



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: **6 November 2023**

SIGNATURE:.....

CASE NO: 29459/2021

In the matter between:

MAUTLA, LESEDI DIKELEDI	1ST APPLICANT
STEYN, ANTOINETTE ELIZABETH BIANCA	2ND APPLICANT
DIPPENAAR, GERMARI	3RD APPLICANT
STRAUSS, JOHANNES CHRISTOFFEL	4TH APPLICANT
SILUMA, NOMTHANDAZO ELIZABETH	5TH APPLICANT
KUBOKO, SINOVUYO	6TH APPLICANT
RADEBE, NONHLANHLA CECILIA	7TH APPLICANT
NDIMA, OPOLA	8TH APPLICANT
W E EMERGENCY RESPOND TEAM (PTY) LTD	9TH APPLICANT
And	
THE ROAD ACCIDENT FUND	1ST RESPONDENT
THE MINISTER OF TRANSPORT	2ND RESPONDENT
MSIBI, T N.O	3RD RESPONDENT
LETSOALO, C N.O	4TH RESPONDENT
THE LEGAL PRACTICE COUNCIL	5TH RESPONDENT

Coram: Opperman *et* Millar JJ & Ally AJ

Heard on: 9 May 2023

Delivered: 6 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 6 November 2023.

JUDGMENT

THE COURT

INTRODUCTION

- [1] This is an application in which the applicants seek the review and setting aside of the decisions to adopt and implement a management directive, a supplier communication notice, a board notice and a claim form substitution notice (the Decisions) issued by the first respondent, the Road Accident Fund (RAF), relating to the manner in which it receives and deals with claims that are submitted to it.
- [2] The applicants are all persons who claim an entitlement to submit claims (either as persons themselves injured and entitled to do so or as suppliers of medical services to such persons) to the RAF. The applicants all made common cause with each other in seeking the reviewing and setting aside of the Decisions and will be referred to in this judgment collectively as such.
- [3] Insofar as the respondents are concerned, besides the RAF, all the other respondents, save for the Legal Practice Council (LPC) are all parties connected in one way or another with either the oversight of the RAF – in

the case of the Minister of Transport - or in its management and operations – in the case of Ms. Msibi and Mr. Letsoalo, the Chair of its Board and its Chief Executive Officer respectively. The RAF, Ms. Msibi and Mr. Letsoalo opposed this application and will for convenience be referred to collectively in this judgment as the RAF.

- [4] The Minister of Transport gave notice of his intention to abide the decision of the Court and the LPC took no part in the proceedings.
- [5] The RAF is a statutory body established in terms of the Road Accident Fund Act ¹ (the Act) whose object is “. . . *the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.*” ² In achieving this object it is required to, *inter alia*, engage in “*the investigation and settling*” of claims submitted to them.³ By no account is the RAF simply a passive observer or simply a processor of claims submitted to it.
- [6] The protection afforded by the RAF to persons injured in consequence of the negligent driving of motor vehicles extends beyond that which a person would ordinarily (but for the Act) be able to recover from a negligent driver.
- [7] The benefits which the Act provides, subject to the fault of the negligent driver being established, include *inter alia* a lifetime of future medical and hospital care⁴ as well as an entitlement to claim for compensation in

¹ 56 of 1996, as amended.

² Section 3 of the Act.

³ Section 4 of the Act which provides:

“4 Powers and functions of Fund

(1) The powers and functions of the Fund shall include-

- (a) the stipulation of the terms and conditions upon which claims for the compensation contemplated in section 3, shall be administered;*
- (b) the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, has been established;*
- (c) the management and utilisation of the money of the Fund for purposes connected with or resulting from the exercise of its powers or the performance of its duties; and*
- (d) procuring reinsurance for any risk undertaken by the Fund under this Act”*

⁴ Section 17(4)(a) which provides: “Where a claim for compensation under subsection (1) –

- (a) Includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, to furnish such undertaking, to compensate –*

circumstances where the negligent driver is unknown or unidentified and at common law the injured person would otherwise have not been able to make any claim.

[8] The incidence of road collisions in the Republic has grown steadily over the years. The consequence has been an ever increasing number of claims which the RAF has to receive, process, investigate and then settle.

[9] Such is the importance of the RAF to victims of road accidents that the Supreme Court of Appeal in *Road Accident Fund v Busuku*⁵ stated that:

“ . . . it must be recognised that the Act constitutes social legislation and its primary concern is to give the greatest possible protection to persons who have suffered loss through negligence or through unlawful acts on the part of the driver or owner of a motor vehicle.”

and

*“ . . . the provisions of the Act must be interpreted as extensively as possible in favour of third parties in order to afford them the widest possible protection.”*⁶

[10] The present application for review concerns the implementation and effect of the Decisions taken by the RAF, ostensibly to better achieve its purpose and to improve operations.

