



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 083710/2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 11 OCTOBER 2023
SIGNATURE

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

**SHERIFF OF THE HIGH COURT FOR
THE DISTRICT OF CENTURION EAST**

First

Respondent

**PARTIES LISTED IN ANNEXURE "A"
TO THE NOTICE OF MOTION**

Second Respondent

Summary: *Stay of execution – court’s discretion – Road Accident Fund seeking to rely on litigation regarding a review of its policy not to pay medical expenses of plaintiffs paid by their medical funds – insufficient grounds to halt execution process in respect of court orders validly obtained in terms of the existing law – stay refused.*

ORDERS

The application is dismissed, with costs.

JUDGMENT AND REASONS FOR THE ORDER

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. The order was handed down on 28 September 2023 and this judgment constitutes the reasons for that order.

DAVIS, J

Summary of the application

[1] In this matter 62 victims of motor vehicle accidents who have sustained injuries in those accidents have obtained orders and judgments against the Road Accident Fund (The RAF) for the costs of medical treatment received by those victims (hereafter “the plaintiffs”).

[2] The plaintiffs have, upon non-payment of the judgments, issued writs of execution in various Divisions of the High Court and attached movable property of the RAF and intend selling same by way of sales in execution in the normal course of satisfying judgments.

[3] The RAF, when removal of the movables was threatened for purposes of such sales in execution, launched an urgent combined application for a stay of the execution of the writs, which are all to be proceeded with by the Sheriff of the High Court for the District of Centurion East (the Sheriff).

[4] The basis for the stay of execution is the RAF's pursuit of a directive issued by it in terms whereof it resolved not to pay claims of plaintiffs for medical expenses which had been paid by medical schemes¹. This directive has been set aside by this court² and leave to appeal has been refused. On application to it, the Supreme Court of Appeal has similarly refused leave to appeal. A final attempt at obtaining leave to appeal the review and setting aside of this directive is pending before the Constitutional Court³.

The law regarding claims for recovery of medical expenses paid by medical schemes in circumstances such as the present

[5] Section 17(1) of the Road Accident Fund Act 56 of 1996 (the Act) obliges the RAF to compensate third parties such as the plaintiffs for any loss or damages suffered as a result of the negligent or wrongful conduct of the driver of a motor vehicle.

[6] The Constitutional Court has, in *Law Society of South Africa v Minister of Transport*⁴ at [25] explained that, in order to succeed with a claim for compensation as contemplated in section 17(1), a plaintiff must "... show that

¹ Directive 12(8) 2020 the relevant position of which reads: "All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. The regions must use the prepared template rejection letter ... to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred expenses relating to the past medical expenses claimed. Therefore, there is no duty on the RAF to reimburse the claimant".

² Granted by Mbongwe J in *RAF v Discovery Health (Pty) Ltd and Another* (2022/016179) [2023] ZAGPPHC 92 (23 January 2023)

³ CCT: 106/23 It had been lodged on 24 April 2023 and there was, to date of hearing, no outcome in respect thereof.

⁴ 2011(1) SA 400 (CC)

he or she has suffered loss or damages as a result of personal bodily injury ... arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent”.

[7] A plaintiff must therefore prove a claim for patrimonial damages, calculated on a delictual basis. This involves the comparison of a plaintiff’s patrimony before and after the commission of the delict. In claims against the RAF, this means a comparison of the plaintiff’s position had the motor vehicle accident not occurred as opposed to the position after the accident had occurred and any loss or costs occasioned thereby.

[8] In calculating the loss referred to above, the Supreme Court of Appeal has explained that “... *in determining a plaintiff’s patrimony after the commission of the delict, advantageous consequences have to be taken into account. But it has been recognized that there are exceptions to the rule*”⁵.

[9] The relevance of the above, is the following: the RAF appears to contend that, insofar as those plaintiffs whose medical expenses incurred as a result of injuries suffered from motor vehicle accidents have been paid by medical schemes, those plaintiffs have experienced “advantageous consequences”. They have therefore not suffered a loss or reduction in patrimony and are therefore not entitled to claim those expenses from the RAF.

[10] Attractive as this reasoning may at first blush appear, particularly from the perspective of the RAF, it has been held by the Supreme Court of Appeal that making provision for the payment of medical expenses (by those members of society who can afford it, either on their own or with assistance of their

⁵ *Erasmus, Ferreira & Ackerman v Francis* 2010 (2) SA 228 (SCA) at [16] and *Thomson v Thomson* 2003 (5) SA 541 (W) at 547H – I.

employers) by way of participation in medical aid schemes, amounts to taking out insurance for the payment of future or unforeseen expenses.⁶

[11] Once a plaintiff is found to have insured himself or herself against a loss which may be suffered as a result of an uncertain future event “...it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law baulks at the wrongdoer to benefit from the plaintiff’s own prudence in insuring himself or herself from a third party’s benevolence or compassion in coming to the assistance of the plaintiff”⁷. Although the RAF is not a wrongdoer, it has statutorily been placed in the shoes of the wrongdoing driver.

