IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 24217/2021

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

In the matter between:

KHOROMMBI MABULI INCORPORATED	APPLICANT
and	
ROAD ACCIDENT FUND	FIRST RESPONDENT
COLLINS PHUTJANE LETSOALO	SECOND RESPONDENT
ABSA BANK LIMITED	THIRD RESPONDENT
GAVIN VILJOEN	FOURTH RESPONDENT
SHOKENG EMILY DHLAMINI	FIFTH RESPONDENT

JUDGMENT

BASSON J

THE PARTIES

[1] The applicant (Khorommbi Mabuli Incorporated) is a legal firm of attorneys acting on behalf of its clients. The first respondent is the Road Accident Fund (the RAF), a Schedule 3A public entity established in terms of section 2(1) of the Road Accident Fund Act[1] (the RAF Act). The second respondent is Mr. Collins Letsoalo, the Chief Executive Officer (the CEO) of the RAF. The third respondent is ABSA Bank Limited (ABSA Bank) and the fourth respondent is Mr. Gavin Viljoen (Viljoen), a branch manager of ABSA Bank's branch in Centurion. The fifth respondent, Ms. Shokeng Dhlamini, is cited in her capacity as the Sheriff, Centurion East. The application before court is opposed by the 1st to 4th respondents.

[2] There are two applications before this court. The first is an application for contempt for an order declaring the 1st, 2nd, 3rd and 4th respondents to be held in contempt of the order of the full bench dated 9 April 2021; that the 2nd and 4th respondents be committed to a term of imprisonment for six months or any other term which this court deems fit; or alternatively, that the 1st, 2nd, 3rd and 4th respondents be "mulcted" with a fine deemed appropriate by this court. Alternatively, and in the event that this court is not prepared to grant the order for imprisonment, the 2nd and 4th respondents are to receive a suspended sentence which shall be wholly suspended on the basis that the 1st and 2nd respondents must, within 72 hours from the date of this order, make payment to the applicant of all claims which are older than 180 days and immediately reinstate the applicant on the Road Accident Fund payment list and that the 5th respondent immediately complies with a warrant of execution which has been served upon it. The applicant further asked for a cost order that the 2nd and 4th

[1] Act 56 of 1996 (as amended).

respondents jointly and personally be held liable on an attorney and client scale alternatively, such costs to be borne by the 1st, 2nd, 3rd and 4th respondents jointly and severally, the one paying the other to be absolved on an attorney and client scale or any other scale that this court deems fit.

COUNTER-APPLICATION

[3] The RAF has also filed a comprehensive counter-application in terms of which it seeks the issuing of a *rule nisi* calling upon the applicant (the 1st respondent in the counter-application) and any other interested party to show cause on 6 July 2021 at 10H00, if any, why any writ of execution based on a court order that compels the RAF to make payment to the applicant's trust account, or any attachment pursuant thereto, should not be immediately suspended in terms of section 173 of the Constitution,[2] alternatively Rule 45A of the Uniform Rules of Court, pending the finalisation of an application to be brought by the RAF within 45 days of the date of this court's order in which application the RAF will seek just and equitable relief including but not limited to requiring the Legal Practice Council to decide whether to investigate and to appoint a *curator bonis* to control and administer the applicant's trust account, alternatively, pending the finalisation of the RAF's investigation to be finalised within six months from the date of this order. The order sought is to operate as an interim order, with immediate effect, pending the confirmation or discharge of the *rule nisi*.

THE DECISION OF THE FULL BENCH

[4] On 9 April 2021, the full bench handed down its judgment (*Road Accident Fund v Legal Practice Council and Others* [3] –"the judgment of the full bench") in which it held that all writs of execution and attachments against RAF assets based on court orders already granted or settlements already reached in terms of the RAF Act which are older than 180 days, were suspended until 30 April 2021.[4] The order was granted, *inter alia,* to allow the RAF time to implement systems to make payment equitably. The following paragraphs of the order are relevant to these proceedings:

> *"(a)…*

[2] Constitution of the Republic of South Africa, Act 108 of 1996.
[3] [2021] 2 All SA 886 (GP).
[4] Paragraph 45(b) of the order.

(b) All writs of execution and attachments against the applicant based on court orders already granted or settlements already reached in terms of the Road Accident Fund Act, 56 of 1996 (the RAF Act) are suspended until 30 April 2021.

