IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

23/5/2025
DATE

[redacted]
SIGNATURE

Case No. A300/2024

In the matter between:

ROAD ACCIDENT FUND Appellant

and

SCHUURMANN VAN DEN HEEVER &

SLABBERT INC First Respondent

INNES MUSERUA COSSA Second Respondent

GERHARD VAN DER MERWE Third Respondent

DIANA SEBOKO Fourth Respondent

MELITA MANGAKA Fifth Respondent

STEPHANUS GERHARDUS JANSE VAN VUUREN	Sixth Respondent
SHANDUKANI RODNEY MPHUGANA	Seventh Respondent
LEBOGANG SANNA NKE	Eighth Respondent
JOHN PETER JORDAAN	Ninth Respondent
ANNA NDHLOVU	Tenth Respondent
SUZANNA ELIZABETH STEBBING	Eleventh Respondent

ORDER

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1. The order in respect of the main appeal is as follows:
   1.1 the appeal against paragraphs 3 and 4 of the order of Kumalo J dated 23 March 2023, is dismissed.
   1.2 The appeal against paragraph 5 of the order of Kumalo J dated 23 March 2023, is upheld and the order is set aside.
   1.3 The appellant is ordered to pay the respondents' costs of appeal, which costs shall include the costs consequent upon the employment of a Senior Counsel and a junior, such to be taxed in accordance with Scale C.

2. The order in respect of the s18(4) appeal is as follows:
   2.1 The appeal is dismissed with costs, which costs shall include the costs consequent upon the employment of a Senior Counsel and a junior, such to be taxed in accordance with Scale C.

JUDGMENT

NEUKIRCHER J:

1] On 23 March 2023, Kumalo J granted the following order (the March 2023 order) against the appellant (the RAF):

a) that the RAF is to make payment of all orders and/or settlements reached between the parties which are older than 180 days within seven days from date of the order;[1]

b) that the RAF is to make payment of the orders and settlements into the bank account of the first respondent (the Attorneys);[2]

c) that in the event that the RAF alleges that it took an administrative decision not to pay the claims, that decision is reviewed and set aside as irrational, unreasonable, capricious and unlawful.[3]

2] Aggrieved by this decision, the RAF filed an application for leave to appeal. At the same time, the Attorneys filed an application in terms of s18(3) of the Superior Courts Act 10 of 2013 (the s18(3)). Strangely, the RAF filed neither a notice of intention to oppose nor an answering affidavit and thus, at the time the application served before Kumalo J on 16 August 2023, it was unopposed on the papers. It bears noting that the application for leave to appeal was opposed by the respondents, and it is clear that the RAF made submissions in respect of that as well as the s18(3) application.

[1] Par 3 of the March order
[2] Par 4 of the March order
[3] Par 5 of the March order

3] On 16 August 2023, Kumalo J dismissed the RAF's application for leave to appeal and granted the respondents' s18(3) (the August 2023 order). The effect of the latter order was that the March 2023 order remained enforceable pending any further appeal process.

4] The RAF then petitioned the SCA for leave to appeal the March 2023 order. That petition was filed late. It also filed a s18(4) appeal – this too was filed late.

5] On 4 July 2024, the SCA granted the RAF condonation for the late filing of its petition, and granted it leave to appeal the March 2023 order.

6] What serves then before this Full Court is the following:

a) the appeal in respect of the March 2023 order;

b) the RAF's s18(4) appeal.

7] I intend to deal with the main appeal in respect of the March 2023 order first, and then I will deal with the s18(4) appeal.

8] It is, perhaps, apposite at this stage already to express the court's disquiet with the manner in which the two appeals were set down to be heard. It appears that on 24 February 2024, a case management meeting was held by the parties before the Deputy Judge President (the DJP). The minute of that meeting reflects the parties' agreement that the two appeals were to be heard at the same time. This decision does not reflect the intention of s18(4) of the Superior Courts Act at all.

9] Section 18 of the Superior Courts Act states:

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

(4)

(a) If a court orders otherwise, as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal…"

10] Section 18(4)(a)(iii) thus envisages that these appeals are heard "as a matter of extreme urgency" – this appeal was certainly not treated with the expediency that s18(4)(a)(iii) envisages. When one considers that the s18(3) order was granted as far

back as 16 August 2023, and that the s18(4) appeal took some twenty months to be adjudicated – this is a far cry from what the legislators intended, and what the express intent of the section requires.[4]

11] Even were one to accept the RAFs submission that the s18(4) appeal could not be filed until the SCA granted it leave to appeal on the main merits on 4 July 2024, it still took the RAF another six weeks to file its notice of appeal[5] and it took another 9 months for the appeal to be heard. This is not acceptable.

