, I think it is prudent to set out the provisions of section 18, in this instance the relevant being sections 18(1) to (3) of the Act set out hereunder:

'**18 Suspension of decision pending appeal**

(1) Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

…..'

[12] Though the section is fairly novel the case law in both the High Courts and the SCA has developed and is of great assistance. In *Ntlemeza v Helen Suzman*

Foundation and Another[2] the *dicta* in *Incubeta Holdings* regarding the jurisdictional prescripts of section 18 was affirmed:

'In *Incubeta Holdings & another v Ellis & another* 2014 (3) SA 189 (GJ) para 16, the court said the following about s 18:

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

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

The case of the applicants

[13] I intend to set out all the applicant's submissions and contention cumulatively as these are primarily repeated by all of the applicants.

Sequence of events following the order of 1 June 2020 varied on 9 June 2020

[14] To appreciate the analysis that follows it is prudent to set out the developments within the period of one month after the order was granted and varied. Cumulatively, the applicant contends that the conduct by the respondents, which is common cause, must be considered by this court in arriving at a decision whether to grant or refuse the leave for execution sought. Henceforth, the conduct referred to below pertains to the first respondent, the RAF.

[15] On 1 June 2020 a meeting ensured between the Acting Chief Executive Officer (ACEO) of the RAF and the experts panel of the RAF in which they were advised that if they engaged in any work for the panel attorneys after that date they would not be paid therefor and instructions were to only be taken from claims handlers of the RAF.

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[2] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 36; *Incubeta Holdings & another v Ellis & another* 2014 (3) SA 189 (GJ) at para 16.

[16] Two days after the delivery of the judgment on 2 June 2020 the claims handlers of the fund advised panel attorneys by correspondence and the like, when instructions were sought, that they were no longer mandated to liaise or provide instructions to any of the panel attorneys. The claims handlers had attained strict instruction from the ACEO to liaise directly with the plaintiff attorneys.

[17] Following the aforesaid on 5 June 2020 the RAF transmitted correspondence to the panel attorneys. Those who had not taken part in the review were thanked for their services and were advised that they would be contacted in the future as regards payment of their bills for services rendered. The rest who took part in the review were advised that 'no way there could be any continued relationship between the parties' and that the RAF 'had not budgeted for legal cost towards the panel whose SLA [Service Level Agreement] terminated on 31 May 2020, for the 2020/2021 financial year'. They were also advised that they had contravened the SLA by refusing to hand over the RAF's files when requested and as such the RAF would be approaching National Treasury to blacklist these panel attorneys.

[18] Notably in correspondence to panel attorneys on 15 June 2020 the RAF at paragraph 13 stated the following:

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

[19] On 12 June 2020 on the date that the leave to appeal application was heard the ACEO called for an 'on-board meeting' with fourteen (14) attorneys of Government Employee Pension Fund (GEPF) on 17 June 2020. The GEPF are in fact contracted to the RAF purportedly via a transversal agreement, which commenced on 1 June and comes to an end in March 2021.

[20] Thus far the latest demand by the RAF for its files from the 'recalcitrant' panel attorneys was on 25 June 2020. Recently, after the refusal of leave to appeal, the ACEO met with the plaintiff attorneys seeking their co-operation and support in the

implementation of its new model of litigation implemented by the RAF sans the panel attorneys.

[21] Finally, the RAF is not adhering to the terms of the SLA in relation to work already conducted by the panel attorneys prior to 1 June 2020 and payments have been withheld for services already rendered. This conduct is *mala fides* toward the panel attorneys and it is clear that the RAF does not intend honouring its obligations particularly to those who took part in the review proceedings.