[11] The applicants seek to review and set aside, with retrospective effect, the following:

-
- (i) *The third party in respect of the said costs after the costs have been incurred and on proof thereof; or*
 - (ii) *The provider of such service or treatment directly, notwithstanding section 19(c) or (d); In accordance with the tariff contemplated in subsection 4(B)."*

There is no tariff as referred to in s 17(4)(a)(ii) that is presently applicable. The applicability of the published tariff, which has never been amended, was found by the Constitutional Court in *Law Society of South African & Others v Minister of Transport & Another* 2011 (1) SA 400 (CC) to be unconstitutional.

⁵ 2023 (4) SA 507 (SCA) at para [6]. See also the reference in para [7] to *Multilateral Motor Vehicle Accident Fund v Radebe* 1996 (2) SA 145 (A) at 152E-I.

⁶ *Ibid.*

- [11.1] The decision to adopt and implement the Management Directive⁷ titled “1/2021 – Compulsory Information to be submitted when lodging a claim for compensation with the RAF”, dated 8 March 2021, and any directives or instructions issued in terms thereof (the Management Directive).
- [11.2] The decision to adopt and implement the Supplier Claims External Communication⁸ (the Supplier Communication) dated 19 May 2021.
- [11.3] The decision to publish, adopt and implement the “BOARD NOTICE 58 of 2021”⁹ with description “Road Accident Fund, Stipulation of Terms and Conditions upon which Claims for the Compensation shall be Administered”, published in the Government Gazette on 4 June 2021, and any directives or instructions issued in terms thereof (the Board Notice).
- [11.4] The decision to publish, adopt and implement the “SUBSTITUTION OF RAF1 CLAIM FORM”¹⁰ published in the Government Gazette on 4 June 2021, and any directives or instructions issued in terms thereof (the Substitution Notice).
(collectively, the Decisions)

REVIEW

- [12] It is the case for the applicants that the Decisions amount to administrative action that stands to be reviewed under the Promotion of Administrative Justice Act¹¹ (PAJA). In the alternative, under the principle of legality.

⁷ A written directive from the office of the Chief Executive Officer of the Road Accident Fund.

⁸ An external communication issued by the office of the Acting Chief Operations Officer of the Road Accident Fund.

⁹ Government Gazette No. 44674 of 4 June 2021.

¹⁰ Government Gazette No. 46652 of 4 July 2022.

¹¹ Act 3 of 2000.

[13] The argument is predicated on section 1(a)¹² of PAJA in as much as the consequences of the Decisions affect the rights of not only the applicants but of every person who may seek succour in a claim for compensation against the RAF. This applies also particularly to the implementation of the Substitution Notice. Each one individually and collectively, it was argued, is a decision taken in the performance of a public function in terms of the Act.

[14] Are any one of the Decisions administrative actions as contemplated in PAJA?

[15] In *SARFU*,¹³ the Constitutional Court held that in determining whether a particular act constitutes administrative action, the inquiry should focus on the nature of the power exercised and not the identity of the actor. The Constitutional Court stressed that the mere fact that the decision-maker is part of the executive arm of government does not mean that the action is executive. The relevant question is whether the task itself is administrative. In this regard, the focus of the enquiry must be the “*nature of the power*” the decision-maker is exercising.¹⁴ The Court went on to note a number of other considerations that may be relevant to determining “*which side of the line a particular action falls*”:

*‘The **source** of the power, though not necessarily decisive, is a relevant factor. So, too, is the **nature** of the power, its **subject-matter**, whether it involves the **exercise of a public duty** and how closely it is **related** on the one hand to **policy matters**, which are not administrative, and on the other to **the implementation of legislation**, which is.’ (emphasis provided)*

[16] The Court held that when a senior member of the executive is engaged in the implementation of legislation, that will ordinarily constitute administrative

¹² “administrative action means any decision taken, or any failure to take a decision, by –
(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; . . .” .

¹³ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

¹⁴ *SARFU* at para 141.

action. The jurisprudence following from the SARFU decision has established that the implementation of legislation by the Executive is an administrative function.¹⁵

- [17] In *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College*¹⁶ the Constitutional Court distinguished between the essentially political functions of formulating policy and initiating legislation, on the one hand, with the implementation of legislation, which is typically administrative, on the other.¹⁷
- [18] O'Regan J explained the difference between policy formulation in the broad (political) sense and in the narrower (administrative) sense. The Court held that the Provincial Government's decision to adopt a particular subsidy formula and the mechanism for allocations was "*policy formulation in the narrow sense or within the framework of legislation*" and was thus administrative action.
- [19] The mere fact that a decision is underpinned by policy does not exclude it from the realm of administrative action. O'Regan J in *Ed-U-College* noted that it is quite possible for action to be administrative even when it has political implications.¹⁸ Our courts have also accepted that certain types of policy decisions – although not having the force of law – will constitute administrative action and be susceptible to review under PAJA.

¹⁵ In *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) the Court found that the Minister's powers to suspend the activities of a company and to attach or freeze its assets was subject to section 33 and therefore administrative action. Similarly, in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 38, the Constitutional Court held that the decision of the Premier of Mpumalanga Province to withdraw state bursaries from state-aided schools amounts to administrative action.

¹⁶ 2001 (2) SA 1 (CC)

¹⁷ See paragraph 18:

"Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action."