(c) The applicant is to pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement reached, on or before 30 April 2021, provided that the applicant has been notified by any attorneys who represent claimants that have such claims that are older than 180 days of the existence of such claims in accordance with paragraph 3 of this court's order made on 16 March 2021.

(d) All writs of execution and warrants of attachment against the applicant based on court orders already granted or settlements already reached in terms of the RAF Act, which are not older than 180 days as from the date of the court order or date of the settlement reached, are suspended from 1 May 2021 until 12 September 2021…."

[5] The remainder of the order provides for issues such as steps to be taken to register and capture court orders or written settlement agreements on the RAF's payment list and for the RAF to continue with its process of making payment of the oldest claims first by date of the court order or date of the written settlement agreement *a priore tempore*.[5]

[6] The consequence of this order therefore is that all executions against the RAF's assets were suspended until 30 April 2021. Beyond 30 April 2021, the RAF therefore has no further protection against execution in respect of orders older than 180 days. It is this judgment that the applicant claims the four respondents are in contempt of.

Locus Standi

[7] All the respondents before court challenged the *locus standi* of the applicant – an attorneys' firm acting on behalf of the claimants in their road accident matters – to bring the application for contempt in its own name.

[5] Paragraph 45(f) of the court order.

[8] The applicant disputed the challenge to its *locus standi* and submitted that it was entitled to launch this application on behalf of its clients who are unemployed indigent claimants who cannot afford to act on their own behalf.

[9] This is not the first time that the applicant has brought an application to have the RAF and the CEO declared to be in contempt of court. The first attempt served before Tlhapi J who dismissed the application on the basis that the applicant did not have the required *locus standi* to bring the contempt of court application. Notwithstanding what Tlhapi J held in that judgment, the applicant again brought an application for contempt in its own name.

[10] This time the applicant argues that it had been authorised by the claimants (the judgment creditors) to bring the contempt application on their behalf and referred the court to the confirmatory affidavits by the judgment creditors attached to the papers.

[11] I am in agreement with what Tlhapi, J held in her judgment: The applicant is a firm of attorneys and not a judgment creditor. It is the judgment creditor that has a direct and substantial interest in the application. A third party cannot bring an application for contempt of court. In her judgment, Tlhapi J held as follows:

> *"[26] As I see it, on a strict interpretation of the Powers of Attorney annexed to the papers, and without analyzing the entire content of the document, I find that the powers do not extend to authorizing the applicant to launch contempt proceedings against the first and second respondents. The personal details of and amounts due to the judgment creditors were available to the applicant at all times. It is the judgment creditors who have a direct and substantial interest, especially where it is alleged that the first respondent has not complied with an order, which directs that court orders and settlement agreements in their favour as judgment creditors be registered for payment, especially the long outstanding ones that are 180 days or older.*
>
> *[27] The importance of the judgment creditor's substantial interest is demonstrated in J Koekemoer and 353 Others supra. The applicants consisted of judgment creditors and the 354th applicant was their attorney of record, who probably had a similar Power of Attorney referred to in this matter. In my view, the importance of the judgment*

creditors bringing the application against RAF in their personal capacities, is their entitlement or right to prompt direct payment within the period prescribed in the Road Accident Fund Act 56 of 1996. In the Koekemoer matter the RAF was able to convince the court to allow for a period of investigation to precede payment to the claimants. Albeit in my view, as probably is the case in this application this process of investigation had the potential of prejudice, to those claimants who were not tainted by fraud or duplicate payments and further prejudice in that a system of payment which has no legality presently is being foisted upon them.

[28] Again, in the matter of RAF v ABSA Bank Limited and Another case number 52865/2020, Fourie J considered the issue of non-joinder of the third parties in particular, the claimants. The court found that the applicant was aware of the joinder requirement but, had conveniently opted not to comply with it. The court was not in favour of granting a rule nisi to have this lacuna fulfilled because there was more at stake to the prejudice of the claimants. Opportunity was given to the RAF, to launch a fresh application and to cite third parties who would be affected by the order.