[12] It is trite that post-accident sympathetic employment or remuneration paid for purely altruistic reasons are excluded from the calculation of claims for loss of income claimed against the RAF⁸.

[13] It is said that the payment of the medical expenses by a medical scheme in circumstances as above, is something collateral to such a plaintiff’s claim against the RAF⁹. Put differently, the participation by a plaintiff in a medical aid scheme and his contractual right to demand payment from the scheme is something between the plaintiff as a member and the scheme. It is irrelevant to the obligations of the RAF and it is said to be *res inter alios acta*, that is

⁶ *Bane v D’Ambrosi* 2010 (2) SA 539 (SCA).

⁷ *Zysset and others v Santam Ltd* 1996 (1) SA 273 (CC) at 278 C – D.

⁸ *Santam Versekeringsmpy Bpk v Byleveldt* 1972 (3) SA 146 (A) and *BEE v RAF* 2018 (4) SA 366 (SCA) at [101].

⁹ *Mooideen v RAF* Case No 17737/2015 of 11 December 2020 WCHC.

something which is a matter between other parties, but not as between a plaintiff and the RAF as defendant¹⁰.

[14] As the law stands, the RAF is therefore obliged to compensate the plaintiffs for the past medical expenses incurred as a result of injuries suffered in motor vehicle accidents as contemplated in section 17 of the Act, even if the plaintiffs' medical aid schemes have paid for those expenses.

Contractual obligations

[15] There is a further angle to the present application. All the plaintiffs in question, incorporated by way of a list annexed to the RAF's application for a stay of execution as "Annexure A", are contractually obliged in terms of the rules of their medical aid schemes (in the majority of cases, Discovery Health) to recover the medical expenses from the RAF and, upon receipt thereof, to repay it to the relevant medical scheme. It is for these reasons that one often finds the stipulation that these claims must be paid to the plaintiffs' attorneys who then see to the direct payment thereof to the medical schemes.

[16] Had there been complete subrogation, as in general short-term insurance claims, the scheme would have stepped into the shoes of the plaintiffs but for various reasons, including the pursuit of other heads of damages by the plaintiffs, this does not happen in RAF matters¹¹.

The claim for a stay

[17] The RAF sought to unilaterally upset the whole scheme of law and, as already mentioned above, issued a directive preventing the entertainment of

¹⁰ See the discussion of *res inter alios acta* in *Erasmus, Ferreira & Ackerman* (supra) at par [15] and *Rayi NO v RAF* [2010] ZAWCHC 30 (22 February 2010) as well as Cooper, *Delictual Liability in Motor Law*, Juta, 1996 at 265 -266 (Cooper).

¹¹ See also Cooper (Supra) at 266.

claims by plaintiffs whose medical schemes had paid some or all of the expenses.

[18] As already indicated, this court, per Mbongwe J, has set aside the RAF's said directive and declared it invalid. Hereafter, the RAF unsuccessfully applied for leave to appeal from the court a quo and the Supreme Court of Appeal and now has an application for such leave pending before the Constitutional Court.

[19] Not only does the RAF in the interim seek to implement its directive in respect of claims submitted to it until it obtains the necessary leave to appeal, but argues that, pending adjudication of that application, plaintiffs should be prevented from enforcing those claims for past medical expenses, even when those claims had been cemented in orders of this court.

[20] In none of the 62 matters listed in said Annexure A has the RAF delivered a rescission application. Even though the papers intimated that this may happen in future, counsel for the RAF could not furnish any firm indication as to what the RAF's intention would eventually be in respect of those matters, should it be successful in changing the law by way of its directive and by way of the related successful litigation on the Constitutional Court. As the success of that litigation is still *sub judice* in respect of the application for leave to appeal, it would be improper for this court to say more about the subject than what Mbongwe J has already said.

A stay of execution is discretionary

[21] Rule 45A of the Uniform Rules grants this court the power to stay the execution of a court order. This appears to be a regulatory formulation of the Court's common law inherent power to regulate its procedures, now entrenched

in section 173 of the Constitution¹². In terms of the rule a court may grant such a stay or suspension of execution “for such period as it may deem fit”.

Evaluation

[22] This court regularly grants stays of execution in instances, for example, where a person’s primary residence is the subject of execution and leniency is requested for an opportunity to pay the arrears due to the mortgagee and reinstate the credit agreement.