¹⁸ *Ed-U-College* at para 17.

- [20] In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*¹⁹ the SCA rejected the argument that the Minister's decision to let waterfront property was a policy decision. Nugent JA found that it was a case of *policy execution* rather than *policy formation* and was thus administrative action. Nugent JA stated "*there will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect.*"²⁰
- [21] Even if we were wrong on finding that the Decisions (or some of them) are administrative action, there is no dispute that a legality review would still be available to the Applicants. By virtue of our findings herein, it matters not whether the Decisions (or some of them) are labelled as executive action which is exempt from judicial review under PAJA or whether the Decisions (or some of them) may be reviewed under the principle of legality. In this latter regard (the legality route) we are conscious of being constrained in the following respects: This court may only evaluate whether the Decisions are *rationally connected to their objectives* of enabling efficient and effective administration of claims whilst accepting that section 24(1)(a) and (4) of the Act is directory and not peremptory. Only substantial compliance is required.
- [22] This court may not interfere with the Decisions merely because there may be another way to achieve the objectives. This court also may not interfere with the Decisions because it would prefer alternative approaches.²¹ This court must thus endeavour to ascertain whether the means employed are *rationally related to the purpose* for which the power was conferred.
- [23] The applicants argued that each of these represents a decision which has a direct effect on the rights of the applicants. Notwithstanding this, there was no engagement with either the legal profession or the wider public, both of

¹⁹ 2005 (6) SA 313 (SCA).

²⁰ *Greys Marine* at para 27. The foregoing analysis has been extracted (and applied to current facts) from *Fuel Retailers Association v Minister of Energy and Others* (28818/2014)(2023) ZAGPJHC 1067 (22 September 2023) at paras [39] to [49] a judgment penned by I Opperman J

²¹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para [51].

whom have a direct interest in the way in which the Act is to be administered, insofar as the submission of a claim is concerned.²² Any requirement which may impede the submission of a claim may well (and in this case does) impact upon its enforceability and whether compensation is ultimately to be paid.

- [24] The right to claim compensation in terms of the Act is a right that is enjoyed by every person within the Republic, subject to compliance with the requirements of the Act. On this aspect section 4(1) of PAJA, which requires procedural fairness in matters where the rights of the public are “*materially and adversely*” affected, is engaged.
- [25] It is common cause that at no stage was there any consideration afforded to any of the rights of the public by calling for participation and input in respect of the anticipated Decisions. It was done without the implementation of any procedurally fair process/es. The Decisions taken were without engagement with any affected persons or the public and were without more imposed upon them.
- [26] The claim form and requirements for the submission of a valid claim are the gateway to any claim for compensation and hence there is a necessity for proper consideration and consultation before any such requirements that are not specifically prescribed by statute can even be considered, let alone imposed.²³
- [27] The RAF for its part argued that each of these was not a “*decision*” or “*administrative action*” because it did not have any external effect on rights. It is difficult to fathom how this can be advanced as the purpose of the Decisions were, in part, to dictate what information would be acceptable and the failure to comply would constitute a bar to compensation. Once the Decisions were communicated to the wider public and their effect was or

²² Section 3(1) of PAJA.

²³ *Esau & Others v Minister of Co-Operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA).

could be either '*material*' or '*adverse*', this brought them squarely within the rubric of PAJA. The argument that PAJA is of no application in this matter is, for this reason, untenable.

[28] Of significance is the fact that the RAF Board had created a Claims and Legal Committee (LECOM) who had decided to publish the notices underpinning the Decisions. The Act does not specifically provide for the creation of Board sub-committees. Although it does not prohibit the creation of committees by the RAF Board, LECOM has no legal or statutory authority. The Board was not asked to consider the matter. The Board was simply informed of the Decisions that had already been taken by LECOM.

[29] We conclude that the Decisions constitute administrative action reviewable in terms of PAJA. It is accordingly through this lens that the Decisions must be considered.

THE REQUIREMENTS FOR THE SUBMISSION OF A CLAIM

[30] On the requirements for the submission of a valid claim, the Supreme Court of Appeal in *Pithey v Road Accident Fund*²⁴ held:

“[15] Since the claim form and the documents submitted to the Fund are pivotal to a decision in this matter, it is necessary to consider the statutory provisions pertaining thereto. First, the relevant parts of s 24 read as follows:

'(1) A claim for compensation and accompanying medical report under section 17(1) shall —

(a) be set out in the prescribed form, which shall be completed in all its particulars

²⁴ 2014 (4) SA 112 (SCA) at para [15] – [19]. Para [19] in particular approved in *Busuku supra*.

(b) *be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing.*

...

(4) (a) *Any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act.*

(b) *A clear reply shall be given to each question contained in the form referred to in subsection (1), and if a question is not applicable, the words 'not applicable' shall be inserted.*

...