[29] According to Mr Lazarus the applicants had demonstrated that they had a substantial interest in the order, hence the launch of the application on behalf of their clients. I do not find that such direct and substantial interest, in their capacity as attorneys for the judgment creditors had been established or properly articulated. Alternatively, a further complication is that no confirmatory affidavits from the judgment creditors have been obtained and annexed to the papers. In as much as I would have wanted to deal with the entire application, however, having come to this conclusion I find that it is no longer necessary to deal with the issue of contempt of the order of 14 December 2020, as doing so would render the exercise superfluous and of no consequence. I rely on what was stated in Four Wheel Drive Accessory Distributors Cc v Leshni Rattan N.O 2019(3) SA 451 (SCA) where the following was stated at paragraph 19:

> *'The court a quo was thus correct in holding that the plaintiff did not prove that it bore any risk in respect of the Discovery. It did not prove an interest in the litigation and consequently, failed to establish locus standi. The court also rightly found that no contract came into being because there was no consensus regarding the terms (and nature) of the agreement. That should have been the end of the matter. Indeed, the court held that the failure to prove locus standi was dipositive of the entire action.'"*[6]

[6] *Khorommbi Mabuli Incorporated v Road Accident Fund and Others* [2021] ZAGPPHC 162 (12 March 2021).

[12] None of the individual claimants, who are all judgment creditors against the RAF, and who have a direct and substantial interest in the outcome of this application, have been joined in this contempt application. In this regard I am in agreement with the submission that the applicant does not have the necessary *locus standi* to bring the application on behalf of the judgment creditors and the application for contempt against the 1st, 2nd, 3rd and 4th respondents should be dismissed on this ground alone.

[13] Even if I am wrong on this point, the applicant has not made out a case for contempt of court against any of the 1st to 4th respondents. I will, despite the fact that I am in agreement with the submission that the applicant does not have the necessary *locus standi*, briefly deal with my reasons for concluding that the applicant has, in any event, not proven that any of the respondents are guilty of contempt of a court order.

ABSA BANK

[14] Before I turn to the contempt application in more detail, it is necessary to first deal with the position of ABSA Bank and Viljoen in respect of the contempt application against them. The applicant seeks an order declaring them to be in contempt of court of the order granted by the full bench on 9 April 2021.

[15] Apart from disputing the *locus standi* of the applicant to bring the contempt proceedings, ABSA Bank and Viljoen submitted that they ought not to have been joined as respondents to these proceedings and that the contempt proceedings brought against them constituted an abuse of court procedure. To this end they seek an order that the application be dismissed with costs on the scale of attorney and client as against the 3rd and 4th respondents.

[16] ABSA Bank explains at length in its papers the nature of the relationship between it and the RAF. It explains that it provides banking services to the RAF which holds various cheque accounts in ABSA Bank's books and that these cheque accounts are conducted on a credited basis only. In other words, there are no overdraft facilities available on the cheque accounts of the RAF in the books of ABSA Bank. This means that if there are no monies that stand to the credit of these accounts, then ABSA Bank

can make no payments therefrom. From 2017 up until October 2019, writs were frequently issued by judgment creditors against the RAF as judgment debtor and served on ABSA as a garnishee. ABSA and the RAF would then arrange payments and all writs were paid by ABSA to the Sheriff according to the case number served on ABSA.

[17] Since October/ November 2019 the RAF experienced severe cash constraints and was unable to pay the writs and since February 2020, an agreement between ABSA and the RAF was implemented to block or place an authority hold on the accounts which were attached by the Sheriffs of various bank accounts of the RAF and paid over to the Sheriff within 30 days after the attachments per individual case numbers.

[18] The applicant refers in its papers to the various writs upon which it relies in this application. But, instead of attaching these writs to the papers, the applicant only attaches a few returns of service (but not the actual writs).

[19] ABSA Bank submits that this omission makes it impossible for it to reply to the allegations levelled against it by the applicant and also makes it impossible to ascertain whether the writs relied upon (but not attached) are directed to all the relevant bank accounts or only at certain of the bank accounts held by the RAF in ABSA Bank's books.

[20] In a letter dated 13 May 2021 (addressed by the applicant's attorneys and addressed to ABSA Bank), the applicant confirms that numerous writs were issued against ABSA Bank during the last 12 months but only attaches the returns of service from the Sheriff in respect of these writs. The applicant then demands that ABSA Bank freeze the account of the RAF failing which it will bring a contempt application against it and seek punitive costs orders against both ABSA Bank and the RAF.

