REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 019085/2024

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

_____ _____
DATE SIGNATURE

In the matter between:

VZLR INCORPORATED	First Applicant
SAM BALOYI	Second Applicant
258 INDIVIDUAL APPLICANTS PER ANNEXURE "NOM1"	Third and Further Applicants

and

ROAD ACCIDENT FUND	First Respondent
CHIEF EXECUTIVE OFFICER: ROAD ACCIDENT FUND	Second Respondent
CHAIRPERSON OF THE BOARD: ROAD ACCIDENT FUND	Third Respondent
SEFOTLE MODIBA	Fourth Respondent
BRETT PHILLIPS	Fifth Respondent
SPECIAL INVESTIGATIVE UNIT	Sixth Respondent

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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be March 2024.*

Summary: An urgent review application in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000[1]. In the absence of evidence of an administrative decision, a Court is incapable of exercising its review powers. On the applicants' own version, the Road Accident Fund had not taken or made a decision to put an internal block on the payments due to the applicants. A delay in payment does not amount to an administrative decision in terms of the Promotion of Administrative Justice Act 3 of 2000, neither is an unlawful or an irrational act reviewable under the legality review.

Financial quandaries cannot serve as a ground for urgency. Where a party is armed with a court order, such a party has available to them or it executional steps, particularly when the order or judgment sounds in money. The requirements of Rule 6(12)(b) of the Uniform Rules have not been met. The applicants have an alternative remedy – to take executional steps against the RAF. The unopposed joinder application ought to be struck off the roll with no order as to costs. Held: (1) The application is struck off the roll for want of urgency. Held: (2) The joinder application is struck off the roll with no costs order. Held: (3) The applicants are to pay the costs of the respondents.

JUDGMENT

MOSHOANA J

[1] as amended.

Introduction

[1] As an opening gambit, the Road Accident Fund ("RAF") is presently faced with a great deal of Court orders and settlement agreements requiring it to pay a vast sum of money, amounting to millions of Rands to its claimants. Undoubtedly, the RAF is under immense financial strain. At the time it approached this Court, seeking orders to suspend the writs of executions and seek reprieve of 180 days before the compliance with the said court orders, it was demonstrably haemorrhaging financially[2]. Unrelated to its financial strains, the RAF in some instances took administrative decisions to block payments of claims where allegations of double payments to claimants surfaced. The issue of alleged double payments is currently under investigation in the hands of the Special Investigation Unit ("SIU") following a Presidential Proclamation. In various matters, this Division has made decisions to the effect that the RAF is not entitled to *"take the law into its own hands"* by putting internal blocks on payments[3]. The urgency of this present application is predicated on allegations that the RAF took a decision to put an internal block on the payments that were to be made to the first applicant, VZLR Incorporated ("VZLR").

[2] That said, before me is an application launched on an urgent basis, with various prayers mentioned in its notice of motion. For the purposes of this judgment, the reliefs sought may be summarised as following:

(a) a hearing on an urgent basis within the contemplation of Rule 6(12) of the Uniform Rules;

(b) a review in terms of PAJA on the decision to block/suspend/delay of payment of compensation;

(c) removal of the block/suspension and/or delay in payments;

(d) declaration of illegality;

(e) just and equitable reliefs in a form of

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[2] See *RAF v Legal Practice Council and others* [2021] 2 All SA 886 (GP)

[3] See *LPC*, *RAF v Theron Inc Attorneys* 2021 JDR 2830 (GP) (*Theron*) and *Cawood and others v RAF* 2022 JDR 3383 (GP).

(i) payment of all monies due within ten days of an order;

(ii) filling of an affidavit confirming payment;

(iii) failure to comply leading to furnishing names of the responsible officials

(iv) providing specific date for payment and the names of the tasked officials;

(f) costs on a punitive scale; and

(g) appropriate relief as an alternative.

[3] The first to the fifth respondents have opposed the urgent application. In their answering affidavit, the respondents have provided that it is necessary to join the Legal Practice Council and Frans Rabie Attorneys, on allegations that these two parties may have substantial interests in the outcome of the present application. Ultimately, a notice of motion was served and filed seeking an order that these two parties be joined as respondents 7 and 8 respectively. The applicants and the to-be joined parties did not give any notice of an intention to oppose the joinder application. The applicants simply took a view that a joinder was not necessary. However, on the day of the hearing of the present application, counsel appeared on behalf of Frans Rabie Attorneys. He argued that the joinder application be dismissed with an order as to costs.