12] In my view, the s18(4) appeal, once instituted, should have been heard "as a matter of extreme urgency" many months ago.

13] Nonetheless, as the parties are agreed that the two appeals should be heard together, this court has adjudicated both – each on its own merits.

The Main Appeal

Background

14] The Attorneys represent all of the remaining respondents,[6] before this court. They each instituted claims against the RAF for patrimonial damages arising out of separate motor vehicle collisions in which each other them suffered various bodily injuries and the related *sequelae*. Lest one gain the impression that those claims are disputed by the RAF, that notion is to be disabused – they are not. In fact, the RAF

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[4] *Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd South Africa* 2023 (2) SA 252 (GJ)

[5] The s18(4) Notice of Appeal is dated 20 August 2024

[6] In this judgment they are collectively referred to as "the plaintiffs"

concedes in all the papers before this court that each of these claims was finalised and court orders have already been granted in terms of which the RAF was ordered to pay specified amounts and the legal costs of each action,[7] within 180 days.

15] The RAF subsequently brought applications to extend the period of payment. The result is, that at the date of the original application in November 2022, the second to eleventh respondents had been waiting for payment as follows:

a) second respondent: over 713 days;

b) third respondent: over 485 days;

c) fourth respondent: over 544 days;

d) fifth respondent: over 480 days;

e) sixth respondent: over 1063 days;

f) seventh respondent over 716 days;

g) eighth respondent over 692 days;

h) ninth respondent over 1229 days;

i) tenth respondent over 586 days; and

j) eleventh respondent over 810 days.

16] Of course, this was as at November 2022 – another two and a half years has passed since then without payment of any amount whatsoever being made in compliance with the various orders made.

[7] This upon taxation of the bill of costs

17] The RAF does not deny any of the above facts; in fact, it admits them. However, it argues that it has a "reasonable suspicion" that the Attorneys lodged bills of costs in each matter which were inflated and/or fraudulent.

18] It based this on the following:

a) in March 2020, a former candidate attorney of the Attorney – one Mr Crichton - in the Attorney's RAF litigation department came forward as a whistle-blower and deposed to an affidavit;

b) according to him, the Attorneys would inflate its bills of cost and fail to properly account to its various clients;

c) the Attorneys would also, in addition, retain substantial portions of the client's award in addition to the amount claimed in the bill of costs, and that the costs taxed were not applied to the client's benefit;

d) the bills of cost included amounts charged for fictitious attendances and disbursements;[8]

e) correspondent attorneys bills of costs were a fabrication;[9]

f) the money collected, to be paid to the correspondent, would not be paid to them, but would be retained by the Attorneys;

g) after receipt of money from the RAF in respect of the taxed bill of costs, the Attorneys would not apply any benefit to the funds to the client and would, instead, transfer the received funds as "fees" either into its business account or into its "business savings account";

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[8] Eg consultations, telephone calls, letters and emails

[9] Because a correspondent was no more than a "post-box" and would invoice the Firm for a flat fee of R1 500 but a bill of costs would be taxed for an amount of R35 000

h) the Attorney used an unaudited banking account called its "business savings account", to pay expenses.

19] The RAF argues that although its investigation[10] uncovered that these infractions were perpetrated by one director with the Attorneys, a Mr Jakkie Supra (Supra), who was fired when the extent of his activities was uncovered, "it is clear that the other director/directors must have been aware of the goings-on in relation to the bank accounts, fees and tax affairs", and therefore "that there is a reasonable conclusion to be drawn that the entire firm is tainted with the fraudulent operation."

20] As a result, a criminal case has been opened and the case allocated to a dedicated Prosecutor at the Johannesburg Director of Public Prosecutions.

21] In the meantime, the RAF made the following tender[11]:

"16.2 However, in order to show the bona fides of the RAF and to comply with its obligations to compensate the actual complainants, the RAF tenders to make payment of the capital amounts of damages awarded to the claimants as listed in Annexure R3[12] hereto.

16.3 In such matters, it is requested with the leave of the court that the RAF is authorized to make payment directly to such claimants, alternatively that payment be made to the Legal Practice Council (LPC) as an administrator, who can then ensure that such funds find its way to the claimants."