[21] I am in agreement with the submission that the served writs cannot remain as a continuing attachment on the bank account (in other words by freezing the account). The process that must be followed is the process of an emoluments order but the RAF

does not owe ABSA any money on a continued basis to qualify for an emoluments order.

[22] ABSA Bank further reiterates that it can only apply with a writ served on it when there are funds which stand to the credit of the account of the RAF. Except for the amount of R 8 166.50, which was available and is due to the credit of the account of the RAF on 18 September 2020, and which was paid over against the writ under case number 990/2015, all the other writs were returned as a "*no attachment*" return.

[23] The joining of ABSA Bank to these proceedings is misplaced. Not only did the order of the full court granted on 9 April 2021 not order ABSA Bank to do anything or to make any payments, ABSA Bank only manages the RAF's accounts and can only pay out monies over to the Sheriff with regard to judgment creditors' writs if there are funds available in these accounts to the credit of the RAF's account in terms of the provisions of Rule 45(5) and 45(12) of the Uniform Rules of Court dealing with garnishee orders.

[24] Regarding Viljoen: He has no interest and/or responsibility whatsoever in respect of this process. Also, no court order, this application, nor any of the writs relied upon by the applicant, have ever been served on Viljoen personally or at all. In fact, it would appear that the order was served on a one "A Swanepoel". This is fatal as it is well-known that a contempt of court application must be served personally on a respondent.

[25] Viljoen therefore has no knowledge of any wrongfulness. The applicant seems to rely on two email addresses as service upon Viljoen. The first email address is non-existent and he denies having received the second one. Also, Viljoen is the manager of the Centurion Branch of ABSA Bank. He does not manage nor oversee the account of the RAF which falls under a Special Public Sector Department. Moreover, the physical cheque accounts fall under the *domicilium* branch of the Menlyn Branch which also do not fall under his control.

[26] The onus rests squarely on the applicant to prove that ABSA Bank and Viljoen maliciously and intentionally failed to adhere to a court order that ordered them to perform a specific act or to refrain from performing a specific act. The applicant placed no such facts before the court and as already pointed out, the order of the full bench is in any event not applicable to these two respondents. The contempt application against both ABSA Bank and Viljoen is accordingly dismissed.

[27] Regarding the issue of costs, this is clearly a matter where a costs order on a punitive scale is warranted. Neither ABSA Bank nor Viljoen should have been joined as a respondent to this contempt of court application: They are not party to disputes between the RAF and the claimants and they are also not interested parties.

[28] ABSA Bank had afforded the applicant an opportunity to withdraw this contempt of court application against ABSA Bank and Viljoen with each party to pay its own costs. This offer was rejected by the applicant. This application against these two respondents is frivolous and vexatious and therefore warrants sanction from this court.

[29] In the event, the application for contempt brought against the 3rd and 4th respondents is dismissed with costs on an attorney and client scale such costs to include the costs consequent upon the employment of senior counsel.

VARIOUS POINTS RAISED

The merits of the contempt application and the counter-application

[30] The merits of the contempt of court application and the RAF's and the CEO's response to the contempt application are intertwined and will be dealt with together.

[31] More specific to the contempt application, it must be emphasised that, in the present matter, the primary order that the applicant prays for in its Notice of Motion is for an order for the committal of the CEO of the RAF (I have already dismissed the application against Viljoen and ABSA Bank.)

[32] The Constitutional Court *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*[7] highlighted the far-reaching consequences of being found guilty of contempt of a court order in that such a finding may constitute a criminal offence:

> *"[50] It is important to note that it 'is a crime unlawfully and intentionally to disobey a court order'. The crime of contempt of court is said to be a 'blunt instrument'.Because of this, '(w)ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence'. Simply put, all contempt of court, even civil contempt, may be punishable as a crime. The clarification is important because it dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime, and the former is not."*

[33] In respect of the standard of proof the Constitutional Court made clear that it is the criminal standard of proof namely beyond a reasonable doubt:

> *"[60] In relation to the proper standard of proof applicable in contempt of court proceedings, there are divergent views on which further reflection and clarity are necessary. One view is that the criminal standard of proof –beyond reasonable doubt –applies always. The other view is that the standard of proof is not always of a criminal standard. The minority in Fakie hinted that the material difficulty in separating coercive/remedial orders of imprisonment made in civil contempt proceedings from punitive orders is a challenge which recurs in judgments in many jurisdictions. It opined, and this is endorsed in Pheko II, that the extension of the criminal standard in civil proceedings would have harmful consequences. In the following discussion I reference Fakie more extensively because it is an instructive judgment in which Cameron JA has ably outlined the law on contempt and how courts have dealt with it."*

[34] Returning to the merits of this application,firstly: What are the requirements for a finding of contempt of court and secondly, has the criminal standard of proof – beyond reasonable doubt – been satisfied in this matter? As already pointed out, because the primary relief sought is committal, the criminal standard of proof applies. The Constitutional Court in *Matjhabeng* confirmed that the requirements are –

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[7] 2018 (1) SA 1 (CC).

> *"(a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor ; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and mala fide".*[8]

[35] At issue in this application is whether the non-compliance of the order was wilful and *mala fide*. The Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd*[9] explains what this means:

> *"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*
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> *[10] These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

[36] As already mentioned, the applicant relies on the decision of the full bench and submits that the refusal of the RAF to compensate claimants displays a "*flagrant disregard and contentious attitude to award the order*" of that court. The applicant claims that the RAF is indebted to 42 of its clients in the amount of R 11 732 000.82 which amount is now due and payable to the claimants to be paid into the trust account of the applicant. Furthermore, the said amounts have been outstanding for a period of more than 180 days from the date of the order of the full bench. The applicant states that it has written several letters to the RAF requesting reasons as to why

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[8] *Ibid* at para 73.
[9] 2006 (4) SA 326 (SCA).

payments were not forthcoming. The applicant argues that if the relief of payments is not granted, the judgment creditors will be left without any remedy and will be subject to the mercy of the RAF. This, the applicant submits, is a "*recipe for big trouble*".

[37] In its answering affidavit (which also serves as the founding affidavit in the counter-application), the RAF states that, on 3 February 2021, the RAF informed the applicant (the respondent in the counter-application) that it had handed over the applicant to its Forensic Investigations Department (FID). The applicant has therefore known since February 2021 that payment to its trust account was suspended pending the outcome of an investigation into a suspicion of serious impropriety which decision has not been overturned. In this regard, the RAF submitted that it has a constitutional obligation to suspend payment to a trust account where there is a suspicion of serious impropriety in order to safeguard the RAF Fuel Levy. The RAF points out that its FID has identified various possible irregularities in respect of Bills of Costs submitted by the applicant and explains that this process could not have been completed earlier because the FID is a small department which is currently involved in the re-investigation of over 350 matters that were litigated and settled to determine whether there was a stratagem against the RAF on a massive scale to defraud. Some of the members of this department have also been infected with Covid-19 which resulted in the department having to quarantine.

[38] Attached to the papers of the RAF is a confirmatory affidavit by a member of the RAF's FID in which the following preliminary findings are confirmed –

> *"21.1 Bills of Costs taxed at Thohoyandou have identical items on the bills despite the fact that it was drawn for different claimants and related different accidents;*
> *21.2 On one of the Bills the court order states that the matter is removed from the roll by agreement between the parties and no order as to costs was made. Despite the said court order bill was drawn and taxed;*
> *21.3 Another item of concern is where the attorney appears as counsel and charges excessively high amounts for attending roll call, postponements and removals. In some instances, the attorney charged a full day fee for his appearance;*

21.4 Where counsel is briefed the attorney charges a day fee as well as travelling time and travelling disbursements, the attorney would also charge travelling time as well as travelling disbursements;

21.5 The team has further noted with concern that counsel charges and is awarded the day fee for attending roll call;

21.6 Usually the role of the corresponding attorney appointed is to act as a postbox and should only identify documents. This is however not the case with the correspondent attorneys appointed by the firm. On the day of trial, the instructing attorney, corresponding attorney as well as counsel attend court and all of them charge day fees;

21.7 It was further noted that counsel that is briefed in some of this matter is not at the seat of the court;

21.8 None of the Thohoyandou bills has a Rule 70 certificate attached which is required in terms of the rules'

21.9 We have also noted on one of the bills that the trial date as per the bill differs from counsel's invoice;

21.10 The bills have been provisionally analysed, and the First Respondent's FID established trends and patterns on bills receive for payment from other attorneys from the same area that were already under investigation. The First Respondent's FID established <u>possible</u> fraud based on the number of line items claimed on the same day."