(5) *If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.'*

[16] *Second, s 19 excludes liability in the event of a failure to provide information in a particular form. Section 19(f) provides that if the third party refuses or fails —*

'(i) *to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out or*

(ii) *to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof* — the Fund shall not be obliged to compensate the third party in terms of s 17 for any loss or damage. The affidavit and copies of statements and the documents mentioned in s 19(f) are required to provide details of how the accident giving rise to the claim arose. It is abundantly clear that the purpose of this provision is, *inter alia*, to furnish the Fund with sufficient information to enable it to investigate the claim and determine whether or not it is legitimate.

[17] *I pause to say something about the primary purpose and objectives of the Act. It has long been recognised in judgments of this and other courts that the Act and its predecessors represent 'social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle'. Accordingly, in interpreting the provisions of the Act, courts are enjoined to bear this factor uppermost in their minds and to give effect to the laudable objectives of the Act. But, as the full court correctly pointed out, the Fund, which relies entirely on the fiscus for its funding, should be protected against illegitimate and fraudulent claims.*

[18] *It has been held in a long line of cases that the requirement relating to the submission of the claim form is peremptory and that the prescribed requirements concerning the completeness of the form are directory, meaning that substantial compliance with such requirements suffices. As to the latter requirement this court in SA Eagle Insurance Co Ltd v Pretorius reiterated that the test for substantial compliance is an objective one.*

[19] *In Multilateral Motor Vehicle Accidents Fund v Radebe 1996 (2) SA 145 (A) at 152E – I Nestadt JA said:*

'It is true that the object of the Act is to give the widest possible protection to third parties. On the other hand, the benefit which the claim form is designed to give the fund must be borne in mind and given effect to. The information contained in the claim form allows for an assessment of its liability, including the possible early investigation of the case. In addition, it also promotes the saving of the costs of litigation. . . . These various advantages are important and should not be whittled away. The resources, both in respect of money and manpower, of agents and particularly of the fund are obviously not unlimited. They are not to be expected to investigate claims which are inadequately advanced. There is no warrant for casting on them the additional burden of doing what the regulations require should be done by the claimant.'

Although these remarks were made in a different context, they articulate, in my view, the purpose that the claim form is intended to serve." (footnotes omitted)

- [31] It must be emphasized at the outset that the submission or delivery of a claim is a precursor to the RAF's "investigation" obligations. The Act specifically provides in section 24(5) that after receiving the claim, the RAF then has 60 days within which to object to the validity of the claim. If there is no objection to the validity of the claim, this does not mean that an otherwise invalid claim is then deemed to be valid. Section 24 however deals only with procedural matters and the deeming provision does not apply to the substantive requirements. This is well established in our law.²⁵
- [32] There are several overlapping periods from submission of a claim which are of application – the 60-day period within which to object to the validity of the claim together with the 120-day period (at least)²⁶ in terms of section 19(6)

²⁵ *Thugwana v Road Accident Fund* 2006 (2) SA 616 (SCA) at para [9] and the reference to *Krishke v Road Accident Fund* 2004 (4) SA 358 (W).

²⁶ The period is calculated from the date upon which the claim is delivered to the RAF and is in terms of s 19(6)(a) 120 days from that date provided that the period may be extended for so long as the claimant has not complied with s19(f)(i) by submitting "an affidavit in which particulars of the accident which gave rise to the claim concerned are set out" or s 19(f)(ii) by furnishing "copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof;"

during which the claimant is barred as a matter of law from proceeding with summons unless there has been a repudiation. These periods are provided for in the Act for the sole benefit of the RAF and to afford it the opportunity to conduct its “*investigation*”.

[33] The RAF was precognized to what was contemplated would constitute substantial compliance. This much is apparent from the contents of the RAF1²⁷ in force at the time the Decisions were implemented. Section 20 of the form states:

“Please complete the following information to validate your claim for substantial compliance with Section 24 of the RAF Act.

1. *The identity (of the injured.) - (paragraph 1).*
2. *The date and place of accident (paragraph 5)*
3. *Identify the insured motor vehicles (paragraph 6 / 7 and 8).*
4. *A completed statutory medical report (paragraph 22);*
5. *Amount claimed as compensation (paragraph 19);*
6. *Attach accounts, vouchers, invoices etc. to support your claim for medical expenses;*
7. *Complete this form as prescribed in Section 24 of the RAF Act.*
8. *In the event that loss of support or funeral expenses are claimed provide documentary proof of the death of the deceased; and*
9. *...*
10. *...”*

THE MANAGEMENT DIRECTIVE AND THE SUPPLIER COMMUNICATION

[34] The Management Directive issued on 8 March 2021 sought to impose a requirement for the submission of “*Compulsory Supporting documents*

²⁷ GN R770 in Government Gazette 31249 of 21 July 2008.

required for RAF Claims Administration” and was addressed to “Plaintiff Attorneys and anyone submitting on behalf of Claimants”.

[35] The preamble to the Management Directive states:

“The Road Accident Fund is on a transformation journey to move away from a litigation – based operation towards a strong claims administration capability. The board has approved strategic plans that will see RAF operate sustainably and managing claims within 120 days. The focus has shifted to a product approach when assessing death and injury benefits.”