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[10] Via its Forensic Investigation Department

[11] In its answering affidavit in the main application

[12] Annexure R3 lists 69 plaintiffs, and includes the respondents before this court. The total amount due by the RAF as at date of its answering affidavit on 3 November 2022 was R52 950 914-63. This amount would, of course, have attracted further interest due to the non-payment over the past twenty-nine months

22] The RAF also denies that it has taken any administrative decision that gave rise to any rights in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It argues that PAJA, as a result, cannot be invoked and that the appeal in respect of that order must succeed.

23] The Attorneys' directors have denied any knowledge of Supra's wrongdoings. According to them, he was fired once his conduct came to their knowledge and the Attorneys have reported him to the SAPS – that investigation is ongoing.[13] They have also, on numerous occasions, requested the RAF to engage with them on the issue of the bills of costs and have tendered a review of the taxation of the bills: all these requests have fallen on deaf ears.

24] It also alleges that the RAF's Forensic Investigation Department failed to contact it, failed to allow it an opportunity to participate in the investigation, and failed to apply the basic principle of *audi alteram partem* before its report was finalized. Given that this is not an issue that falls on us to decide, as a review of the report of the Investigation Unit is not sought, it is unnecessary for us to delve into this conduct.

25] As I have already stated, the RAF does not dispute its liability to pay the plaintiffs – it disputes that payment be made to the Attorneys. Its argument is premised upon s44(1) of the Legal Practice Act 28 of 2014 (the LPA) which provides:

> "The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, a candidate legal practitioner of a juristic entity."

[13] The matter is being investigated by the Germiston Commercial Crimes Unit

26] It argues that the Attorneys abdication of its role in the wholesale and admitted fraud perpetrated by one of its directors, simply cannot be countenanced. It relies on the decision of *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others*[14] *(Chueu)* for this stance, in which the SCA stated:

> "[26] Every director has a fiduciary duty towards the company of which it is a director. To plead ignorance when faced with allegations of misappropriation, does not absolve a director. It has been emphasized over the years that legal practitioners cannot escape liability by contending that they had no responsibility for the keeping of the books of account or the control and administration of the trust account. As this Court stated in Hepple v Law Society of the Northern Provinces,[15] for an attorney to explain trust deficits on the grounds that he or she had no involvement in the financial affairs of the firm is no defence at all."

27] But whilst the principle in *Chueu* is trite, the facts are distinguishable – the appeal *in casu* does not involve a trust deficit or the fact that the attorney had failed to pay his/her client despite receiving payment from the RAF. This case is about a single director in charge of the plaintiffs' claims drawing up and taxing bills of cost that did not accurately reflect the Attorneys' fees, charges and disbursements.

28] The point is also that the LPC has, upon investigation, found no culpability on the part of the remaining directors of the Attorneys.

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[14] (459/22) [2023] ZASCA 112 (26 July 2023) par 26; *General Counci of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 87: "It therefore stands to reason that absolute integrity and scrupulous honesty are demanded of each of them."
[15] [2014] ZASCA 75 para 21

29] Whilst I agree with the RAF's submission that a court may grant orders that would safeguard the interests of claimant and advance the interests of justice, it cannot do so without cause – in this case there is no cause.

30] I also do not agree that "the RAF as an organ of State cannot be compelled to make payments to a law firm that is the subject of both a criminal and disciplinary process as this is not in the best interests of the claimants." The reason for this is that, the RAF's mandate is set out in s3 of the Road Accident Fund Act 56 of 1996:

> "The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."

31] The Road Accident Fund Amendment Act, 2005 left unaffected this section of the 1996 Act.

32] This mandate was fulfilled the moment that the RAF concluded the settlement agreements with the plaintiffs and agreed to pay them compensation for their injuries caused pursuant to "the driving of motor vehicles" – at worst it was at the moment that court orders were granted in their favour. Once the court order was granted, the RAF then had an obligation to comply with that order in terms of s165(5) of the Constitution which states:

> "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

33] It is common cause that the orders in question were granted in excess of three years ago and that it is only payment of the costs orders that are contentious. The RAF has not sought to rescind any of the orders/ the costs portions; nor has it sought

to appeal any of them either as a whole, or in part. Absent such step taken by the RAF, the court orders stand and must be complied with.

34] In *South African Association of Personal Injury Lawyers v Heath and Others*[16] the Constitutional Court stated:

> [55] The RAF is a State institution and investigation of any fraud on the RAF would fall within the scope of the Act. But the matters referred to the SIU do not deal with this. The allegations in question relate not to the RAF, but to dealings between particular attorneys and their clients. There is no suggestion that payments made by the RAF to attorneys, on behalf of their clients, were in any way improper or unlawful, or that the investigation can possibly give rise to the recovery of any money on behalf of the state. On the face of it, the investigation is not concerned with the appropriation or expenditure of public money. It is concerned with the reasonableness of charges made by particular attorneys to particular clients for services rendered by them in connection with RAF claims, and to the possible over-reaching of those clients by their attorneys. It involves an investigation into what would be "a reasonable and/or taxed amount in respect of attorney-client costs", and whether a particular attorney has either overcharged his or her client, or failed in some other way to account properly to such client for the compensation paid to that attorney as the client's agent."

