HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 19778/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 30 SEPTEMBER 2022

SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND	Applicant
and	
THE AUDITOR-GENERAL OF SOUTH AFRICA	First Respondent
THE ACCOUNTING STANDARDS BOARD	Second Respondent
THE MINISTER OF TRANSPORT	Third Respondent

Summary: urgent application – interim interdict against a Chapter 9 institution on an urgent basis – Road Accident Fund alleging fear of reputational damage – requirements not satisfied.

ORDER

The application is dismissed with costs, including costs of two counsel.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction and context

[1] On 28 April 2021 the Road Accident Fund (the Fund) resolved to switch the accounting standard applicable to the compilation of its annual financial statements since 2014 from the IFRS4 standard to the IPSAS42 standard. The effective result was a difference of some R300 billion in respect of its contingent liability position and that its insolvency position improved from 3% to 54%. This was reflected in the Fund's financial statements for the 2020/2021 financial year.

[2] The Auditor General of South Africa (the AG) was of the view that the use of the IPSAS42 standard by a public entity such as the Fund was inappropriate and did not fairly and accurately reflect the Fund's contingent liability for outstanding and future claims. In her view the use of IPSAS42 to formulate the accounting policy of the Fund significantly understated the future liability of the Fund and would result in non-compliance with section 55(1)(b) of the Public Finance Management Act No 1 of 1999 (the PFMA).

[3] Aggrieved by the AG's view, reflected in an audit report and "disclaimer of opinion" (also referred to in Heads of Argument submitted on behalf of the AG as the "D & O"), the Fund on 14 January 2022 sought to restrain the AG from publishing "in any way" or disclosing her audit report and opinion to Parliament "or to any other person". The urgent application was heard on 10 February 2022.

[4] On 24 February 2022 this Court, per Collis J, dismissed the relief sought in Part A of the Fund's urgent application, which had been sought pending a review of the AG's audit report and opinion, which was sought in Part B of that application.

[5] Collis J granted leave to appeal the refusal of the interim interdict, but since then, the audit report and the D & O had been delivered to the Fund and subsequently also to Parliament. In fact, it is currently the subject of a review conducted by the Standing Committee on Public Accounts (SCOPA). It is also otherwise in the public domain and has received widespread media coverage, rendering the appeal moot.

[6] The RAF has since, despite the Accounting Standards Board (the ASB) and National Treasury having concluded that IPSAS42 is an inappropriate standard to formulate the Fund's accounting policy, retained that standard for purposes of finalizing its financial statements for the 2021/2022 financial year.

[7] In this regard, the AG has concluded as follows in an audit finding disclosed to the RAF on 20 June 2022: "*RAF management changed their accounting policy that was in line with the principles of IFRS4 to one that is in line with IPSAS42 in the 2020-21 financial year. We evaluated the appropriateness of this change in accounting policy and arrived at the conclusion that the change in accounting policy is not appropriate. We did not agree with the change in accounting policy in the prior year and that was part of the*

disclaimer of audit opinion issued in the prior year. We have reviewed the current year AFS and noted that the RAF has continued to make use of the same accounting policy as the prior year to account for the provision for outstanding claims liability. This is a disagreement on the principles and this disagreement still exists in the current year. There have been no changes on how management is accounting for the provision for outstanding claims liability since last year to warrant us to reconsider our view on this matter" (AFS refers to annual financial statements).

[8] In similar fashion as before Collis J, the Fund now seeks to restrict the AG from delivering its D & O pending, yet again, finalization of a review of that report and opinion. It does so again on an urgent basis due to the fact that the AG intends furnishing her report to the Fund three days after the hearing of this application on 27 September 2022, being on Friday 30 September 2022. She intends doing so in terms of statutory prescripts to which I shall refer hereinlater.

The requirements for an interim interdict

[9] It is by now trite that the requirements for an interim interdict is that an applicant must have a *prima facie* right, even though open to some doubt and a well-grounded apprehension of irreparable harm which will be suffered, should the interim relief not be granted. In addition, the balance of convenience in granting an interim order should favour the applicant who must further indicate that it has no appropriate alternative remedy[1].

