REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 41371/2021

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

DATE 29 /07/2024 SIGNATURE

In the matter between:

ADV M VAN ANTWERPEN obo SCHOLTZ JC	**1st Applicant**
PAUL ANTON VAN ASWEGAN	**2nd Applicant**
and	
ROAD ACCIDENT FUND	**1st Respondent**
CHIEF EXECUTIVE OFFICE: ROAD ACCIDENT FUND	**2nd Respondent**

JUDGMENT

Summary: In an application to declare the failure by the RAF to make payment of judgment debts as being deliberate, contemptuous of the court, and inconsistent with section 12(1) of the Constitution and seeking under section 172 of the Constitution that the court grant a remedy in the form of the coercive imprisonment of the CEO of the RAF:

Held: The RAF is technically insolvent and unable to pay certain judgment debts against it, including those of the applicants.

Held: The RAF is a component of a central, State-run social security scheme which demands legislative and executive co-operation in accordance with section 41 of the Constitution.

Held: The constitutional right to which victims of motor vehicle accidents are entitled is the right to have access to a social security insurance fund which is financially viable and which has a compensation scheme that is fair, equitable and sustainable; this constitutional duty can only be realised with legislative and executive co-operation.

Held: A constitutional challenge in respect of this right cannot be launched without an inclusive approach and a holistic challenge to failings in the scheme; the RAF cannot be singled out as the State Organ which must take direct and exclusive accountability for the failure of a scheme which has long been acknowledged to be interim in nature, underfunded, and presently unsustainable.

Held: This must not be interpreted to allow impunity for mismanagement by the RAF, however, the application fails to allow for the location of the constitutional right with reference to the complex inter-governmental duties which are the source and origin of a social system which is meant to insure those who suffer injury and damages as a result of motor vehicle against their loss.

Held: The Minister of Transport is the member of the National Executive responsible for the administration of the RAF Act and the failure to join him is a material non-joinder.

Held: As to costs, it is not appropriate to apply the *Biowatch* principle due to the applicants' failure to acknowledge the broader social security environment and the seeking of a remedy which is inherently counter-intuitive and admittedly extraordinary; also, the manner in which the application was brought was lamentably insubstantial which occasioned an equally deficient opposition by the respondents.

FISHER J

Introduction

[1] The applicants seek a coercive order of suspended imprisonment of the Chief Executive Officer (CEO) of the Road Accident Fund (RAF or the Fund).

[2] This order is sought as a result of the failure of the RAF to make payment of judgment debts owing to the applicants which arise from damages claims for personal injury sustained as a result of motor vehicle accidents.

[3] Whilst conceding that such relief is extraordinary, the applicants contend, that the court's wide powers under the Constitution allow the proscription against civil imprisonment for failure to pay a judgment debt to be overridden on the facts of this case. They argue that this is because the non-payment is not merely a debtor's delinquency but also conduct which is inconsistent with the Constitutional function and duty of the RAF and, particularly, with its obligations under section 12(1) which accords to all the right to security of the person and freedom from violence.

[4] The applicants argue that, once it is recognised that the non-payment amounts to conduct which is unconstitutional, the court is obliged to fashion an equitable remedy under section 172. The remedy proposed is the coercive imprisonment of the CEO. It is argued that such an order is just and equitable in the context of what the applicants allege is a serial and deliberate failure of the Board of the RAF to meet its constitutional duty.

[5] The CEO is cited on the basis that he is responsible for the conduct of the Board. He is also, presumably, intended to be cited in his personal capacity given the fact that his imprisonment is sought. This distinction was not, however, made clear.

The parties' submissions as to the failure to pay in accordance with the judgments in issue

[6] The judgment debts in issue were granted against the RAF in favour of the first and second applicants respectively during 2019 with a cash component in respect of the first applicant's judgment being approximately R 11.1 million and that of the second applicant being approximately R 1.8 million

[7] The RAF settled the capital amounts in each case but left the interest unpaid. As at the date of the launching of the application, first applicant and second applicants

claims for outstanding interest are alleged to have been approximately R1.6 million and R 400 000 respectively.

[8] Whilst there was some attempt by the RAF to suggest that the interest was not immediately due, this was not pressed in argument. It appears that it is not disputed by the RAF that there are amounts still due under the judgments. This judgment, thus, proceeds on the basis that there is a judgment debt owing to each of the applicants which has not been paid.