[23] Although the plaintiffs are admittedly not in comparable dire straights as mortgagors, neither is the RAF. The RAF is not a stranger to writs of execution but has not claimed a feared “implosion” as it did in *RAF v Legal Practice Council*¹³, should the execution not be stayed and should it, in order to stave off the sale of its movables, have to pay the R33 601 521,33 being the total of amounts listed in Annexure A to the Notice of Motion.

[24] In considering whether to exercise its discretion to stay execution, a court will be guided by factors usually applicable to interim interdicts or where “real and substantial injustice” requires such a stay¹⁴.

[25] Applying the principles applicable to interim interdicts¹⁵ and even assuming that a *prima facie* right, even though open to some doubt has been established, the RAF asserts that “irreparable harm” will befall it if it is required to make payment whilst there is a “possibility” that the underlying causa “*may ultimately be removed, i.e where the underlying causa is the subject-matter of an ongoing dispute between the parties*”¹⁶.

¹² See also *RAF v Legal Practice Council* 2021 (6) SA 230 (GP) at par [30] (*RAF v Legal Practice Council*).

¹³ 2021 (6) SA 230 (GP).

¹⁴ *Gois t/a Shakespears Pub v Van Zyl & Others* 2011 (1) SA 148 (LP) (*Gois*).

¹⁵ Being the existence of a *prima facie* right, apprehension of irreparable harm, the balance of convenience and the absence of another satisfactory remedy. See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

¹⁶ *Gois* (supra) at [35].

[26] This assertion is, in my view, put too strong by the RAF. Firstly, there is no ongoing dispute currently between the RAF and any of the plaintiffs. No rescission applications have been brought. The RAF is simply litigating about a generalized proposition put forward by it to change the law as it stands.

[27] Secondly, while litigating in this fashion, the RAF is unilaterally refusing to comply with procedurally validly obtained existing court orders. Section 165(5) of the Constitution prohibits organs of state, such as the RAF, to do so.

[28] Thirdly, the orders were all granted in terms of Rule 34 A, meaning they can be revisited at a later stage.

[29] Fourthly, the RAF claims that, should it make payment of the amounts claimed in the writs and, should it be successful in its Constitutional Court bid and, should it as a consequence be entitled to have the writs of execution set aside, it would not be able to recover the amounts paid out. This apprehension appears to be more illusory than real: the medical funds in question have indicated that, should such a scenario occur, they would be in a position to repay the monies but, moreover, the RAF would be able to set-off such prospective repayments against the balances of the claims. Despite alleged extensive investigations into the matters, the RAF has not placed any evidence or particularity of claims before the court, supporting the “irreparability” of any interim payment. There is also no explanation as to why some of the claims have partially been paid, but the RAF refuses to pay the balances.

[30] Faced with an similar situation, but at a time when the RAF had not yet lodged its application for leave to appeal in the Constitutional Court, the enforcement of claims for past medical expenses had been upheld against the RAF¹⁷.

¹⁷ *Watkins v RAF* (19574/2017) [2023] ZAWCHC 14 (8 February 2023).

[31] Moreover, the RAF had even been in default of making payment of the orders listed in Annexure A which pre-dates the directive in question. This smacks of contempt, even bearing in mind that the orders are *ad pecuniam solvendam* and not *ad factum praestandum*¹⁸, when perpetrated, not by an impecunious judgment debtor, but by way of a conscious decision by an organ of State not to abide by court orders.

[32] Another basis on which the RAF contended that it has satisfied the requirements of an interim interdict which bears mention, is the fact that, if it is forced to make payments of the writs of execution, it would contravene the provisions of the PFMA¹⁹, namely by making “irregular” or “wasteful” payments or incurring “fruitless expenditure”. This proposition simply has to be stated to make its lack of foundation apparent. Compliance with an existing court order can hardly be found to be irregular and therefore in contravention of the PFMA.

[33] I therefore find that the RAF has not satisfied the requirements of an interim interdict, particularly relating to perceived irreparable harm or lack of alternate remedies. I further find that there are no other “grave injustices” which might occur, should execution of the writs not be stayed, which would merit the exercise of the court’s discretion in favour of the RAF. It follows that the claim for a stay of execution of the writs in question should be refused.

Orders

[34] For the above reasons, I granted the following order on 28 September 2023.

The application is dismissed, with costs.

¹⁸ Which is the distinction between orders which can be enforced by way of a writ of execution and those which are to be sanctioned by findings of civil contempt of court.

¹⁹ *Public Finance Management Act 1 of 1999*.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 29 August 2023

Judgment delivered: 11 October 2023

APPEARANCES:

For the Applicant: Adv K. A. R Thobakgale

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For the 2nd Respondents: Adv B. D Stevens

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