Current situation as regards RAF litigation in the country

[22] Borrowing from the heads of argument of the applicants the following is the status of RAF matters country wide:

- The RAF is the largest litigating party in the country, having 190 000 litigated matters in the hands of panel attorneys;
- Since 1 June 2020 the RAF has been effectively unrepresented by attorneys in the countless RAF trials on a daily basis;
- Civil trial rolls around the country are in chaos;
- Claims handlers and RAF officials are trying to appear on behalf of the RAF in court, when they have no legal entitlement to do so;
- Many matters are being postponed because the RAF has no legal representation, with obvious prejudice to the claimant;
- Other matters are proceeding in default of the RAF, with obvious prejudice to it and the fiscus;
- Because of all this, the RAF is now desperately seeking to settle matters at any costs. And the obvious consequence is that matters are being over settled with the cash-strapped RAF paying far more than a court would ever have ordered;

[23] To demonstrate the chaos it was pointed out that on 15 June 2020 the Judge President of the Limpopo division issued a directive removing and suspending all RAF matters from the court roll until September 2020. In the Western Cape High Court Rogers J in a trial matter had to stand the matter down for the following day for the RAF to come to court with legal representation as he refused to entertain that the

RAF had no representation at court and that the claims handler who was at court had no authority to represent the RAF at court.

[24] Likewise, in this division Gauteng-Pretoria, on 3 June 2020 Tlhapi J due to no representation on the part of the RAF ordered that the matter stand down to the following day for representation on behalf of the RAF. If no representation was forth-coming the learned Judge sought the team leader at the RAF to give reasons and an explanation why the trial ought not to proceed. Further in this division, Neukircher J conducted a RAF trial on a default basis on account of the representatives of the claimant having tried on numerous occasions to attain instructions from the RAF with no joy whatsoever having been aware that the matter was on the civil trial roll months ago. In this matter the court awarded an amount of R7 476 619, 75 on a default basis.

[25] The applicants also advanced at least four examples where the RAF over settled directly with the plaintiff attorneys in matters where they had either agreed with the panel attorneys as regards to the amount to offer or where the RAF had even suggested to the panel attorneys a lesser amount than that proposed by the panel attorneys.

[26] The applicants make a case that the conduct of the ACEO is careered to have the order declared moot as it has employed various delaying tactics during the leave to appeal process. The first of these being a confidential communication directly to the Judge President, though the RAF, Board and the ACEO, were represented. Such correspondence alleged impropriety between the Judge's clerk and the *FourieFismer* contingent including their senior counsel. The allegation was to the effect that the clerk transmitted the order to those parties' hours before doing so to all the other parties. In an application to postpone the application for leave to appeal the ACEO sought a postponement as he had requested the Judge President seek a response from the presiding Judge.

[27] During the interrogation of the postponement application it emanated that the said communication issuing the order to *FoureiFismer* before the other parties was in fact a fake and fraud. The applicants submit that to date they have not received an

explanation from the RAF, the Chairperson of the Board, the ACEO and the Minister who were parties to the leave to appeal and had sought the postponement.

[28] The LSSA contends that the RAF and its ACEO are deliberately disregarding the courts processes and directions to the prejudice of the litigating parties, 'which are constantly left guessing as to what the RAF might do next'. The applicants argue that the RAF's miss interpretation of the SLA in that they contend that they may cancel their agreement with any of the panel attorneys without reason on thirty days (30) notification. This yet again is indicative of the sort of conduct of the RAF and the ACEO that they have to contend with, so the applicants argue.

The case of RAF

[29] The RAF sought to present their case primarily on the prospects of success they would achieve having petitioned the SCA. They also sought to relook at the order granted on the premise that same 'creates great uncertainty and … the obligations and rights of all the parties during the six-month period and thereafter are difficult to ascertain.' What concerned the RAF was the logistics as regards return of their files from the panel attorneys and if they were ordered to comply with the SLA then according to the SLA, clause 24, they were entitled without cause 'to terminate on a 30 days' notice within the six month period?'

[30] The RAF conceded that this case is indeed an exceptional case but clarifies that it was not so in terms of the exceptionality envisaged in section 18. The exceptionality was that on the same facts two judges came to 'wide divergent opinions'. The RAF then proceeds to conduct a synopsis of Davis J who presided on Part A of the *Mabunda* and *Diale* applications to interdict the RAF which was refused.

[31] In the present cases the RAF argued that there were no exceptional circumstances warranting an interim enforcement. They argued that the applicants had failed to reach the high bar set by section 18(1) as:

- the applicant where not without relief;
- the applicants have not pleaded the actual predicament they faced;
- if the applicants allege that they have breached the order 'they must take the

necessary steps and bring the requite application.';
- the ACEO raises concerns that the applicant makes 'scandalous and defamatory allegations against him.';
- the RAF argues that the relief sought is time bound and that is the high water mark of the applicant's case, however no exceptional circumstances exist.