35] And in *Road Accident Fund v MKM obo KM and Another*[17] the SCA stated:

> "[26] The high court also said:
> 'In short, where there is a [contingency fees agreement] (and this would rationally be the case in all RAF matters where action is instituted using the services of an attorney) the RAF is not empowered to make an out of court settlement.'
> and

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[16] 2001 (1) SA 883 (CC) para 59
[17] 2023 (4) SA 516 (SCA) para 27 - 31

'[A]s part of its administrative function, [the RAF] has a duty to see to it that the provisions of [the Contingency Fees Act] are strictly adhered to when it comes to settling claims.'

Also,

'The making of payment without a court order, is incompetent and contrary to the statutory scheme which binds the RA. Without a valid settlement it has no basis to pay out on the claim and such payment is technically made *ultra vires*.

[27] I disagree with these pronouncements and findings. It must be borne in mind that a contingency fees agreement is a bilateral agreement between a legal practitioner and his or her client. It has nothing to do with a party against whom the client has a claim – the RAF in this instance. By its very nature, it is confidential and privileged between the client and his or her legal practitioner. Thus, ordinarily, a third party against whom a claim is prosecuted (such as the RAF), would not know about its existence, and has no right, nor an obligation, to enquire about its existence or its contents.

[28] The effect of the high court's judgment is that in each claim against it, before it makes an offer of settlement, and pays in terms of the subsequent settlement, the RAF must enquire from the claimant's legal practitioner whether there is a contingency fees agreement. If there is, the RAF must insist that the legal practitioner must obtain judicial approval in terms of s 4(1) of the Contingency Fees Act before it concludes a settlement agreement with him or her. If it does not, and it settles the claim, and pays out the capital amount without the legal practitioner having obtained judicial approval, it acts unlawfully.

[29] That is untenable. There are no textual or contextual indications in the Contingency Fees Act that the RAF bears any obligation to insist on a legal practitioner to obtain judicial oversight before it concludes a settlement agreement with such a practitioner. As the short title of the Contingency Fees Act makes plain, the Act was enacted:

'To provide for contingency fees agreements between legal practitioners and their clients; and to provide for matters connected therewith.'

[30] It is practically not clear how the RAF can force the legal practitioners, who act on behalf of its opponents, to comply with s 4 of the Contingency Fees Act. The high court, by a fiat, impermissibly imposed an obligation on the RAF not contemplated in the Contingency Fees Act. It did so, purportedly on the basis of a 'purposive interpretation' of the Contingency Fees Act. This, with respect, is not interpretation, but legislation, which is not within a court's remit.

[31] I therefore conclude that there is no obligation on the RAF to ensure that the legal practitioner complies with the provisions of s 4 before it concludes a settlement

agreement with him or her. It may well be salutary, where a contingency fees agreement is in place, for the RAF to enquire whether there has been compliance with s 4 of the Contingency Fees Act before it concludes a settlement agreement with a legal practitioner. But that does not equate to a statutory or legal obligation. "

36] Thus, the clear principle established is that the RAF has no right to interfere in the contractual relationship between an attorney and his/her client. By insisting on paying anyone other than the attorney of the plaintiff, this is precisely what it is doing. In any event, and if there is indeed a valid Contingency Fee agreement between the plaintiffs and their attorneys, by paying the plaintiffs directly, the RAF is impermissibly circumventing that agreement.

37] Furthermore, it was conceded during argument that an attorney may not lawfully practice without a Fidelity Fund certificate in terms of s82(1) and 84(2)[18] of the LPA. Thus, in the event that the attorney misappropriates any funds, the plaintiffs will have recourse to the Fidelity Fund. The RAF conceded that it is not its case that the attorneys' firm has practiced without a Fidelity Fund, or that the plaintiffs have no recourse to the Fund in the event of any theft of their funds.

38] But this aside, this very issue has already been dealt with by this Division: in *Ehlers Attorneys v Road Accident Fund*[19] *(Ehlers)*, Mabuse J stated:

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[18] (1) Every attorney or any advocate referred to in section 34(2)(b), other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practises or is deemed to practise—
(a) for his or her own account either alone or in partnership; or
(b) as a director of a practice which is a juristic entity,
must be in possession of a Fidelity Fund certificate.
(2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund certificate.