[10] In circumstances such as the present, where the interim relief is sought pending a review application, a *prima facie* right though open to some doubt exists when there is a prospect of success in the claim for the principal relief,

[1] *Setlogelo v Setlogelo* 1914 AD 22 as reiterated in *National Treasury v Outa* 2012 (6) SA 223 (CC).

albeit that such prospect may be assessed as weak by the court hearing the application for interim relief[2].

[11] When an interim interdict is sought which will restrict the exercise of a statutory power, a court must be astute not to trespass across the line separating the exercise of powers and be mindful of limiting the exercise of statutory power only in exceptional circumstances[3].

The AG's statutory obligations

[12] The AG is a state institution created in Chapter 9 of the Constitution for the support of constitutional democracy[4]. As such, she is accountable to the National Assembly (Parliament)[5].

[13] The functions of the AG obliges her to audit and report on the accounts, financial statements and financial management of institutions or accounting entities required by national legislation to be audited by her[6]. The Fund is such an entity[7].

[14] The Fund is a national public entity and is as such bound by the PFMA. As such, the Fund's accounting officer must prepare financial statements for each financial year and submit them to the AG for auditing. These statements must "fairly present the state of affairs of the public entity"[8].

[15] In terms of the Public Audit Act No 25 of 2004 (the PAA) the AG is the supreme audit institution in the Republic and must impartially and without fear,

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[2] *Johannesburg Municipality Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) at [8] I, citing *Ferreira v Levin NO and others* 1995 (2) SA 813 (W) at 832I – 833B.
[3] *National Treasury and Others v Outa* 2012 (6) 223 CC at [44] and [47].
[4] Section 181(1)(e) of the Constitution.
[5] Section 181(5) of the Constitution.
[6] Section 181(1)(c) of the Constitution.
[7] Section 14(2) of the Road Accident Fund Act 56 of 1996 (the RAF Act).
[8] Sections 55(1)(b), 55(1)(d), 55(2) and 55(3) of the PFMA.

favour or prejudice perform her functions, while being accountable to the National Assembly[9]. The AG must also determine the standards to be applied in performing audits[10].

[16] An audit report compiled by the AG must "*reflect such opinions and statements as may be required ... but must at least reflect an opinion or conclusion on whether the annual financial statements of the auditee fairly present, in all material respects, the financial position at a specific date and results of its operations and cash flow ... in accordance with the applicable financial framework and legislation ...*"[11].

[17] The AG is obliged to submit her audit report to the auditee, in this case, the Fund, who in turn must submit it to Parliament. Should the Fund fail to do so within one month after Parliament's first sitting after the report had been submitted to it by the AG, she must then "promptly publish the report"[12]. The report must also be submitted by the AG to the National Treasury[13].

Res judicata?

[18] What must firstly be considered is whether, in circumstances where a party brings the same dispute it has with the self-same other party to a court for the second time, the spectre of *res judicata* does not arise[14]. It is not in dispute that the only difference of any moment between the January urgent application and the present urgent application, is that the present application refers to the

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[9] Section 3 of the PAA.
[10] Section 13 of the PAA.
[11] Section 20 of the PAA.
[12] Section 21(3) of the PAA, read with sections 13 and 14 of the RAF Act.
[13] Section 28(3) of the PAA.
[14] *Res judicata* is the legal doctrine that bars continued litigation of the same case, on the same issues, between the same parties. See *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564 and *Molaudzi v S* 2015 (8) BCLR 904 (CC).

statement of a subsequent financial year. The portion of the AG's current audit findings quoted in paragraph 7 above, confirms this.

[19] Insofar as the above may constitute a distinguishing feature between the two matters, namely that there are two years' financial statements and two corresponding audit reports and D & O's at play, only results therein that the order of Collis J is not directly applicable and dispositive of the present application. It is only in this limited sense that her judgment is not, strictly speaking *res judicata*. The question of issue estoppel, however still remains.