Pertinent background facts to the present application

[4] The upshot of the present application is that if it is so ordered, the financially beleaguered RAF must within ten days of being so ordered, pay an amount of around R81 million. This it must do in favour of only the applicants, in the circumstances where other similarly placed claimants are still awaiting payment of compensation from the RAF. The commencement of the present application germinates from the order of this Court *per* Meyer J in *RAF v Legal Practice Council and others*[4] ("LPC"). Owing to its financial woes, whereby it has accumulated a deficit of an estimated amount of R322 billion as at the end of the 2019/20 financial year, the pertinacious RAF wished to place all its writs in execution on a moratorium. Having listened to its plea, Meyer J ordered

[4] [2021] 2 All SA 886 (GP).

amongst others the following in favour of the RAF; (a) that the writs of execution for he orders or settlement agreements already reached were suspended until 30 April 2021; (b) the RAF was to pay all claims based on the Court orders already granted and settlement agreements reached which were older than 180 days as from the date of the Court order or the date of the settlement agreements reached on or before 30 April 2021; (c) the RAF was to prepare a list of payments and provide it to the relevant parties; (d) the RAF was to continue with the process of making payments of the oldest claims first by date of the Court order or the date of the written settlement agreements *qui prior est tempore*[5].

[5] Subsequent to the *LPC* judgement, the so-called Request Not Yet Paid ("RNYP") list was generated. This list gets updated every time. Where a matter acquires the so-called Treasury Ready (T) status, such implies that the claim was verified and ready to be paid. The majority of the claims involved in the present application have reached that status.

[6] VZLR developed a working relationship with Frans Rabie Attorneys. During the duration of this working relationship, Frans Rabie Attorneys accumulated a debt owed to VZLR for professional fees. During 2018, Frans Rabie Attorneys terminated its mandate with VZLR. On 27 May 2019, the RAF made payment of an amount of R650 000.00 into the trust account of VZLR pertaining to the Ngubane claim. VZLR retained the said payment until it could set-off the money received against the fees owed to it by Frans Rabie Attorneys. It paid over the balance to Frans Rabie Attorneys after effecting a set off. At the time the R650 000.00 payment was effected, the Ngubane claim had not been fully finalised. In due course it was finalised, and VZLR demanded payment of its professional fees over the claim.

[7] While under investigation by the SIU, VZLR provided an explanation to the SIU pertaining to the payment of the R650 000.00. Satisfied with its findings and the explanation the SIU, the SIU abandoned its investigation against VZLR. During November 2023, VZLR reached out to the RAF to follow up the RAF on an outstanding payment in respect of one of its client. Correspondence was

[5] The principle asserts that "he who is earlier in time is stronger in law."

exchanged between the RAF and VZLR which culminated in an email written by one Mr Snyman in his capacity as the attorney of the RAF on 16 January 2024. In the said email, and pertinent to the present application, the following was communicated:

> "Received instructions that your firm is blocked because of the Frans Rabie duplicate issue…"

[8] Having been so informed, VZLR opened a communication line with one Sefotle Modiba (Modiba), an official of the RAF. On 24 January 2024, a detailed letter was penned for the attention of Modiba. In parts, the detailed letter read:

> "You have now advised that VZLR incorporated is blocked from receiving any payment from the Road Accident Fund by virtue of (what can only be described as) the Frans Rabie debacle, as we are allegedly aiding Frans Rabie Attorneys in obtaining payment from the RAF.
>
> We wish to note that we have not been provided with any formal correspondence to this effect, save for an email from Sunelle Eloff from Malatji & Co on 16 January 2024 in the matter of Ms Lefaso."

[9] There was no response forthcoming from the RAF in response to the detailed letter of 24 January 2024. This prompted VZLR to send a further email to Modiba on 29 January 2024. The email in parts read as follows:

> "…would you please provide us with your response as per our request in our letter dated 24 January 2024, so that all parties involved would exactly know what the basis would be for the non-payment to VZLR…"

[10] Ultimately, Modiba responded on 29 January 2024 and stated that:

> "Internal discussions are yet to be held on this issue. Your firm will be reverted to once engagements are finalised."

[11] On 14 February 2024, VZLR again addressed a detailed letter to Modiba and other officials at the RAF. Amongst others, VZLR recorded in that detailed letter the following:

> "Despite trying to follow up with yourselves on several occasions, to date you have – Failed to **formally** revert to us in respect of the Frans Rabie debacle and the so-called **alleged block**…"

[12] Prior to the launch of this application VZLR received no communication confirming the alleged block. Resultantly, on or about 20 February 2024, VZLR launched the present application and enrolled it for hearing on 5 March 2024. As indicated already, the present application is duly opposed.

Analysis

[13] Although the present application raises a number of what appears to be important legal issues, two issues are dispositive of the present application. The first of which is the lack of cogent evidence on whether a decision was taken or made by the RAF. The second of which is whether the applicant complied with the Rule 6(12) urgency requirements.

Was there an administrative decision taken or made by the RAF?