[19] (32968/21) [2021] ZAGPPHC 563 (1 September 2021)

"[12] On the other hand, the Respondent, for inexplicable reasons, insists on paying the claims into the bank accounts of the Applicant's clients. This is a clear indication of the ability of the Respondent to pay the Applicant's clients' claims. The only problem with this method of payment, and something that has never been considered by the Respondent, is that the method the Respondent insists on using does not cater for the Applicant's fees. The Respondent does not explain how, in the amounts that it wants to pay into the First Respondent's clients' personal accounts, provision will be made for the Applicant's fees.

[13] It is not correct, as the Respondent contends, that this appeal engages significant legal issues that include what the RAF's constitutional and statutory mandates are. This proposition is farfetched and lacks merit. The most crucial point in this matter is simply a statutory body ignoring its constitutional and statutory mandate and furthermore ignoring the Court's orders and treating the Court orders with disdain."

39] The RAF conceded in argument that there is no allegation that there are any suspension or removal proceedings contemplated or underway against the Attorneys' remaining directors. The RAF then also conceded that no *curator bonis* has been appointed by the LPC to manage the firm, its clients or its funds.

40] This all being so, there is no basis upon which this court can interfere with the orders made or the orders granted by Kumalo J on 23 March 2023 that the RAF is to make payment of the plaintiffs' claims within seven days, into the Attorneys' account. Thus, the appeal as against paragraphs 3 and 4 of the order granted must fail.

41] However, the appeal against paragraph 5 of the March 2023 order must succeed. The basis upon which the order was sought was that, insofar as the RAF

may allege that it took an administrative decision not to pay the Firm, this decision was taken without notice; the Attorneys and its clients were denied an opportunity to make representations; the Attorneys has not been given any statement of the administrative decision and despite several requests no reasons for "the decision" have been provided despite several requests.[20]

42] But the respondents' bald allegations are simply insufficient for purposes of a review application:

a) firstly, the "review" (such as it was) was not properly motivated in the founding affidavit and was not supported by any documentation demonstrating that such a decision was either contemplated or taken by the RAF;

b) secondly, the RAF resoundingly denied that any such decision existed;

c) thirdly, the manner in which the application is framed does not support a review application, and any such application would have been brought outside of the 180-day period stipulated in s7(1) of PAJA. The application contains no attempt to explain the delay, nor does it ask for condonation for the late institution of the purported review. This would be fatal to such a review[21];

d) lastly, given the lack of any cogent evidence that such a decision was taken by the RAF, its response is not untenable or so far-fetched that it should be rejected.[22]

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[20] PAJA: s3(1)(a), s3(1)(b) and s3(1)(c)
[21] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA)
[22] *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A)

43] Thus, the appeal against paragraph 5 of the March 2023 order must succeed.

44] Given that the RAF has not succeeded on the main merits of the appeal, it must bear the costs of the appeal. Both parties employed both Senior and junior counsel, the issues are quite complex and the record not insignificant. In my view, costs of two counsel, of which one is a Senior Counsel, to be taxed in accordance with Scale C, are justified.

The Section 18(4) appeal

45] The relevant provisions of s18 of the Superior Courts Act 10 of 2013 state:

> "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal 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.
>
> (4)
>
> (a) If a court orders otherwise, as contemplated in subsection (1)—
>
> (i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal..."

46] The RAF's notice of appeal in the S18(4) was only filed on 20 August 2024: this is a year after the s18(3) order was granted and about six weeks after the SCA granted it condonation to appeal the merits of the March 2023 order. The RAF also filed an application for condonation for the late filing of this notice of appeal. Including the citation of the parties, the founding affidavit is 18 paragraphs (or 3 pages) long and its high-water mark is that the notice of appeal is "only" a few days late and there is no prejudice to any party.