[9] There is a further leg to the alleged contempt or non-compliance relied on by the applicants. This is an order by this court which allowed the RAF an extension of payment for 180 days on the basis that they were not then able to pay. More on this later, but it suffices to state, at this juncture, that this court-ordered moratorium on execution, which includes the debts in issue, has long expired and payment has still not been made.

[10] The applicants' point of departure is that this failure to pay under both the initial judgment and the moratorium constitutes a deliberate flouting on the part of the Board of its constitutional function. Central to this argument is the allegation that the RAF is able to meet this indebtedness but simply chooses not to pay.

[11] In support of the allegation as to the RAF's recalcitrance, the applicants rely on the fact that the CEO reported in an affidavit in litigation in June 2021 that the RAF had an "unprecedented surplus of R3,2 billion as at the end of March 2021".

[12] The applicants reason that this is evidence of the fact that the RAF can pay them the balance of the debt which is outstanding but choose not to do so.

[13] It is common cause that the RAF's bank accounts, as at the date on which execution was attempted by the applicants, were empty. It is suggested by the applicants that it may be that the RAF's cash reserves have been put beyond execution. There is, however, no evidence of any secreting away of reserves.

[14] Although the affidavit of the CEO, Mr Collins Letsoalo, who is to be the subject of the imprisonment order sought, is not a model of clarity as to the joining of issue with this allegation of deliberate failure to pay, it was confirmed in argument by Mr Mangolele SC for the respondents that it is not in dispute that the RAF's bank accounts could not be executed on and that the failure to pay must be viewed in this context.

[15] Mr Letsoalo makes mention of the great complexity involved in the administration of the RAF in the circumstances and raises the failure by the applicants properly to account as to the interest component of the debts claimed by them.

[16] The central argument of the respondents, albeit reluctantly made, is that the temporary insufficiency of funds which occasioned the failure to pay is a feature of administering a fund which is insufficiently funded by the State.

[17] The central question in this matter is whether the failure to pay in accordance with the judgments can be said, without more, to constitute a breach by the RAF of the applicants' constitutional rights.

[18] This question must be examined with reference to the function and powers of the Board in the broader legislative scheme in which the Fund operates.

The Fund's position in the Legislative scheme

[19] The RAF is a component of a central, governmentally run social security scheme. Such a scheme demands Legislative and Executive co-operation in accordance with section 41 of the Constitution.

[20] The RAF cannot and does not exist in a vacuum. It is entirely State funded. Its powers and functions include the settling of claims and the management and

utilisation of the money of the Fund for purposes connected with or resulting from the exercise of its powers or the performance of its duties.[1]

[21] The Board is appointed by the Minister of Transport (the Minister) and its authority is exercised subject to the Minister's powers.[2]

[22] The CEO may attend meetings of the Board, but has no vote. [3]

[23] In terms of section 15(3) of the RAF Act no member of the Board, 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 duties.

[24] Whilst the RAF has apparently been reluctant to admit bankruptcy in these and other proceedings, there is no option but for this position to be met head-on.

[25] The RAF cannot, seriously, deny that it is unable to pay its debts as and when they fall due and thus that it is technically insolvent. I will demonstrate later, with reference to recent attempts by the RAF in the courts to vindicate and alleviate its predicament, that it appears that this insolvency which is snowballing out of control in the constitutional era, which has issued in a more accommodating and inclusive approach to social justice. The crisis has, however, been decades in the making.

[26] I turn to a historical analysis of legislative schemes that have served to meet the challenge of providing the necessary social security insurance for road users. I do so with the aim of contextualizing the current predicament of the Fund.

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[1] Road Accident Fund Act 56 of 1996 (RAF Act) section 4.

[2] Id section 11(1)

[3] Id section 10(5)

The Insolvency of the RAF – a historical examination

[27] A governmental scheme providing compensation to innocent road users injured in motor vehicle accidents was first introduced almost eighty years ago and came into effect in 1946. This was part of a world-wide trend which saw an increasing number of motor vehicles taking to the road and a concomitant increase in road accident casualties.

[28] The right to the benefits of such a compensation scheme arose out of an acknowledgment by the State of its social responsibility to compensate road users under circumstances where the right of recourse under the common law was inefficient and beset with uncertainties.

[29] Ever since the coming into operation of the first Act of Parliament which established and governed the scheme, the nature and functioning of such a scheme has been the subject of considerable formal inquiry, legislative revision, and judicial pronouncement.