[20] Issue estoppel, involving the relaxation of the strict confines or requirements of *res judicata*, in appropriate cases, is to the effect that where an issue of fact or law was an essential element of a dispute between the same parties and a court has pronounced thereon, it cannot be raised afresh in new litigation between the same parties[15].

[21] When the principle of issue estoppel (reflecting the common-place adoption of English law terminology) is applied to the present matter, it simply means that Collis J has already determined that there should not be a restraint placed on the AG to perform her statutory duties in respect of audit reporting on the Fund's annual financial statements, even whilst a review application may be pending regarding the question whether the IFRS4 or the IPSAS42 standard was the appropriate one for the Fund to use or whether the Fund's financial statements fairly and accurately reflected the Fund's financial position or not.

[22] The fact that an appeal, particularly one which has become moot, may be pending, is no defence to a plea of *res judicata* and issue estoppel[16]. Accordingly

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[15] See *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) at [10] and the cases quoted there as well as *AON South Africa (Pty) Ltd v Van der Heever NO* 2018 (6) SA 38 (SCA).
[16] *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W)

the Fund's current application for interim relief in these similar proceedings should be refused.

[23] Should I be wrong in this conclusion or should this be an appropriate case in which the principles of *res judicata* or issue estoppel should completely be relaxed[17], then I shall proceed to consider whether the other requirements for an interim interdict have been satisfied, notably those of a *prima facie* right, a reasonably apprehended fear of irreparable harm and the balance of convenience.

Evaluation

[24] The review contemplated in Part B of the Fund's January 2022 application is still pending and is apparently being case managed. No satisfactory answer could be furnished why this application has not yet served before court.

[25] Assuming in the Fund's favour, despite this court's view of the rather tenuous prospects of success of that review, that a *prima facie* right exists in respect of the similar review application contemplated in Part B of the current application, the remainder of the requirements for the granting of an interim interdict need to be considered.

[26] The Fund alleges that it would suffer irreparable harm if the sequence of events relating to the submission of the AG's audit report, including her D & O, envisaged to take place today 30 September 2022 (including the remainder of the processes for the tabling thereof in Parliament and publication and dissemination thereof), is not immediately halted. The "harm" is alleged to manifest itself as follows: the Fund claims that it has suffered "reputational" damage after the wide media coverage resulting from the publication of the AG's D & O regarding the 2020/2021 financial statements. It claims that a repeat disclosure of a similar D

[17] Such as in *Prinsloo NO v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA).

& O will "harden" and "intensity" public sentiment against the Fund. It further claims that, as a result, its cost of insurance for personal liability indemnity of its CEO and principal officers have increased and that it may have difficulty in obtaining a new transactional banker as a result of this reputational damage.

[27] Firstly, the Fund is not a commercial entity. It is not in the business of selling or marketing a product or service for which it needs to maintain or enhance its reputation. It is a statutory body with a statutory obligation to provide compensation to motor vehicle accident victims. Secondly, the "damage" to its reputation (such as it is) as a result of transparency occasioned by the AG performing her statutory obligations, insofar as that may have occurred as a result of the Fund unilaterally opting to utilize the IPSAS42 standard, is not only of the Fund's own making, but has already occurred. It is difficult to conceive how that damage can be "intensified" by both the Fund and the AG simply maintaining their respective positions. Even if this would notionally happen, victims of motor vehicle accidents are statutorily prevented from claiming damages from wrongdoers and generally speaking have only the Fund to turn to[18], whatever the Fund's reputation may be.

[28] The issue of an alleged increase of the premiums for personal liability as a result of the publication of the AG's previous D & O is not supported by evidence. The costs of insuring the CEO and the Fund's principal officers against possible personal liability of up to R150 million each, costs around R5 million per year. This cost has increased due to a member of factors, of which none have been mentioned by the insurers but which have been listed in an internal memorandum compiled by the Fund's acting chief strategy officer, apparently acting as an internal procurement officer in this regard. After listing various factors, this officer adds that other factors are the *"... governance challenges in State Owned*

[18] Section 21 of the RAF Act.