47] In argument, Mr Motepe[23] submitted that the notice of appeal could not be filed until such time as the SCA had granted it condonation in respect of the main appeal. Had it not done so, the s18(4) appeal would have been premature.[24] Whilst this may be so, it is very clear that the RAF did not treat the s18(4) with the urgency with which that section envisages and indeed demands. In fact, it is clear from its conduct that it

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[23] Counsel for the RAF

[24] *Myeni v Organisation Undoing Tax Abuse and Another* (15996/2017) [2021] ZAGPPHC 56 (15 February 2021):

> "[26] The application for leave to appeal in the present matter has lapsed. In order for the application for leave to appeal to be revived, condonation will have to be granted by the SCA. Until such time, there is no application as contemplated by section 18(5) of the Superior Courts Act, and the ineluctable consequence is that the section 18(4) appeal is not competent. We further hold the view that, although the length of the delay in filing the application for leave to appeal to the SCA is negligible, having read the principal judgment of the court *a quo* and the judgment in the application for leave to appeal, the prospects of the appellant succeeding with her condonation application to the SCA are rather slim."

has, throughout all the proceedings simply taken a *laissez-faire* stance[25] in the hope that the court will take up the cudgels on its behalf. This dissatisfactory manner of conducting litigation is strongly deprecated and is to be resoundingly discouraged.

48] However, I do intend to deal with the s18(4) as there are issues which require an adjudication by this court. Had it not been for this, the outcome may well have been considered differently.

49] It is, by now, trite that when considering a s18(3) application, the court is constrained to consider and pronounce on three main issues. Those are:

a) are there exceptional circumstances which would warrant the court departing from the automatic suspension of the original order?

b) did the party who applied to the court to order otherwise, prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order?

c) did the party who applied to the court to order otherwise, prove that the other party will not suffer irreparable harm if the court so orders?[26]

50] It is clear from the judgment of Kumalo J, that the application for leave to appeal and the s18(3) were heard at the same time, and it appears that the judgment on the two applications contain the same ratio for both. This *ratio* appears to be the following:

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[25] To be seen in the late filing of the petition, its failure to file any affidavits in the s18(3) application and the late filing of its notice of appeal in the s18(4)

[26] *Incubeta Holdings and Another v Ellis and Another* (2013/ 30879) [2013] ZAGPJHC 274; 2014 (3) SA 189 (GSJ) (16 October 2013)

a) that it is difficult to understand the RAF's objection to granting the respondents' request that it make payment of the court orders as

"[5] ...this is nothing more than the confirmation of the principle established in the full court of this division of prior matters involving the appellant and a host of other partners involved including the Legal Practice Council, Personal injury Plaintiff's Lawyers Association, etc";

b) the RAF has given an undertaking to make payment of the plaintiff's orders;

c) the order to pay the Attorneys is also not a novel issue and has been decided by several courts[27] against the same objections by the RAF against the RAF;

d) "Even if this court were to grant leave to appeal on it, it certainly will not advance the cause of the appellant in this matter and would simply delay the payment of the claim of the individual respondents who need the matter to be finally settled."[28]

51] Whilst the reasoning of the court demonstrates why it granted the orders it did, what it failed to do is set out the three requirements upon which the s18(3) order was based. The respondents argue that paragraph 10 of the judgment is quite clearly the *ratio* upon which this order was based and that it contains the necessary basis upon which one can conclude that exceptional circumstances were present and that irreparable harm would ensure to them were the order not to be granted.

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[27] Heath supra and Ehlers supra
[28] Paragraph 10 of the judgment of the court *a quo*

52] The question is whether this court can, in these circumstances, consider all the evidence before it to determine whether the order should have been granted in the absence of the court *a quo's* clear intention on each of the relevant issues?

53] The RAF did not raise the failure of the court to deal with the three requirements as a ground of appeal in its Notice of Appeal. Its heads of argument however, focused almost exclusively on this issue. This is hardly surprising given the RAF's conduct in this matter thus far. Its original grounds overlap the grounds of the main appeal. The s18(4) heads of argument focus on the court a quo's failure to deal with the three requirements set out in s18(3), and more especially, its failure to find that there were any exceptional circumstances present.

54] The argument is that an order in terms of s18(3) is an extraordinary remedy which the statute envisages will only be deployed in exceptional circumstances. The reason for this is self-evident:

> [1] The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful."[29]

55] The RAF argues that findings on exceptional circumstances and irreparable harm are the very foundations upon which any order in terms of s18(3) are grounded.[30] Without those, it is impossible for the court hearing a s18(4) appeal to know why the

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[29] Knoop v Gupta(115/2020) [2020] ZASCA 149 (19 November 2020) (Knoop)
[30] UFS v Afriforum & Another [2015] ZASCA 165 (17 November 2016) para 9; Road Accident Fund and Others v Mabunda and Others (15876/2020); 17518/2020; 182389/2020) [2020] ZAGPPHC 386; [20201] 1 All SA 255 (GP) (18 August 2020); University og Free State v Afriforum and Another 2018 (3) SA 428 (SCA)

order was granted, or whether these grounds were even considered and the test properly applied. It argues that the high water mark of the court *a quo's* judgment being found in paragraph 10 of the judgment, it is in any event clear that no exceptional circumstances were present justifying the order granted. It lastly argues:

a) that there were sufficient prospects of success on appeal for the SCA to grant its petition on the merits;

b) that, this being so, there are no exceptional circumstances present;

c) that the RAF would suffer irreparable harm were payment to be made to the Attorneys as it would render any appeal moot and that payment would not be able to be reversed in the event that an appeal is successful.