[36] The effect of the Management Directive is to require *“Compulsory Supporting documents / Information required for RAF Claims Administration.”* It then provides for what are said to be the specific *“Compulsory Documents”* that need to be submitted for the various types of claims – personal injury, loss of support or funeral expenses.

[37] It concludes with the following: *“Henceforth, the documents listed in this directive must be attached to all claims submitted to the RAF, effective 1 April 2021.”*

[38] The effect of this is that the RAF, from 1 April 2021, with only 3 weeks’ notice, when faced with the submission of claims, refused to accept those claims which did not have all the documents and that were then prescribed as being mandatory.

[39] The Supplier Communication issued on 19 May 2021 was titled *“Supplier Claims – Compulsory Supporting Documents for Lodging Claims with the Road Accident Fund.”* This communication specifically incorporated the requirements of the Management Directive of 8 March 2021 as requirements which would also apply to suppliers but went further and provided for a revised *“supplier process”* and the imposition of a *“claims lodgement pre-assessment template”*.

[40] An ancillary requirement was set out in the revised supplier process annexure reflected under the heading “Notes”, that:

“There is a duty incumbent on all parties, including suppliers, to ensure that their claims are lodged on time and that they do not prescribe due to the effluxion of time.”

and

“Late submission of a claim may compromise a claim since it has to go through pre-assessment to ensure it meets the minimum requirements.”

[41] What is readily apparent is that the subsequent Supplier Communication was intended to bring suppliers within the ambit of the Management Directive although there was no amendment or substitution of the RAF2 suppliers claim form either by way of the Board Notice or subsequently.

THE BOARD NOTICE AND ITS SUBSEQUENT SUSPENSION

[42] The Board Notice issued on 4 June 2021 sought by publication in the Government Gazette to elevate the status of the contents of both the Management Directive and the Supplier Communication from internal administrative requirements to “legal requirements” and sought to clothe these with legislative force which they hitherto had not had.

[43] If there were any doubt about the purpose for which the Board Notice had been published, paragraph 3 of the Notice provided that *“These terms and conditions took effect on 1 April 2021.”* - The same day that the Management Directive was implemented.

[44] Furthermore, the gazetting of the Board Notice also sought to substitute the existing RAF1 claim form which in its terms represented the aggregation and consolidation of all the requirements set out in the Decisions.

- [45] The applicants, aggrieved at the Decisions, applied for and were granted an interdict against their implementation on 15 June 2021.
- [46] On 22 June 2021 and through the issue of a further Board Notice 65 of 2021, which was published,²⁸ the Board Notice 58 of 2021 was withdrawn and the implementation of the new RAF1 which had accompanied it suspended with *“immediate effect.”* The notice went on to provide that the suspension was *“until further notice to be published in the Gazette, the effective date of the substitution of the RAF1 form.”*

WHO MAY PUBLISH NEW REGULATIONS IN TERMS OF THE ACT?

- [47] It was argued for the applicants that section 26²⁹ of the Act empowers only the Minister to make regulations and that it is neither contemplated nor authorised that the authority of the Minister in terms of the Act can be exercised by the RAF through either Management Directives or Board Notices. In as much as it was argued for the RAF that section 4(1)(a)³⁰ of the Act empowered it to do so, the applicants argued that this was only permissible within the confines of the internal administration of the RAF to issue such Directives and Notices. These do not acquire the force of law and cannot impermissibly conflict with the provisions of the Act. The applicants referred to the provisions of section 4(1)(a) which unequivocally state that the power and functions of the RAF to stipulate terms and conditions applies to the way claims *“shall be administered”*.
- [48] The applicants argued that since the Decisions individually and in their combined effect, were decision/s which affected all the applicants, they could not simply be withdrawn or suspended, but required the imprimatur of the Court to set the Decisions aside. The withdrawal of the Management

²⁸ Government Gazette 44746 of 22 June 2021.

²⁹ *“The Minister may make regulations regarding any matter that shall or may be prescribed in terms of this Act or which is necessary or expedient to prescribe in order to achieve or promote the object of this Act.”*

³⁰ Section 4(1)(a) provides that: *“The powers and functions of the Fund shall include – (a) the stipulation of the terms and conditions upon which claims for the compensation contemplated in section 3, shall be administered.”*

Directive, Supplier Communication and Board Notice however did not affect the substituted RAF1, the operation of which was suspended to a future date to be gazetted.

[49] The RAF for its part relied on Regulation 7(1) which provides:

“A claim for compensation and accompanying medical report referred to in section 24(1)(a) of the Act, shall be in the form RAF1 attached as Annexure A to these Regulations, or such amendment or substitution thereof as the Fund may from time to time give notice of in the Gazette.” (our underlining)

[50] The RAF relied on the underlined portion to contend that it was entitled to amend the claim form by publication in the gazette as it had done together with the Board Notice. The argument for the RAF was that Regulation 7(1) empowered it to do so. This Regulation was made by the Minister and so Regulation 7(1) constituted a sub-delegation of the Minister’s power to the RAF.