[39] The RAF points out that the investigation is still ongoing and further information supporting or disproving suspicions of impropriety is being collected as soon as possible. Under these circumstances, the RAF cannot make payment to the applicant's trust account until completion of the investigations. Should payment not be suspended, the applicant will continue to receive public funds into its trust account possibly leading to misappropriation, misuse or irregular spending. The RAF acknowledges that it is an unfortunate, but unavoidable, consequence of the RAF's suspension of payment to the applicant's trust account that third parties' (such as the claimants) rights will be impacted but submits that this consequence should be weighed up against its constitutional obligations to safeguard the RAF Fuel Levy.

[40] Returning to the issue of contempt: In order to succeed with its application, the applicant must show, *inter alia*, that the RAF, although it is in a position to make

payment to the applicant's trust account, may do so without contravening the provisions of the Public Finance Management Act[10] (PFMA) and in circumstances where the RAF is constitutionally obliged to put measures in place to safeguard its "*available resources*" against fruitless and wasteful expenditure.[11] The applicant must further prove that the RAF acted wilful and *mala fide* in suspending payment to the applicant's trust account in circumstances where the applicant is under investigation for suspicion of serious impropriety.

[41] I am not persuaded that the applicant has been able to do so. The court cannot ignore the constitutional duties imposed upon the RAF as well as the duties imposed on the RAF in terms of the provisions of the PFMA to guard against fruitless and wasteful expenditure –particularly in respect of the administration of the RAF's Fuel Levy. The RAF has also placed *prima facie* evidence of possible impropriety identified by its FID systems. This cannot be ignored and in light of this, I am not persuaded that the RAF (or its CEO) is in wilful and *mala fide* disregard of an order of this court.

[42] In the event, the application for contempt against the first and second respondents is dismissed. As in the case of the third and fourth respondents, I am likewise exercising my discretion to dismiss the application with costs on an attorney and client scale including the costs consequent upon the employment of three counsel.

THE COUNTER-APPLICATION

[43] The applicant submitted that the counter-application should be dismissed in light of the judgment of the full bench that ordered that all writs of execution and attachments against the RAF based on court orders already granted or settlements already reached in terms of the RAF Act were suspended until 30 April 2021. Beyond

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[10] 1 of 1999.

[11] See, *inter alia,* section 50 of the PFMA which provides for the fiduciary duties of accounting authorities: (1) The accounting authority for a public entity must–

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;"

See also sections 51, 57, 81 and 83 of the PFMA where similar obligations are placed on the accounting authority of a public entity to guard against irregular, fruitless and wasteful expenditure.

30 April 2021 the RAF therefore has no further protection against execution in respect of orders older than 180 days.

[44] The applicant submitted that the judgment of the full bench left no room for any exceptions to its order. I do not read the judgment of the full court as constituting an obstacle against bringing the present counter-application to further suspend writs of execution and warrants of attachment after 30 April 2021. In my view, the door is left open by the full bench for the RAF to, on a case by case basis, approach the court if it has *valid grounds* to seek an order for a (further) suspension. The full bench held as follows:

> *"[39] I have referred to the objections raised by attorneys acting on behalf clients who are successful claimants against the RAF. I do not believe that payments should be withheld from successful claimants because of a dispute between the RAF and the attorneys acting for them, or pending the repayment of double payments by attorneys. Such exceptions may cause undue hardship on and be unfair to successful claimants. In such instances, the RAF should approach the court, on a case-by-case basis, if it believes or is advised that it has valid grounds to obtain an order suspending writs of execution and warrants of attachment against it. The order which we propose to make, therefore, does not provide for any exceptions. The RAF, as it undertook to do, must pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement, on or before 30 April 2021, provided it has been notified by any attorneys who represent claimants that have such claims that are older than 180 days of the existence of such claims in accordance with paragraph 3 of this court's order made on 16 March 2021."*[12]

[45] I am further in agreement with the RAF's submission that this court can urgently intervene in terms of, *inter alia*, sections 39(2) and 173 of the Constitution to prevent a constitutional crisis and to prevent potential contraventions of the PFMA. If it were to continue with payments into the applicant's trust account in circumstances where the applicant is under investigation for possible serious impropriety, such payments would be unlawful, invalid and unconstitutional. I am further in agreement that, in the

[12] My emphasis.

present circumstances, the RAF should be granted the order sought to suspend further execution to ensure it safeguards the RAF's Fuel Levy against suspicion of serious impropriety.