[14] Counsel for the applicants Mr Van den Berg SC, who appeared alongside Mr van As submitted that a block and delaying of payment are interrelated and should be treated as one for the purposes of this application. I disagree. An internal block would occur where an official put a stop or halt to a payment process for whatever reasons. A delay in payment happens when payment is to be made but not timeously. It is common cause in this matter that most of the payments involved in *casu* have surpassed the 180 days reprieve sought and granted in the *LPC* matter. The RAF has admitted to delaying payments. When an entity delays a payment of any money due and payable, there is no administrative action involved. The applicants elected to impugn the so-called block decision in accordance with PAJA.

[15] Section 1 of PAJA defines a decision as any decision of an administrative nature made, proposed to be made or required to be made. Therefore a decision must be made or be proposed to be made. In this instance, it is the pleaded case of the applicants that the decision to block the payments was made as opposed to being proposed. Accordingly, the applicants bear the onus

to prove that a decision to block the payments was indeed made. Section 1 of PAJA defines an administrative action to mean any decision taken by an organ of state when exercising a public power or performing a public function in terms of any legislation or by a juristic person when exercising a public power or performing a public function in terms of an empowering provision. Based on these provisions, a decision needs to be taken or be made. Equally, a party alleging that an administrative decision exists must allege and prove that it was indeed taken.

[16] In *casu*, the evidence that a decision to block the payments to the claimants was taken by the RAF is premised on shaky grounds. Regard being had to the available evidence, VZLR heard from an attorney, who allegedly was instructed that such a decision was made or taken. Of course, VZLR, correctly so, sought a formal confirmation of what may, at the time, be characterised as a rumour. VZLR itself referred to the block as an 'alleged' block. As proof that there was no certainty about this alleged block, VZLR wished to know the basis of the non-payment. Prior to launching the application, VZLR was not provided with any formal confirmation of the alleged block. In this regard, VZLR must have anticipated a dispute of fact over the alleged block. Nevertheless, it chose to resort to motion proceedings to address the allegation. Indeed in the papers before this Court, the RAF denies having effected any block.

[17] The RAF's, as a juristic person, decisions would ordinarily be recorded and taken by an authorised functionary. That there is no recorded formal decision on the block taken by the RAF or its authorised functionaries is common cause. As a demonstration that VZLR knew that a formal confirmation was required, it persisted on such being provided. It knew that it cannot legally place reliance on what the attorney communicated. On the available evidence, and on application of the *Plascon Evans*[6] rule, this Court must conclude that on the preponderance of probabilities, no decision to block payments was taken or made by the RAF. Having made this finding, this Court must immediately have regard to the provisions of section 6 of PAJA. In terms of section 6(1) of PAJA, any person may institute proceedings in a court for the judicial review of an

[6] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd*.; 1984 (3) SA 623;

administrative action. Absent of an administrative action being made or taken, this Court has no judicial power to review the action. The RAF admitted to a delay of payments. Contrary to the submissions of the applicant's counsel, a delay in payments cannot equate to a decision being made to block payments. A delay of payments authorised by a Court order can be unlocked by executional steps, whilst a block in payments registers as one taking the law into their own hands. This offends the principle of legality and requires a court's intervention[7].

[18] Accordingly, this Court concludes that the applicants have no basis to approach this Court in terms of section 6(1) of PAJA. Similarly, in the absence of any exercise of public power, no legality review may be instituted. Accordingly, even if this Court were to accept that this part of the case (the blocking of payments) may be heard on an urgent basis, in the absence of any objective evidence that there was any decision to block the payments, this Court cannot exercise its review powers either in terms of PAJA or a legality review. With regards to the issue pertaining to the decision made to block the payments, given the dispute of fact, the applicants could have requested that that issue be referred for oral evidence. Having not done so, the application is dismissible under the rubric of Rule 6(5)(g) of the Uniform Rules. However, as Mr Skosana SC, who appeared on behalf of the respondents correctly argued, in its truest sense, this entire application is about expedited preferential payment. It would appear that it is the applicant's intention that this Court override the bespoken executional steps and provide it with what appears to be preferential treatment. There are thousands upon thousands of claimants and legal firms that are still queuing to receive payments of compensation from the RAF. The applicants are no different from those claimants and legal firms. Since this application is, as correctly submitted, all about payments, the question which I now turn to is whether the applicants are entitled to an urgent relief or not.

The issue of urgency.

[19] A trite principle in motion proceedings is that a party makes its case in its founding affidavit. Rule 6(12)(b) of the Uniform Rules is explicit. It provides that

[7] See *Cawood and others v RAF* 2022 JDR 3383 (GP).

in every affidavit filed in support of any allegation under paragraph (a) of the sub rule, the applicant must set forth explicitly the circumstances that render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course.