[51] The Act contains no express provision permitting the Minister to sub-delegate his authority to make regulations, to the RAF. Even if, however, it could be argued that there was an implied authority to sub-delegate in respect of the RAF1 claim form. In this regard the maxim of *delegate potestas non potest delegari* applies. An authority or power delegated cannot be further delegated unless expressly permitted in the enabling legislation³¹, which in this particular case, has not been expressly provided for in the Act.

[52] But the exercise of such sub-delegated power would in any event require that it be consonant with not only the Constitution³² but also the provisions of the Act itself.

³¹ *AAA Investments v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC).

³² *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).

- [53] The Respondents argue that Regulation 7(1) is constitutional. In this regard they argue that the words 'necessary and expedient' in the context of the said regulation, has been fulfilled. However, this argument loses sight of the fact that the regulation must be necessary and expedient. Parliament has delegated the power to the Minister to make regulations and has not given the Minister the further power to sub-delegate. This is the crux of this debate.
- [54] It was argued for the RAF that since the Decisions were subsequently withdrawn and the substituted RAF1 suspended by notice, the present proceedings are moot. This cannot be so. For so long as the substituted RAF1 form that accompanied the Board Notice stands, awaiting gazetting, they too stand, and self-evidently there is neither a withdrawal of those Decisions, notwithstanding the publication of a notice, nor any mootness.
- [55] The Decisions cannot be separated from the substituted RAF1 form and for this reason, those Decisions in any event could not have been withdrawn by the RAF simply by publication in the gazette while the substituted RAF1 form stands. The claimed authority of the RAF in terms of Regulation 7(1) relates only to the substitution of the RAF1 form but that document itself is nothing more than the Decisions clothed and cast as a RAF1 form.
- [56] The substituted RAF1 form that accompanied the Board Notice is substantially different to the one that was in use until 30 June 2022. In this form, the notes relating to compliance pertinently state:
- "a. This is a prescribed form to be completed in respect of claims for compensation under section 17 of the Road Accident Fund (RAF) Act, provided for in terms of section 24(1)(a) of the Act.*
 - b. This form shall be completed in all its particulars and in instances where there are asterisks indicating that supporting documents will be required, such must be included for completeness.*

- c. *Your attention is drawn to the provisions of section 24(4)(a) of the Act which provides that any form referred to in the section which is not completed in all its particulars shall not be acceptable as a claim under the Act.*
- d. *Please take note that when a form submitted to the Fund is not completed in all its particulars and not acceptable as a claim, the provisions of section 24(1)(b) shall not be invoked, and the Fund shall not be obliged to acknowledge receipt thereof.*
- e. ...
- f. ...
- g. ...”

[57] In comparing what the extant RAF1 form required for substantial compliance as set out in section 20 of that form and what is now required in the substituted RAF1 form,³³ the following is readily apparent:

[57.1] The RAF1 claim form to be submitted must now no longer only “*substantially comply*”³⁴ with the requirements of the Act. Insofar as the directions for the completion of the new form state that it “*shall be completed, in all its particulars*”, an additional peremptory requirement that it “*must*” be accompanied by certain specific supporting documents.

[57.2] That absent the completion of the form to the satisfaction of the RAF together with the simultaneous furnishing of the additional documents, the RAF will not “*be obliged to acknowledge receipt thereof.*”

³³ On 30 June 2022, a year after the suspension of Board Notice 58 of 2021, the Minister of Transport, acting in accordance with section 26 of the Act, prescribed a new RAF1 form. This form is of application for claims submitted on or after 1 July 2022 and is identical in all respects to the RAF1 form that was published with Board Notice 58 of 2021. However, its status is not a matter in issue before this Court and so we refrain from any consideration of it.

³⁴ *Ibid Pithey* at para [19].

- [58] What the RAF has done through the implementation of the Decisions and the substituted RAF1 form is to summarily impose conditions for the submission of what it regards as a valid claim and at the same time appropriated to itself the right to decide whether or not the provisions of section 24(1)(b) of the Act are to apply.
- [59] This section provides that a claimant's claim when submitted shall:
- “(b) *be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing.*” [our underlining]
- [60] This is the very complaint of the applicants. During the period 8 March 2021 to 15 June 2021, when the interdict was granted against the RAF for implementation of the Decisions, but even thereafter, the RAF refused to accept or acknowledge receipt of claims that had been submitted to it and which in its view were not valid. Besides the applicants, it is unknown how many represented and unrepresented persons there are whose submitted claims were neither accepted nor acknowledged by the RAF.
- [61] The consequence of this refusal to accept delivery or to acknowledge receipt of delivery of the claims engages the time limits within which claims are to be submitted in terms of the Act.
- [62] Broadly³⁵ speaking, claims in respect of which the identity of the negligent driver or owner of the vehicle concerned is known are to be submitted within 3 years³⁶ of the date of the occurrence and in respect of claims

³⁵ The time periods are extended for certain categories of persons as set out in section 23(2) of the Act. None of these are applicable in respect of any of the applicants before the Court.

³⁶ Section 23(1) of the Act.

where neither the negligent driver nor owner are known (also known as hit and run claims) within 2 years³⁷ of the date of the occurrence.