[30] In his illuminating overview of the evolution of such schemes in our law in *Law society of South Africa v Minister for Transport and another*[4] *(*Law Society), Moseneke DCJ remarked that, at that stage, being 2011, there had been no less than five principal Acts and at least nine Commissions of inquiry set up to review the funding, management, and levels of compensation offered by the scheme.[5] The fifth and current Act is the Road Accident Fund Act of 1996 (RAF Act). It sustained a significant remodelling in 2008.

[31] An important milestone in the evolution of the current system came with the passing of the Motor Vehicle Accidents Act of 1986 (the MVA Act). The MVA Act

[4] *Law society of South Africa v Minister for Transport and another* 2011 (1) 400 (CC).

[5] Id at paras 18 to 22.

introduced a fuel levy to fund the scheme and terminated the ability of private insurers to deal with hit and run claims which were to be dealt with exclusively in the context of the scheme.

[32] Only three years later, the MVA Act was jettisoned in favour of the precursor to the RAF Act, the Multilateral Motor Vehicle Accidents Fund Act of 1989 (MMVAF Act). Like its predecessors the MMVAF Act was subject to substantial amendment. During this time, the Melamet Commission of Inquiry was established to inquire into what was then considered an unprecedented actuarial deficit of an estimated R 1 billion. The Melamet Commission found widespread inefficiencies and abuses of the system, including overstated and fraudulent claims and inflated legal costs.

[33] The RAF Act has been amended at least five times and has been the subject of a major commission of inquiry led by Satchwell J.

The Satchwell Commission (the Commission)

[34] The Road Accident Fund Commission Act[6] (the Commission Act) established the Satchwell Commission to inquire into, and to make recommendations to the President on a reasonable, equitable, affordable and sustainable system for the payment by the Road Accident Fund of compensation under the Constitution.

[35] The Commission Act required that the recommendations of the Commission take into account the necessity of achieving, as soon as was practicable, the RAF's solvency, in the sense that its liabilities, contingent or otherwise, were fully funded.

[36] The Commission was called upon to consider the audit reports of the Auditor-General (AG) in respect of the Road Accident Fund and the Multilateral Motor Vehicle Accidents Fund, covering several years.

[6] Act 71 of 1998.

[37] The Commission was allowed, through its Chairperson Judge Kathleen Satchwell, to have full access to the Minister, the Board, the management of the RAF, and related Government departments. The powers of inquiry accorded to the Commission were extensive.

[38] The Commission Report was presented to Parliament on 19 March 2003. Of its most material recommendations was that the existing common law basis for claims should be jettisoned in favour of a no-fault model.

[39] The funding model of the RAF was found by the Commission to be financially and actuarially unsound in that there was no congruence between the liabilities of the Fund and the amount of income generated from the fuel levy.

[40] Two main factors determine the RAF's expenditure: the number of claims lodged and the amount of compensation paid. The Fund can neither control the number of claims it has to pay nor adjust the benefit levels, the latter being determined by the courts and legislation.

[41] Simply put, the RAF is obliged by legislation to make payment irrespective of its ability to do so.

[42] Important findings, recommendations, and observations of the Satchwell Commission Report were as follows:

i. The Minister of Transport was not the correct person to oversee a social security system.

ii. The then Financial Services Board, under whose financial supervision the RAF fell, whilst suited to financial supervision of an insurance scheme, should not be called on to oversee a social services scheme.

iii. The supervision of the AG was insufficient in that its office only had the capacity to spot check 120 of 50 000 claims submitted.

iv. The Board had an absence of managerial and financial expertise to supervise what was, then, a R2.7 billion undertaking.

v. The management of the Board was open to political pressure and conflicts of interest.

vi. There was no proper accounting system, and there was a lack of data available to the Board.

vii. The RAF was an organisation in transition.