The application of section 18(1) and (3)

Exceptional circumstances

[32] The execution process has evolved from that of the common law under Rule 49(1). In terms of section 18(1) the applicant seeking to execute an order has to provide exceptional circumstances for that order's operation whilst the appeal process is underway. The section in terms of section 18(3) has even made it more onerous as this section requires the applicant to show that without the grant of execution irreparable harm will befall the applicant and conversely the respondent will not incur any irreparable harm. Clearly the onerous bar imposed is not easily overcome.

[33] In establishing whether exceptional circumstances do exist I am mindful that the facts of each case inform whether exceptional circumstances exist. Further, that these circumstances must be nothing short of 'exceptional' in order to deviate from the norm of the judgment and its order be suspended until the appeal process is complete. In addition, the circumstances of being exceptional must arise from the facts adduced as being the difficulty in that particular case[3].

[34] Exceptionality is:

'1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

[3] *University of Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at para 13.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'[4]

[35] The onus lies with the applicants to prove that exceptional circumstances exist and I am satisfied that the applicants have illustrated this in droves as is set out above in the case they presented. Clearly illustrated by the fact that '…the RAF is deliberately failing to do so [adhere to the courts order] even in respect of work done prior to 1 June 2020. It is failing to pay for the work, failing to access accounts and failing to uphold its obligations under the SLA.'

[36] The crises set out and well known amongst all litigants in RAF litigation at this time is indicative of exceptionality. The RAF and the ACEO have at all costs ignored the court orders of 1 and 9 June 2020 and proceeded to continue on its own path sans the panel attorneys as ordered. The manner in which the RAF and the ACEO has conducted itself in the face of an order of this Court is yet another indication that the circumstances are exceptional.

[37] As illustrated by the facts advanced above by the applicants the South African population in its entirety who are claiming or are potential claimants, are being held at ransom by the ACEO and the RAF. In my view, simply because they are failing to fulfil their statutory and constitutional obligations. This constitutional crisis the making of the ACEO via the RAF institution cannot be countenanced. The claimant's unrepresented in these proceedings is at the mercy of the ACEO via the RAF. The rights of claimants are being affected and on all levels constitutes an exceptional circumstance in my view.

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[4] *Ntlemeza* at para 37.

[38] The judicial system is in disarray as the ACEO via the RAF seeks to ignore the court processes and proceed as though no order exists. This is so by his comments on the social media platform as advised that he would not adhere to the order of this court, the fact that the RAF is not represented in majority of its matters nationally, the endeavour to settle matters by way of the claims handlers to the detriment of the RAF as illustrated above and thus the fiscus indicates over compensation, as the claims handlers are clearly not equipped and prepared to deal with litigious matters.

[39] In non-adherence of the court order and the various tactical ploys imposed by the ACEO via the RAF this has resulted in a clear indication that the ACEO via the RAF seeks that the order ride out into the sunset and be eventually declared moot. The applicants in my view are correct in advancing this contention. The conduct set out above that the country is in, is clearly revealing of this finding.

[40] The conduct of the respondents is to ensure that the applicants would forfeit substantial relief in delaying the application of the order which through all its delays will result in the order evaporating and being declared moot. The RAF response thereto is that the appeal court might grant in their favour even after the period of six months. This is evident from the case made out above by the applicants. I am convinced that this alone warrants the inducement of exceptionality as within that answer by the ACEO and RAF is a concession that the aim is to have the order declared moot.

[41] The RAF has changed its version far too many times as to whether it requires the service of attorneys or not. It is well documented that in litigious matters an attorney is vital. Likewise, in third party litigation/RAF litigation the use of attorneys is inevitable. Thus, the RAF having realised that its Strategic Plan will not work without attorney's attempts to insert the necessary without compliance with section 217 of the Constitution as it should have. On this basis alone the applicants ought to be granted the relief sought.

Irreparable harm to applicants and absence of such to the respondents

[42] The applicants have to prove irreparable harm which must be proven on a balance of probabilities and in addition they must show that the respondents will not suffer irreparable harm if the order is granted.