[63] Furthermore, once a claim has been submitted, it is necessary, in order to avoid prescription of the claim, for a summons to be issued and served within 5 years³⁸ of the date of the occurrence.

[64] The date of delivery of the claim is the essential first step for the enforcement of any rights in terms of the Act. This first step is crucial for claimants because it determines whether or not their claim in the first instance has been submitted timeously. There is no provision in the Act which permits the RAF to refuse to accept the delivery of a claim or to refuse to acknowledge receipt of that claim. Had the legislature contemplated such a situation, it would have provided for it specifically.³⁹

[65] In the case of the Act, the absence of the right to refuse to accept delivery or to acknowledge receipt of a claim does not result in any disadvantage to the RAF in the discharge of its mandate of "*investigation*" of claims.

[66] Fundamentally, this court concludes that the RAF exceeded its powers in issuing and applying the Board Notice in a peremptory way without any statutory authorisation. From what served before us, the Board Notice's did not facilitate the efficient administration of claims but rather reduced the number of claims by creating administrative hurdles to stop claims from being submitted. It resulted in victims of motor vehicle collisions being excluded from claiming compensation. The Act does not contemplate two sets of rules – one by Regulation and another by Board Notices.

³⁷ Regulation 2(1)(b).

³⁸ Section 23(3) of the Act and Regulation 2(1)(c).

³⁹ See for example section 47CB(2) of the National Environmental Management Act 107 of 1998 which provides in the context of condonation for time periods applicable to appeals relating to prospecting, exploration, mining or production : "*The Minister may not accept an application for condonation to submit an appeal contemplated in Section 43(1A) after 30 days has lapsed from the date of the decision by the Minister responsible for Mineral Resources or any person acting under his or her delegated authority.*"

- [67] The delivery and acknowledgement of receipt of a claim does not impede in any way the discharge of the RAF of its mandate in terms of the Act nor does it impose, without more, liability on the RAF.
- [68] The Decisions taken were taken unilaterally and in circumstances where the RAF was not empowered in terms of the Act to do so. There was no prior engagement or consultation⁴⁰ in respect of the imposition of the requirements as a pre-condition to its acceptance of delivery and acknowledgement of receipt of claims submitted to it.⁴¹
- [69] For the reasons set out above, the Decisions and the substituted RAF1 form were neither authorised by the Act nor rationally connected to the achievement of the purpose of the Act.⁴² Properly construed, the making of the Decisions and their implementation are so unreasonable and so inimical to the purpose and provisions of the Act that the RAF in doing so acted in a manifestly unreasonable and unlawful manner.⁴³ The Decisions and substituted RAF1 are unlawful and must accordingly be set aside.

REMEDY

- [70] The applicants seek an order declaring Regulation 7(1) to be unconstitutional and unlawful insofar as it gives the RAF the right to amend or substitute the RAF1 form prescribed in the Regulations.
- [71] They also seek an order setting aside the Decisions together with the substituted RAF1 claim form. Additionally, they seek the consequential relief of an order setting aside any objection or rejection of any claim submitted to the RAF in the period 8 March 2021⁴⁴ to 15 June 2021 in consequence of the Decisions, together with an additional 3-month period

⁴⁰ Section 6(2)(c) of PAJA.

⁴¹ See section 6(2)(a)(i) of PAJA.

⁴² See section 6(2)(f)(i)-(ii)(bb) of PAJA.

⁴³ See section 6(2)(h)-(i) of PAJA.

⁴⁴ In the amended notice of motion, the applicants seek the consequential relief for the period from 8 March 2021, because although the Management Directive only became effective on 1 April 2021, it was enforced from 8 March 2021, its date of publication.

from the date of any order granted by this Court for those affected persons to resubmit their claims. The consequences of the Decisions are far reaching, and it is in the circumstances entirely appropriate for this Court to grant the consequential relief although we intend extending the period from 3 months to 6.

[72] A further aspect not canvassed by any of the parties arises. There may well be other persons, and in particular unrepresented persons, who sought to deliver claims to the RAF during the period in question and were turned away. It is in the circumstances necessary for the RAF to also bring to the attention of all those persons in respect of whom they may have a record alternatively in respect of whom they do not have a record, the terms of the order that this Court intends to make.

[73] It is for this reason that in addition to ordering publication of this order, the time period for the consequential relief, claimed for 3 months by the applicants should more appropriately be set at 6 months so as to accommodate those affected claimants not presently before the Court.

COSTS

[74] The applicants argued that in the event of their success that the RAF be ordered to pay costs on a punitive scale as between attorney and client. It is trite that the award of costs and its scale is a matter that falls within the discretion of the Court.

[75] It was argued for the applicants that the power the RAF exercises has been entrusted to them and that they are accountable for how they fulfil that trust. It is expected of them that they behave honourably, that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. In regard to the RAF, the argument was that:

“This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of person, and bodily integrity, as a result of road accidents. The very mission of the RAF is to rectify those violations, to the extent that monetary compensation and compensation in kind are able to. That places the RAF in a position of great responsibility: Its control of the purse strings places it in a position of immense power in relation to the victims of road accidents.”⁴⁵

[76] In circumstances such as the present where the RAF, through the unlawful Decisions it has taken has subverted the very purpose for which it was created, to the detriment of the very persons it was established to protect, we are of the view that a punitive order for costs is appropriate.