[43] The Commission proposed the establishment of a Road Accident Benefits Scheme (RABS) which would operate in the following manner:

i. The RABS should be formed to administer the proposed scheme. It should not be part of the Department of Transport, but rather be under the aegis of the Department of Social Development and a RABS Board.

ii. It would require private sector executive competence to provide managerial and financial experience, while administrative competency should come from healthcare and pension administrators.

iii. The present RAF should be wound down with ring fencing of current obligations.

iv. Primary funding would continue to be provided by the fuel levy, but this would be supplemented by additional amounts based on risk would be surcharges on road use traffic fines, on the basis that those motorists being fined would be more likely to be involved in road accidents.

v. Another surcharge would be added to the registration costs of certain higher risk vehicle categories, i.e. taxis and trucks.

vi. Financially, the scheme need not be fully funded, but would be a pay-as-you-go scheme as it was government backed.

vii. As a social security scheme, it would need to be integrated within the system of comprehensive social protection.

viii. It should provide a safety net only, with limitations on the benefits provided.

ix. Victims would still retain the common law right to sue wrongdoers for greater amounts.

[44] Pursuant, inter alia, to the Commission's findings and certain provisions which limited the Fund's liability being unconstitutional, an extensive overhaul of the existing Act occurred in the passing of the Road Accident Amendment Act of 2005 (the Amendment Act). In the main, these amendments took effect in 2008.

[45] Pursuant to these changes, the Law Society, representing some 20 000 attorneys in over 9000 law firms practising in the area of road accident litigation, the South African Association of Personal Injury Lawyers, and certain civil society organisations launched the constitutional challenge in *Law Society*.

[46] *Law Society* dealt with a challenge to the constitutional validity of sections 17(4)(c) and 21 of the Amendment and regulation 5(1) of the regulations made under the Act. These impugned provisions, respectively, abolished a road accident victim's common-law right to claim the balance of damages not compensable by the RAF, limited the quantum awards in claims for loss of income and support, and limited claims for medical treatment in terms of a tariff prescribed by the Minister.

[47] In *Law Society*[7] the Constitutional Court held the impugned sections to be constitutional, but set aside the regulation.

[48] The basis on which the sections were held to pass constitutional muster are important in the context of the development of the present scheme and the technical insolvency of the Fund.

The findings in *Law Society*

[49] The Constitutional challenge centred on the allegation that the impugned provisions, viewed either on their own or collectively, unjustifiably limited the constitutional rights to security of the person under section 12(1).

[50] The Court accepted the argument on behalf of the Minister that the amendments were made necessary by an ever-growing funding deficit of accident claims and, after 1994, also by the constitutional obligation to remove arbitrary forms of differentiation in the compensation of accident victims.[8]

[51] The Minister conceded that the scheme had been underfunded for decades. It was explained that, for the five-year period from 1985 to 1989, the funding deficit as seen against the value of proven claims ran to R906 million. From 1990 to 1995 the funding deficit rose to nearly R4.2 billion and, by the end of 1996, it stood at R6,347 billion. It was further confirmed that the accumulated deficit stood R39,964 billion in 2009. In effect, the Minister conceded the Fund was doing business whilst technically insolvent.[9]

[52] It was argued, however, that these amendments were merely interim steps to the development of a brand-new system of compensation for road accident victims.

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[7] Supra note 4.

[8] Id at para 41

[9] Id at para 41.

This entailed, it was stated by the Mister, that the imperfect motor vehicle accident insurance function then run through the Fund was to be integrated into a comprehensive social security system which would replace the common-law system of compensation with a set of limited no-fault benefits which would be located within a broader social security network.[10]

[53] The Minister conceded that the design of a comprehensive social security system was complex and that it would take time take. He provided some comfort to the Court by stating that Cabinet had already approved the system in principle (on 18 November 2009) and published a draft no-fault policy for public comment and consultation.[11] The implication was that the roll-out of the new system was already progressing.

[54] It was alleged that the scheme, as contained in the impugned provisions, was intended to be a first step to the greater reform envisaged.

[55] The Court accepted the assertion by the Minister that the impugned provisions had "been adopted as an interim measure in order to arrest the ever-bulging financial deficit of the Fund, which [could not] be adequately funded by constant increases in the petrol levy". It was warned that "if the unfunded deficit is left to grow it will, in time, harm the country's financial soundness".[12]

[56] In summary, in determining the constitutionality of the impugned sections, the Court, whilst acknowledging the misgivings of the applicants as to the constitutionality of the sections, was persuaded that these changes were transitional and necessary to reform the ailing compensation system.[13]

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[10] Id at para 45.

[11] Id at para 45

[12] Id at para 46

[13] Id at para 51.