56] The respondents argue that the import of paragraph 10 of the judgment *a quo* directly affords insight into the ground upon which Kumalo J found exceptional circumstances to be present. They argue that it is an important consideration that the RAF does not seek to overturn the court orders upon which its liability to the plaintiffs is based – what it does is seek authorization to pay the funds to someone other than the attorneys. Thus, even were the appeal to be successful, the RAF's liability to the plaintiffs would remain extant. This, they argue is, partly, the basis of the exceptional circumstances and also founds the irreparable harm findings.

57] The respondents also argue that the issue is whether the outcome of the s18(3) is justified on the record before this court, to which this court is bound.

58] In my view, the respondents' argument must prevail. In *Knoop* the SCA was faced with a s18(3) judgment which failed to properly set out one of the most important factors to be considered when granting such an order: that is the "exceptional circumstances" ground[31]. Furthermore, the SCA was also quite critical of the manner in which the court a quo had considered the "irreparable harm" requirements. The court then proceeded to consider the affidavits as well as the heads of argument before it[32] before finding that the s18(4) appeal should be upheld.

59] The SCA also had the benefit of the appeal on the merits before it and in this regard stated:

> [50] We had the full record in the main appeal before us and had read it in anticipation of dealing with the main appeal, but the argument on the urgent appeal did not include any debate over prospects of success in the main appeal. Our finding that the three requirements for making an execution order were not established means that we did not have to consider whether there is a discretion once they are present and, if so, whether the prospects of success should affect its exercise. There may be difficulties if the high court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s 18(4) will always be in a position to assess the weight of this factor. As I have noted, in both *UFS v Afriforum* and *Ntlemeza* the court disposed of the appeal by disregarding the prospects of success on appeal. The urgency of the appeal almost inevitably dictates that in this court and possibly in a full court, the appeal court will not have the record before it and will be confined to assessing the prospects of success in the main appeal from the judgment alone. The usual principle that an appeal court decides the appeal on the record before the high court cannot apply in those circumstances. If the

[31] Knoop para 55
[32] Knoop para 60

language of s 18(4) confers a discretion, is that a full discretion or a power, combined with a duty to exercise that power on proof of the requirements for its exercise? These issues may warrant a reconsideration of the approach in *Justice Alliance* on an appropriate occasion."

60] It is thus clear, that when considering the outcome of the s18(4), this court must have regard not just to the judgment in respect of the s18(3) application – which I emphasize was not opposed by the RAF – but to the entirety of the appeal record before it. Given that we are seized with the appeal on the merits, insofar as prospects of success are to be considered when considering the issue of exceptional circumstances, this court is in a position to consider that as well.

Exceptional circumstances

61] In this case, I have already stated on several occasions that the merits of the plaintiffs' claims and the issue of the RAF's liability were not in issue; the quantum was settled and the RAF concedes on several occasions that it owes the plaintiffs' payment.

62] It is difficult to conceive on what basis the RAF claims an entitlement not to pay the Attorneys given the outcome of the appeal on the merits. The RAF has no right to retain the payments and its argument has already been rejected by several courts. It is also bound by s165(5) of the Constitution.

63] The fact remains that the RAF has failed to pay court orders, validly granted, for (in some cases) over 6 years. This, in the absence of an appeal on those matters, in and of itself, gives rise to the exceptional circumstances requirement.

Irreparable harm

64] The RAF argues that it will suffer irreparable harm were this court to refuse the s18(4) as the funds would be paid to the Attorneys and they would have no recourse. But that statement is not correct:

a) it is obliged to pay the plaintiffs' duly authorized representative in terms of the court order;

b) the plaintiffs' support the Attorneys in its endeavours – this is evident from the fact that they have supported the Attorneys in the initial application[33] and in all the subsequent proceedings;

c) there is no indication anywhere on the record that any of the plaintiffs have terminated the Attorneys' mandate and appointed different legal representatives;

d) in the event that the RAF pays out the claims and the Attorneys fail to pay their clients, the RAF's obligations have been fulfilled towards the plaintiffs and the plaintiffs must then exercise their individual rights against the attorneys;

e) in the event that the RAF succeeds in proving that the costs paid out to the Attorneys were not due or payable (for whatever reason), the RAF has recourse against the firm and/or its directors via, for example, a claim for repayment or damages or any other legally competent cause of action.