[46] On 18 April 2021 a letter entitled "DUPLICATE PAYMENTS AND CRIMINAL INVESTIGATIONS" was dispatched to all current firms of attorneys that are under investigation for suspicion of serious impropriety. On 7 May 2021 the RAF's attorneys sent a letter to the applicant in terms of which it is stated that –

> *"Your client has not been cleared for payment because of an ongoing investigation by the Forensic Investigation Department, as referred to in our client's answering affidavit in the urgent application proceedings your client launch against the RAF a few months ago. We will let you know as soon as your client is cleared for payment."*

[47] On 10 May 2021, the applicant's attorneys sent a letter to the RAF stating, *inter alia,* that they failed to understand on what basis the RAF is refusing to pay their client on the basis of a purported investigation. The attorneys further stated that it is common cause that their client (the applicant in this matter) has already repaid the duplicate payments it had received and accordingly that payment must be resumed. Payments should accordingly not be withheld from successful claimants because of an ongoing dispute between the RAF and the attorneys representing the claimants. The RAF and the CEO of the RAF are further advised that the applicant intends launching an urgent contempt of court application against both the CEO and the RAF *"who are clearly persistent in portraying a contentious attitude and flagrant disregard" of court orders "and who are hell bent on destroying our Constitutional Democracy and the independence of the judiciary.*".

[48] The RAF submitted that it is clear from this letter, as well as from further letters subsequently sent to the RAF, that it has no alternative but to approach the court urgently and suspend payment to the trust account of the applicant pending the outcome of the investigation into the alleged irregularities. In as far as it is necessary to pronounce on the issue of urgency, I am persuaded that the counter-application is urgent.

***PRIMA FACIE* RIGHT**

[49] I am persuaded that the RAF has a *prima facie* right to the order sought particularly in circumstances where there is a suspicion of impropriety. Although the applicant has repaid duplicate payments, the firm is still under investigation. Any attempt to further execute after 30 April 2021 against the RAF's assets in such circumstances amounts to an attempt to circumvent the RAF systems to safeguard the RAF's Fuel Levy against unconstitutional conduct. In this regard I agree with the sentiments expressed by Fisher J in *Taylor v Road Accident Fund and a related matter*:[13]

> *"**Conclusion***
>
> *[131] While De Broglio might believe that it has served the interests of its clients and itself in achieving a settlement agreement for a grossly inflated amount in circumstances where it has avoided this court's jurisdiction, in fact it has placed them in jeopardy. To the extent that the settlements are unconstitutional they are unenforceable. And if payment is made pursuant thereto this would constitute irregular expenditure by the RAF and potentially make those approving such payments vulnerable to personal scrutiny by the courts. The RAF is a public entity, as contemplated in part A of sch 3 to the Public Finance Management Act ("PFMA") and is therefore subject to the onerous prescripts relating to public expenditure set out in the PFMA. Thus, without further collusion by the RAF in relation to payment, the settlements are, in effect, worthless."*

REASONABLE APPREHENSION OF HARM

[50] I am in agreement that should the order not be granted, the RAF will lose the progress it has made since the implementation of systems to safeguard the RAF Fuel Levy against, *inter alia*, wasteful expenses. Should the process of attachment be allowed to continue in circumstances where there exists suspicion of impropriety especially in respect of a trust account, the administration of the RAF in attending to and paying out claims to claimants, will be severely hampered. I am thus persuaded that the RAF will suffer irreparable harm should the interim order not be granted.

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[13] 2021 (2) SA 618 (GJ).