[57] The assurances of the Minister led to the acceptance by the Court that a compelling case for the urgent reduction of the Fund's "unfunded and ballooning liability" had been made out.[14]

[58] Moseneke DCJ encapsulated the position thus:

> "Simply put, urgent steps must be taken to make the Fund sustainable so that it can fulfil its constitutional obligations to provide social security and access to healthcare services. This is a pressing and legitimate purpose. The second consideration is that the government has committed to restructuring the Fund's scheme into one which would pay compensation on a no-fault basis, and as part of its duty to facilitate access to social security and health care. On the evidence, there is no cause to doubt this commitment."[15]

[62] On this basis, the Court was satisfied that the impugned sections were rationally related to the legitimate government purpose to make the Fund financially viable and its compensation scheme equitable.[16]

[63] The RAF Act remains materially unchanged to what it was when it first came into effect in 2008 and the Constitutional Court handed down *Law Society* .

[64] I am unable to comment on the steps which have been taken in the past nearly 15 years to bring the vision laid out by the Minster in *Law Society*[17] to fruition save to state that the Fund has remained transitional.

[65] The Minister is the member of the National Executive responsible for the administration of the RAF Act. The Minister has not been joined in these proceedings. It would have been for the Minister to deal with these aspects had

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[14] Id at para 53 to 55

[15] Id at para 52

[16] Id at para 55.

[17] Supra note 8.

there been a proper challenge to the scheme as a whole. It is clear that the failure to join the Minister is a material non-joinder.

[66] Recent developments in the lower courts seem to suggest that the RAF is in crisis.

[67] The advent of our constitutional democracy in 1994 meant that the irrational legislative differentiation between the compensation due to passengers (limited to R25 000), on the one hand, and to drivers and pedestrians, on the other, (unlimited) became vulnerable to constitutional challenge.

[68] In *Law Society* it was accepted that, with these changes, it became necessary to amend the legislation in order to give effect to the constitutional requirements regarding *(a)* expenditure which is efficient, effective and economical; *(b)* prohibition of irrational differentiation; and *(c)* reasonable access to social security and health care.[18]

[69] Part of the amendment scheme sought to achieve some financial balance by limiting the claims for general damages to serious injuries only.

[70] It is, thus, provided in section 17(1) that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) which involves the assessment of the seriousness of an injury by an expert medical practitioner registered under the Health Professions Act[19] in accordance with a method prescribed by regulation.

[71] This attempt to achieve some balance in the scheme so as to alleviate the growing deficit by limiting claims for general damages has been less than successful. This is partly because of the burgeoning passenger claims and also because the limitation has been met by widespread abuse by some

[18] Id at 44.

[19] Act 56 of 1974

unscrupulous claimants, legal practitioners, and medico-legal experts who seek to characterise non-serious injuries as serious, thus letting in claims for general damages which the new interim scheme sought to exclude.

[72] As I have said, the RAF's position continues to worsen.

Recent Deveopments

[73] The applicants were part of a large group involved in *Road Accident Fund v Legal Practice Council and Others*[20], a case brought by the RAF in the Gauteng Division, Pretoria to quell a tide of attempts to execute on the basis of a vast number of unmet judgement debts.

[74] In that case, the RAF sought an order suspending certain writs of execution and attachments based on court orders granted against it and settlements reached, for a period of 180 days.

[75] The RAF disclosed in its papers in that application that, in its draft annual financial statement ending 31 March 2020, it showed that it had an accumulated deficit of R322 billion and that its total liabilities exceeded its assets by over R300 billion.

[76] The application was brought on the basis that this suspension was needed to avoid, what the RAF referred to as a "constitutional crisis". It was conceded that it could not pay the debts in issue.

[77] On this basis the Court made an order suspending the operation of writs of attachment and directing the RAF to make payment of the oldest claims first.

[78] If the facts of this case are anything to go by this respite did not completely alleviate inability to pay.

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[20] *Road Accident Fund v Legal Practice Council and Other*s (*58145/2020) [2021] ZAGPPHC 173; [2021] 2 All SA 886 (GP); 2021 (6) SA 230 (GP); [2021] HIPR 166 (GP) (9 April 2021)*

[79] A further recent case has dealt with the AG's oversight responsibility and the RAF's accounting obligations.