[43] In addressing this aspect I must point out from the outset that the irreparable harm is not only to the panel attorneys but to the claimants and potential claimants in South Africa as a whole. In my view, I am convinced that the applicants have clearly demonstrated that they will incur irreparable harm whilst the respondents would not.

[44] The judgement is only in operation for a short time, however, with the manner and attitude of the RAF and its ACEO one month after the grant of the judgment and order, it is evident that there is an ongoing effort in delaying adherence of the order and the eventuality is that the order would be rendered academic and moot, as was considered in *Incubeta*[5].

[45] From the facts set out above, the irreparable harm is not only against the applicants but against those litigants involved in a motor vehicle accident. That is how serious the irreparable harm is. The litigants are being held at ransom by the ACEO and the RAF by their failure to perform their Constitutional duty as a State organ. The deliberate attempt, in my view, to evade the operation of the order and have it declared as moot when and if an appeal is heard is indicative of irreparable harm on the applicants. Added to this dilemma is that the RAF is withholding payments as a result of this judgment on matters already concluded and billed. During this period of Covid19 it is inevitable that as a result of the ACEO and the RAF's conduct the panel attorneys and the various subcontractors to the RAF would have to down size and this is prejudicial in itself and irreparable harm upon them.

[46] I am of the view that on a balance of probabilities the panel attorneys together with the general public would suffer irreparable harm if the order to execute is not granted.

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[5] *Incubeta* at para 25.

[47] The Constitutional chaos is upon the entire country and in all courts of the land. This must be considered as irreparable harm to those who undertook to protect and uphold the Constitution on behalf of the RAF. The applicants have demonstrated on the probabilities that there would be irreparable harm ensued not only on them but upon the South African public at large.

[48] Would the RAF endure irreparable harm if the relief sort to execute is granted? Considering the submissions and arguments advanced by the RAF there is no serious contention, if any, against the grant of the section 18(3) application.

[49] The RAF has failed to address any of the requirements of section 18 of the Act, instead, they used this application as a platform to rehash the application for leave to appeal on a different level, by making a comparison between Davis J judgment and the review judgment. The RAF unfortunately did not set out or argue the issue of the irreparable harm that it would incur, be that as it may, I am bound to address this aspect holistically and objectively. The conduct of the ACEO and the RAF in itself has already demonstrated an unwillingness to come to the party so to speak.

[50] The RAF does not realise that they still retain the power from the SLA, as they are entitled to distribute instructions to panel attorneys as and when necessary. The RAF only instructs attorneys after the 120 days of lodgement, as and when it requires these services. It is entitled to desist from granting instructions. The issue of the transversal agreements is also clearly to seek to avoid compliance with the tender process, as they attempt to bypass the provisions of section 217 of the Constitution.

[51] The contention of the RAF that it will not be able to recover its funds if an execution order is allowed is unsustainable. This is so as the RAF has been involved with the panel attorneys for the past five years in terms of the SLA.

[52] In terms of legislation section 4(2)(g) of the Road Accident Fund Act 56 of 1996, the RAF can still achieve its goal whilst ‘tied to’ the SLA, as the RAF can ‘take any other action or steps which are incidental or conducive to the exercise of its powers or the performance of its functions.’ As well as section 4(2) (i) ‘conclude any

agreement with any person for the performance of any particular act or particular work or rendering of particular services contemplated in this Act'. To this end the RAF has procured their corporate attorneys, whose rates are twice or thrice that of the panel attorneys. This sought of behaviour adopted by the RAF is indeed, as characterized by the applicants, '*mala fides* towards the panel attorneys'.

Prospects of success

[53] In these applications, leave to appeal has already been denied, as this court found that there were no prospects of success. Therefore, it is not necessary to deal with this aspect as this court has already ruled on this issue.

[54] Having had sight of the authorities above, the facts adduced and the law applicable, I am persuaded that the applicants have proven their case on a balance of probabilities.

The order to be granted

[55] It is prudent that I commence with the *dicta* in *Ntlemeza* where it is stated that the power granted in terms of section 18 of the Act must be seen against the general inherent power of the courts to regulate its own proceedings. It is trite that this jurisdiction emanated from section 173 of the Constitution:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own proceedings, and to develop the common law, taking into account the interest of justice', in terms of section 173 of the Constitution: The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and develop the common law, taking into account the interest of justice'. [6]

[56] Even though such a discretion is no longer part and parcel of inherent jurisdiction in granting the executing orders, however in *South Cape Corporation*

[6] *Ntlemeza a*t para 30.