THE ORDER

[77] In the circumstances, it is ordered that:

[77.1] Condonation is granted for the late institution of the review proceedings.

[77.2] Regulation 7(1) of the Road Accident Fund Regulations promulgated by the Second Respondent in terms of section 26 of the Road Accident Fund Act 56 of 1996, is declared to be unconstitutional, unlawful and invalid and is reviewed and set aside to the extent that it confers upon the Road Accident Fund the right to amend or substitute the “RAF1 Form” attached as Annexure A to the Regulations.

[77.3] The following Decisions and actions are reviewed and set aside: in terms of section 8(1) of Promotion of Administrative Justice Act 3 of 2000:

⁴⁵ This was set out in the heads of argument filed on behalf of the 9th applicant and to which the court was referred in particular to *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at para [12].

- [77.3.1] the decision to adopt and implement the Management Directive titled "*1/2021 – Compulsory Information to be submitted when lodging a claim for compensation with the RAF,*" dated 8 March 2021, and any directives or instructions issued, or actions taken in terms thereof.
- [77.3.2] the decision set out in the "*RAF Supplier Claims external Communication*" dated 19 May 2021 which requires the compulsory submission of certain supporting documents for the submission of supplier claims and any directives or instructions issued, or actions taken in terms thereof.
- [77.3.3] the decision to publish, adopt and implement "*Board Notice 58 of 2021*", with description "*Road Accident Fund Stipulation of Terms and Conditions upon which Claims for Compensation shall be Administered*" published in the Government Gazette on 4 June 2021 and any directives or instructions issued, or actions taken in terms thereof.
- [77.3.4] the decision to publish, adopt and implement the "*SUBSTITUTION OF RAF 1 CLAIM FORM*" published in the Government Gazette on 4 June 2021, and any directives or instructions issued, or actions taken in terms thereof.
- [78] It is ordered that consequential upon the orders set out in paragraphs 77.2 and 77.3.1 to 77.3.4 above:
- [78.1] Any objection, or rejection by the RAF of a claim for compensation submitted between 8 March 2021 and 15 June 2021 due to non-compliance with the Management Directive, Board Notice or

Substitution Notice referred to in paragraphs 75.3.1 to 75.3.4 hereof is declared to be null and void.

[78.2] Claimants whose claims were rejected by the RAF between 8 March 2021 and 15 June 2021 due to non-compliance with the Management Directive, Board Notice or Substitution Notice referred to in paragraphs 77.3.1 to 77.3.4 above are afforded a period of 6 months from the date of this order to resubmit their claims in accordance with the provisions of the Road Accident Fund Act.

[79] The RAF is ordered to inform each and every person of whom it has a record, and in respect of whom a claim was submitted during the period 8 March 2021 to 15 June 2021 and whose claim was neither accepted nor acknowledged, of the terms of this order.

[80] The RAF is ordered to inform each and every person of whom it does not have a record, and in respect of whom a claim was submitted during the period 8 March 2021 to 15 June 2021 and whose claim was neither accepted nor acknowledged, of the terms of this order by publication of the whole order in a newspaper circulated nationally on a Friday, commencing the first Friday after the granting of this order, for 4 consecutive weeks and to post a copy of this whole order on its website where it is to remain, prominently displayed on the home page, for a period of not less than 6 months commencing within 7 days of the granting of this order.

[81] The First Respondent is ordered to pay the costs of each of the applicants as between attorney and client, such costs to include the costs consequent upon the employment of more than one counsel where so engaged.

I OPPERMAN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 9 MAY 2023
JUDGMENT DELIVERED ON: 6 NOVEMBER 2023

COUNSEL FOR THE 1ST TO 7TH APPLICANTS: ADV JP VAN DEN BERG SC
ADV E VAN AS
ADV V MABUZA
INSTRUCTED BY: ADAMS & ADAMS ATTORNEYS
REFERENCE: MR JP RUDD

COUNSEL FOR THE 8TH APPLICANT: ADV. B GEACH SC
ADV. F KEHRHAHN
INSTRUCTED BY: MDUZULWANA ATTORNEYS
REFERENCE: MR Z MDUZULWANA

COUNSEL FOR THE 9th APPLICANT: ADV. B GEACH SC

ADV. F KEHRHAHN

INSTRUCTED BY:

ROETS & VAN RENSBURG ATTORNEYS

REFERENCE:

MR J RUITERS

**COUNSEL FOR THE 1st, 3rd &
4th RESPONDENTS:**

ADV J MOTEPE SC

ADV K MVUBU

INSTRUCTED BY:

MALATJIE & CO ATTORNEYS

REFERENCE:

MR T MALATJIE

**THE 2ND RESPONDENT FILED NOTICE TO ABIDE THE DECISION OF THE
COURT**

NO APPEARANCE FOR THE 5TH RESPONDENT