[80] On 20 December 2021 the AG issued a disclaimer opinion in respect of the RAF's annual financial statements for the year ending 2020/2021. It read as follows:

> "The overall audit outcome for the [RAF] has regressed compared to the prior year. A disclaimer of opinion with material findings on compliance with legislation was issued. The financial statements submitted for audit were not prepared in accordance with the prescribed financial reporting framework and were not support by full and proper records as required by section 55(1)(a) and (b) of the PFMA. The financial statements contained material misstatements in claims expenditure, current and on-current liabilities and disclosure notes which were not adequately corrected subsequently, which resulted in the financial statements receiving a disclaimer of opinion. The accounting authority did not put adequate measures in place to ensure that the financial statements are prepared in accordance with the appropriate accounting framework. This was due to use of IPSAS 42 in formulating account[ing] policy which is in conflict with the standard of GRAP" (the Disclaimer)

[72] It seems that it was, in the context of the application of this accounting policy, that Mr Letsoalo had made the statement relied on by the applicants to the effect that there was an unprecedented surplus of R3.2 billion.

[73] The RAF sought the review of the decision to issue this disclaimer and, in fear of a loss of public confidence, brought an urgent interim order to prevent publication of the disclaimer.

[74] The urgent application was dismissed, inter alia, on the basis that the process of accountability required transparency in the management of organs of State.[21]

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[21] *Road Accident Fund v Auditor-General of South Africa and Others* (19778/2022) [2022] ZAGPPHC 737 (30 September 2022) at para 32.

[75] The review itself was also ultimately dismissed. The Full Court of the Gauteng Division, Pretoria in *Road Accident Fund v Auditor-General of South Africa and Others*[22] (Attorney General) found that the attempt to employ a new accounting standard meant that the liabilities of the RAF were incorrectly reflected as being reduced from R300+ billion to R30-odd billion. The court held this to be a self-serving approach which would put the determination of the RAF within its own control. The approach, it was held, gave a skewed picture of the true financial position of the RAF.

Discussion

[76] From the history, long past, and, more recent, it is clear that it cannot be in dispute that the current Board, as many of its predecessors, inherited a Fund which was insolvent. Bertelsmann J in *Ketsekele v Road Accident Fund*[23] remarked that whomsoever should manage the RAF is: 'Saddled with an *inheritas damnosa*" - a cursed inheritance that would be doomed to failure.

[72] Whether the Board and its CEO are managing the Fund in a manner which is optimal is not the subject of this judgment. As I have said, the Minister has not been joined and, thus, there has been no information provided by the State as to the current status of and developments in the broader social insurance scheme proposed in 2009.

[73] This failure to join the Minister in this application is a symptom of the applicants' attempt to cast the RAF as the sole failure in what is a cohesive and co-operative constitutional scheme.

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[22] *Road Accident Fund v Auditor-General of South Africa and Others* (1452/2022) [2024] ZAGPPHC 358 (19 April 2024)

[23] *Ketsekele v Road Accident Fund* 2015 (4) SA 178 (GP).

[74] The principles of co-operative governance espoused in section 41 of the Constitution mean that there is an obligation on Parliament to provide a legislative scheme which provides reasonable, fair and affordable compensation to all innocent victims of motor accidents.

[75] It was accepted in *Law Society*[24] that "it is to be expected that a scheme which depends on public funding would, at times, have income less than the compensation victims may be entitled to". It was not contemplated however that this scheme should be allowed to drift further and further into insolvency.

[76] The targeting of the conduit for payment of social benefits without resort to the broader structure and in the absence of engaging the complexity of the scheme and governmental policy is patently without any legal cogency.

[77] It is not in dispute that certain judgment debts against the RAF are not being met. That this is, on the face of it, a failure of social justice is undeniable.

[78] Any such constitutional failure would, it seems, reside in the failure of all components of the scheme and not only the RAF. The responsibility for such failure accrues at various levels and in a number of spheres of government.

[79] The flawed approach adopted by the applicants lies in the failure to allow for the location of the constitutional right with reference to the complex inter-governmental duties which are the source and origin of a social system which insures those who suffer injury and damages as a result of motor vehicle against their loss.

[80] The chosen remedy is, in the circumstances, counter intuitive. The motive for coercive civil imprisonment is that payment will be extracted by the placing of he, who has the keys to his own freedom, in a position where he is forced to act in accordance with his duty in order to free himself.

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[24] Supra note 19.

[81] If, as the respondents allege, the RAF cannot, within the exercise of its powers and functions, pay the balance of the amount due to the applicants because it's obligations to manage the fund do not allow for their preference in a commercially insolvent situation, then the conduct of the CEO has not been shown to be in conflict with the Constitution.