(Pty) Ltd v Engineering Management Services (Pty) Ltd[7], Corbett JA identified the considerations relevant to the grant of an application for leave to execute pending appeal in the following manner: 'The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet*, 49.7.3; *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another* [1961 (2) SA 118 (T)] at p. 127). [My emphasis]

[57] What is relevant for these applications is not the discretion issue but rather the fact that it is still relevant and good law that a court has the right to determine the conditions upon which the right to execute will be exercised. Having recognized this, I turn to deal with the supplementary relief sought to execute the order.

[58] In the *Diale* application the supplementary order sought is primarily the adjudication of the tender RAF/2018/00054, whilst in the *FourieFismer* application the supplementary order sought is 'that pending the application for leave to appeal, where the RAF uses the service of attorneys in dealing with claims against it under the RAF Act, it may only use the services of attorneys' firms which were on the RAF panel at as 10 March 2020.'

[59] The supplementary relief sought by *Diale* for the adjudication of the tender is clearly not competent and does not in any way assist the execution of the orders granted on 1 June and varied on 9 June 2020. However, that supplementary order sought in the *FourieFismer* application is concomitant to the relief already granted and varied.

[60] It is trite, that the execution of a judgment is permitted in any manner appropriate to the nature of that judgment appealed or sought to be appealed.[8] Further, the control of the judgment is within the inherent jurisdiction of the court itself[9] and a court has to give effect to its judgments.[10]

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[7] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545C-G.
[8] *Reid and Another v Godart and Another* 1938 AD 511 at 513.
[9] *Fismer v Thornton* 1929 AD 17 at 19.

[61] The conduct of the RAF and it's ACEO in the past month since the order has been in existence is clearly an indication that the order is on its way to be nugatory and ultimately declared moot. In the circumstances I am satisfied that this is a case with exceptional circumstances, irreparable harm and prejudicial to the applicants where there is none to the respondents. Notably this case warrants that additional conditions be attached to ensure the execution of the order duly varied pending the leave to appeal and appeals.[11]

Costs

[62] The applicants sought that a punitive costs order be granted. I am not inclined to do so as the payment of such costs would come from the public purse so to speak. Costs are to follow the result inclusive of the employment of two counsel where so employed. It must be pointed out that the fourth respondent did not take part in these proceedings thus no order is made against the Minister of Transport.

Order

[63] Consequently, the following order is made:

(a) The LSSA is granted leave to intervene in the *Mabunda* application;

(b) The respondents are granted condonation for the late filing of their answering affidavit;

(c) In terms of section 18(3) of the Superior Courts Act 10 of 2013 pending the outcome of the applications for leave to appeal or appeals by the respondents,

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[10] *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 2017 GJ at para 28; *Actom (Pty) Ltd v Coetzee and Another* (A269/2015) [2015] ZAGPPHC 548N (31 July 2015) at para 15.

[11] *S.A Breweries v Solomon* 1924 OPD 76; *Ismail v Keshavjee* 1957 (1) SA 684 (T) at 688-9.

(d) The order of the 1st of June 2020 varied on 9 June 2020 is operational and given effect to.

(e) Pending any applications for leave to appeal or appeals in respect of the Road Accidents Fund's (RAF) the use of attorneys specifically in dealing with personal injury claims against it under the Road Accident Fund Act 56 of 1996, the Road Accident Fund may only use the services of the attorneys' firms (panel attorneys) which were on the Road Accident Fund panel as at 10 March 2020.

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

W Hughes
Judge of the Gauteng
High Court, Pretoria

APPEARANCES:

For FourieFismer Inc: Adv. Budlender Sc
Adv. Ferreira
Adv. Harding

For Mabunda Inc: Adv. Mukhari Sc
Adv. Lithole

For Diale Mogashoa: Adv. Tsatsawane Sc
Adv. Tisani

For the 1st Amicus: Adv. Solomon Sc
Adv. Williams

For the Road Accident Fund, Chairperson of the Board of RAF & Chief Executive Officer of RAF: Adv. Puckrin Sc
Adv. Schoeman