BALANCE OF CONVENIENCE

[51] I have considered the plight of the applicant's clients. It is indeed unfortunate that the individual claimants again have to bear the brunt of serious failings not only on the part of the RAF but on the part of their attorneys. This is indeed unfortunate. On the other hand, this court cannot lose sight of the importance of resolving existing disputes regarding improper conduct on the part of attorneys' firms whereafter the payment to claimants will be restored. As already pointed out, the court cannot lose sight of the fact that the RAF has a constitutional obligation to safeguard the RAF Fuel Levy and to ensure proper administration and oversight of claims lodged with the RAF.

[52] To ameliorate the harm that a claimant may suffer as a result of this court's order, I have imposed a stricter time limit for the finalisation of the investigation proposed by the RAF in the Notice of Motion in the counter-application.

NO ALTERNATIVE RELIEF

[53] I am in agreement that the RAF has no other alternative remedy but to seek urgent interim relief in circumstances where the measure of protection that was afforded by the full court no longer exists.

COSTS

[54] I have exercised my discretion to grant the counter-application with costs on an attorney and client scale. In exercising my discretion, I have also taken into account the fact that the papers of the applicant are replete with serious and scandalous allegations against the RAF and its CEO. The applicant, *inter alia*, states that the RAF has a "*vendetta*" against it and that it is the RAF's "*modus operandi to silence those who do not agree with it by posing threats of spurious and endless investigations to delay an or avoid payment or frustrate the implementation of Court orders against it*". The RAF is also accused of being involved in "*dirty and selective payment dealings*" and that the refusal to pay is "*designated to frustrate the applicant to a point of misery*". The RAF denies these allegations and denies in particular the allegation that the suspension of payment is for "*malicious and illegitimate reasons*" and states that it does not "*willy-nilly*" (as claimed by the applicant) suspend payments to an attorney's trust account but does so when there is suspicion of impropriety. Then, in reply, Mr.

Lazarus launched an astonishing personal attack on the CEO. He, *inter alia*, accused the CEO of having lied under oath. This is conduct unbecoming of an officer of this court.

COURT ORDER: CONTEMPT APPLICATION

[55] In the event, the following order is made:

1. The application for contempt brought against the first and second respondents is dismissed with costs on an attorney and client scale including the costs consequent upon the employment of three counsel.

2. The application for contempt brought against the third and fourth respondents is dismissed with costs on an attorney and client scale such costs to include the costs consequent upon the employment of senior counsel.

COURT ORDER: COUNTER-APPLICATION

[56] In the event, the following order is made:

i. A *rule nisi* is issued calling upon the respondent (the applicant in the contempt of court application) and any other interested parties to show cause, if any, to this court on 6 July 2021 at 10H00, why the following order should not be made final:

1.1 Any writ of execution based upon a court order that compels the Applicant (the Road Accident Fund) to make payment to a trust account of the respondent or any attachment pursuant thereto is immediately suspended in terms of Section 173 of the Constitution, alternatively Rule 45A of the Uniform Rules of Court and set aside pending:

1.1.1 The finalization of an application to be brought by the Applicant within 30[14] days of the date of this Court's order in which application the Applicant will seek just and equitable relief, alternatively,

1.1.2 Pending the finalisation of the Applicant's investigation to be finalized within 30 days from the date of this Court's order.

2. That the order sought under paragraphs 1 to 1.1.2 shall operate as an interim order, with immediate effect, pending the confirmation or discharge of the *rule nisi*.

3. That the Applicant be granted leave to publish this order by publication in two national newspapers.

4. That the Applicant's costs of this application are to be paid by the respondent, Khorommbi Mabuli Incorporated, on an attorney and client scale including the costs consequent upon the employment of three counsel.

_____

AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically generated and therefor unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is 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 11 June 2021.

[14] I have also reduced the time period stipulated in the Notice of Motion for the institution of a further application.

APPEARANCES

For the Applicant:	MR. J LAZARUS (ATTORNEY)
Instructed by:	SHAPIRO & LEDWABA INCORPORATED
For the 1st & 2nd Respondent:	ADV. C PUCKRIN SC
	ADV. R SCHOEMAN
	ADV. P NYAPHOLI-MOTSIE
Instructed by:	MALATJI & CO INCORPORATED
For the 3rd Respondent:	ADV. DJ JOUBERT SC
Instructed by:	TIM DU TOIT & CO INCORPORATED
Date of hearing:	3 June 2021 (Virtual hearing)
Date of judgment:	11 June 2021