Entities and previous increased media coverage of state capture allegations, and the media coverage on RAF with AG". It is the last portion of this sentence that the Fund wishes to rely on. The opinion expressed by this officer is not only lacking in detail, but is without supporting evidence. It is therefore an attempt at self-corroboration which cannot be accepted.

[29] The Fund further alleges that it is in the market for obtaining new transactional bankers. It avers that this search may be compromised should a re-occurrence of publication of the AG's D & O take place. In an attempt to lend credence to this claim, the Fund annexed a letter from one of its current transactional bankers, Absa. This letter, dated 1 April 2022, does not support the contention made. In the letter, Absa bemoans the fact that the Fund had not furnished it with its latest audited financial statements. This would refer to the previous year's statements. Absa needed these "latest audited financial statements" within 21 days in order to review the facilities then made available to the Fund. The Fund does not say whether it has since furnished the statements and neither does it explain how the AG's findings in June 2022 could have an impact on Absa's request made in April 2022. The attempted proving of the transactional banker issue is therefore non-sensical and without foundation. The same applies to the Fund's unsubstantiated claim that publication of the AG's D & O might make it difficult for the Fund to obtain "alternate" funding besides the fuel levy income it currently receives.

[30] Counsel for the AG referred the court in written Heads of Argument to the decision in *City of Tshwane Metropolitan Municipality v Afriforum*[19] in respect of the issue of irreparable and imminent harm. At paras 55 and 56 the then Chief Justice explained the position as follows:

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[19] 2016 (6) SA 279 (CC).

> "*Within the context of a restraining order, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already .... Within the context of a restraining order, harm connotates a common-sensical, discernable or intelligible disadvantage or peril that is capable of legal protection*". The court went further to state that the disadvantage that the applicant seeks to prevent must be capable of being objectively and "universally appreciated[20]".

[31] I find that in the present case the Fund has failed to objectively demonstrate that an imminent harm will befall it, should the AG perform her duties.

[32] There are two further factors which militate against the granting of the relief claimed by the Fund. The first is that it would unduly prevent the AG from performing her statutory obligations and that there are no weighty or exceptional circumstances justifying such interference. To do so, would be to impermissibly infringe on the principles regarding the separation of powers. The second is that, even if one were to entertain the argument that the infringement would only be in the form of delaying the execution of her functions and not by finally interfering with the AG's duties (and that therefore the principle regarding the separation of powers might permissibly be breached), public interest is against such interference. All the statutory instruments referred to above, including the Constitution, demand swift, accurate and, importantly, transparent reporting of the financial affairs of public entities[21]. This requirement for transparency is even more acute in the current state of concern regarding the governance of public entities in South Africa. The further requirement for an interim interdict, namely

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[20] See also South African Airways SOC v BDFM Publishers (Pty) Ltd and Others [2016] 1 All SA 860 GJ from 31.
[21] See, inter alia sections 188(3) and 195(1)(g) of the Constitution.

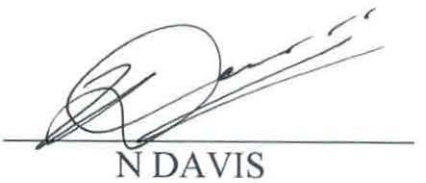
the balance of convenience, is therefore not met in that it is more "convenient" that the requirements of transparency be satisfied, than that the Fund's preference for delay of an audit opinion be satisfied.

Conclusion

[33] I therefore find that the Fund has not satisfied the requirements for an interim restraining order and that its application should fail. I find no cogent reason why the customary principle that costs should follow the event should not apply.

Order

[34] The application is dismissed with costs, including the costs of two counsel.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 27 September 2022

Judgment delivered: 30 September 2022

APPEARANCES:

For Applicant:	Adv J Motepe SC together with Adv T Modisenyane
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