65] The respondents however, have indeed suffered and will continue to suffer irreparable harm were the s18(4) appeal to succeed:

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[33] And all have filed confirmatory affidavits

a) the attorneys firm has already incurred substantial costs on behalf of the plaintiffs in their claims against the RAF for which they have yet to be reimbursed despite costs orders being granted and taxed:

"44. The matter is urgent because experts such as Industrial psychologists, Actuaries, Medical Practitioners are owed money and they are starting to threaten litigation against the first Applicant. These professionals no longer believe the 1st Applicant who has informed them that the 1st Applicant's claimants have not yet been paid and therefore [their] bills can not yet be paid at this juncture.

45. The matter is urgent because the first Applicant is a law firm which primarily practices third party litigation and as the Road Accident Fund refuses to make payment to the first Applicant the First Applicant may be compelled to close its doors."(sic)

b) the Attorneys states:

"15. I place on record that some of the claimants that we represent are unemployed and/or severely injured and due to the fact that they have not been paid for reasons which only the Respondents can state, they have not been able to go for the treatment/s which they desperately need. Many of the claimants have been compelled to take loans against their awards in order to attempt to survive due to the Road Accident Fund's failure and/or refusal to make payment in terms of court orders or settlements which the claimants have obtained, and which are not challenged or disputed..."[34]

And

"43. The claimants urgently require payment so that they can continue with their required medical treatment, use their compensation for the daily living

expenses, utilse the money for wheelchairs and infrastructure to adapt to their injury-stricken lives."

66] It bears noting that the RAF denied the content of this paragraph and callously stated that, in the event that the claimants were given undertakings in terms of s17(4) of the Act, they could have sought medical treatment. They also repeat the tender to pay either plaintiffs directly or the LPC. Firstly, the *in vacuo* denial, especially in the face of the confirmatory affidavits put up by each of the plaintiffs which are part of the record, certainly does nothing to disturb the finding that the plaintiffs will indeed suffer irreparable harm were the s18(4) appeal to succeed. Secondly, the tender was correctly rejected for the reasons set out *supra*.

67] Thus, in my view, there is no merit in the s18(4) appeal, and it must be dismissed with costs.

Costs

68] The respondents have sought costs on a punitive scale. They argue that the RAF's continued delays in the prosecution of both the main appeal and the s18(4) appeal and the lack of merits of the s18(4) appeal strongly suggest that the RAF was not *bona fides*.

69] Whilst the RAF's conduct has lacked the impetus envisaged by s18, this court cannot lose sight of the other factors that brought about the delay in the finalization of this appeal:

a) the petition was only granted on 4 July 2024 – this was some 11 months after the application for leave to appeal was originally refused;

b) the finalization of both appeals was delayed: despite the s18(4) Notice of Appeal being filed on 20 August 2024, it took another 8 months for this appeal to be heard which is not acceptable. The latter was the result of an agreement between the parties that the two would be heard together.

70] Thus, in my view, both parties ultimately delayed the hearing of the s18(4) and the costs should follow the result on the same basis as the main appeal. There is no case made out for a punitive order against the RAF.

The order

1. The order in respect of the main appeal is as follows:

   1.1 the appeal against paragraphs 3 and 4 of the order of Kumalo J dated 23 March 2023, is dismissed.

   1.2 The appeal against paragraph 1 of the order of Kumalo J dated 23 March 2023, is upheld.

   1.3 The appellant is ordered to pay the respondents' costs of appeal, which costs shall include the costs consequent upon the employment of a Senior Counsel and a junior, and to be taxed in accordance with Scale C.

2. The order in respect of the s18(4) appeal is as follows:

2.1 The appeal is dismissed with costs, which costs shall include the costs consequent upon the employment of a Senior Counsel and a junior, and to be taxed in accordance with Scale C.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered

C COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

KF PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judges whose names are reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 May 2025

For the appellant	:	Adv Motepe SC, with him Adv Rip
Instructed by	:	Bornman Duma Zitha Attorneys
For the respondent and		
Intervening Applicants	:	Adv Ngcukaitobi SC, with him, Adv Thompson and Adv Dewey
Instructed by	:	Shapiro & Ledwaba Inc
Matter heard on	:	15 April 2025
Judgment date	:	