[82] Mr Letsoalo cannot command more resources to obtain his freedom in the event of his incarceration. If he were able to take moneys earmarked in the administration of the Board for other debts, this preference would not serve to vindicate the function of the Board in the context of the legislative scheme and the constitutional function which it is enjoined to fulfil.

[83] The correctly located constitutional right is the right to have access to a social security insurance fund which is financially viable and which has a compensation scheme which is fair, equitable and sustainable. That the most important part of this right is the payment of damages is undeniable. However, it is clear that this constitutional duty can only be realised with legislative and executive co-operation.

[84] A proper challenge to an alleged failure cannot be launched without an inclusive approach and a holistic challenge to failings in the scheme.

[85] The entire foundation on which the case of the applicants rests is the declaratory relief sought. Section 172(1)(a) of the Constitution states that this Court must declare "any law or conduct that is inconsistent with the Constitution" to be invalid to the extent of its inconsistency. It is a special constitutional provision, different to the common law rules governing the grant of declaratory orders.[25]

[25] For a discussion of the differences between the jurisdiction of the High Court to grant declaratory relief and section 172 of the Constitution, see *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 8-12 and *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at paras 55-56.

[86] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [26] O'Reagan J said the following in relation to the declaration of a right under 172(1)(a):

> "Unlike under section 172(1)(a), the courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the Supreme Court Act, will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters.''

[87] Thus, before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values."[27]

[88] On this basis the declaratory order sought by the applicants is incompetent.

Conclusion

[89] The RAF and its CEO cannot appropriately be singled out as the state organ which must take direct and exclusive accountability for the failure of a scheme which is universally acknowledged to be interim in nature and presently unsustainable.

[90] This must not be interpreted to allow impunity for non-payment of due indebtedness by this State Organ.

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[26] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004).

[27] Id at paras 106 and 107.

[91] A constitutional challenge of this nature would have to be mounted in a considered manner with due regard being paid to the co-operative nature of the scheme.

[92] The bringing of such a challenge may be overdue.

[93] The approach taken by the applicants is self-evidently devoid of achieving a proper constitutional remedy in a crucial area of social protection. The application must thus be dismissed.

Costs

[94] I have weighed up whether to apply the *Biowatch* principle.[28] This court is faced with a situation where the applicants rights to payment as judgment debtors have been seriously impinged upon in the context of what is jurisprudentially a weighty matter.

[95] This having been recognised, the applicants' failure to acknowledge the broader social security environment and the seeking of a remedy which is inherently counter-intuitive and admittedly extraordinary was ill-considered.

[96] Furthermore, the manner in which the application was conceived was lamentably insubstantial. Regrettably, this occasioned an equally deficient opposition by the Respondents.

[97] The failure to join the Minister in a proceeding such as this is also self- evidently a non-joinder and, in itself, would have been fatal to the application.

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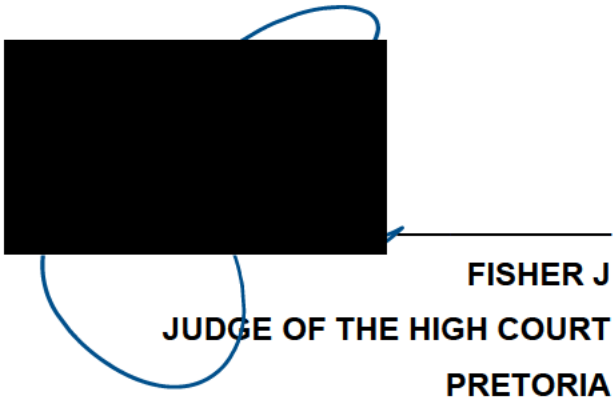
[28] *Biowatch Trust v Registrar Genetic Resources and Others (*CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009*)*

Order

[98] In the circumstances an order is made as follows:

The application is dismissed with costs, such costs to include the costs of senior and junior counsel where employed.



FISHER J
JUDGE OF THE HIGH COURT
PRETORIA

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 29 July 2024.

Heard:	27 May 2024
Delivered:	29 July 2024

APPEARANCES:

Applicant's counsel:	Adv. E C Labuschagne SC Adv R Ferguson
Applicant's Attorneys:	Adams & Adams Attorneys
Respondent's Counsel:	Adv. M S Mangolele SC Adv T Williams
Respondent Attorneys:	Maponya Ledwaba Attorneys