[20] As a general principle financial hardship is not regarded as a ground for urgency[8]. In its founding affidavit, VZLR unashamedly laments that it will suffer from financial hardship should the Court not grant the relief sought. In its founding affidavit at paragraphs 133 and 138, the deponent, attorney Jaun-Pierre Robbertse testified as follows:

> "The RAF's decisions severely prejudices VZLR's financial position because it impacts the whole firm…
>
> VZLR does not have the resources to absorb the financial impact should the RAF continue to block and or delay payments. By the time this application is heard in the ordinary course, VZLR will have been forced to close its doors. Lastly, the parties who stand to suffer the most are VZLR clients.

[21] These allegations of financial hardship, as bare as they are, were vehemently disputed by the respondents. The respondents contended that some of the monies owed dates as far back as 2016. In reply, instead of bolstering the ground of financial quandaries as an aftermath of the decision to block the payments, discovered by it through an attorney of the RAF on 16 January 2024, the applicants changed its strategy as it were. They stated that:

> "The applicants submit that the urgency of this application cannot be in doubt, the respondents' *ultra vires* and invalid conduct has necessitated this application…"

[22] Perspicuously, the applicants seek to shift the goal posts as it were, they alleged that the *ultra vires* and invalid conduct necessitated, as opposed to the financial hardship, the launching of the application on an urgent basis. It is unclear from the above paragraph what *ultra vires* and invalid conduct the applicants are referring to. Nevertheless a party cannot make its case in reply.[9] The applicants must stand or fall by its case made in the founding affidavit. The

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[8] See *Hultzer v Standard Bank of South Africa* [1999] 8 BLLR 809 (LC)

[9] *Obsidian Health (Pty) Ltd v Makhuvha* [2019] JOL 46118 (GJ)

case made in the founding affidavit and the case answered to is that of financial hardships. Assuming for now that the alleged *ultra vires* and invalid conduct is the result of the blocking of the payments, having been discovered only on 16 January 2024, there is no objective evidence demonstrating financial hardship experienced by the applicants. VZLR discovered the block on 16 January 2024 and barely two months after finding this fact out, did the applicants launch an application before this Court. If the financial quandaries bares any causal connection to the decision to block the payments as initially alleged in the founding affidavit, then the quandary set in after January 2024 and not before then.

[23] The reasons advanced by the applicants why a substantial redress may not be afforded to it is that by the time they are heard in the ordinary course, VZLR will have been forced to close its doors. This means they would not survive the financial hardship. No substantial evidence has been provided as to the manner in which the clients stand to suffer. Assumingly, they will suffer financially. No details of the financial hardship that will befall the clients had been spelled out. What bears emphasis is that the clients are already armed with Court orders or settlement agreements that compensation must be paid to them. The applicants do, as a matter of law, have an alternative remedy to the alleged financial hardship they are suffering. Rule 45 of the Uniform Rules provides a detailed procedure as to how to satisfy a judgment debt. This Court disagrees with a submission that given the arrangements in the *LPC* judgment, the executional to be steps taken against the RAF have been disabled. The Rule 45 procedure of execution remains intact. The Full Court of this Division in the matter of *RAF v Ehlers Attorneys*[10] aptly stated the following:

> "Furthermore, that section 34 of our Constitution affords everyone the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court. <u>The process of execution is a means of enforcing a judgment or order of court and it is incidental to the judicial process.</u>"

[24] Accordingly, this Court concludes that having being armed with court orders, there is nothing that would prevent the applicants from taking the available

[10] 2021 JDR 1728 (GP) at para 51.

executional steps. The unsubstantiated allegations by the sheriff that when attached goods are sold on auction the RAF buys back the attached goods at a lower price are of no importance and must be ignored. Nevertheless, such an alleged unscrupulous conduct does not necessarily take away the legal process of execution. Therefore, with regard to the payment of claims, no case for urgency was advanced on both legs in terms of Rule 6(12)(b); namely (a) explicit reasons why the matter is urgent, and (b) why a substantial redress is not available in due course.

[25] The other leg of the present application relates to the so-called declaratory and consequential relief sought. This leg of the application is fallacious and is actually effortlessly defeated by the matter's lack of urgency. The alleged breach of section 17(1) of the Road Accident Fund Act 56 of 1996 ("RAFA") made by the fund in its failure to make payment as per Court orders cannot be advanced as an urgent one. Section 17(1) of RAFA[11] deals with the liability of the RAF to pay compensation. Presence of a Court order and or settlement agreement bears testimony to the fact that the liability has already been determined. Once so determined, what would remain is the payment of such compensation. In that regard, the provisions of Rule 45 sets in. Such liability to pay compensation has since 2016 in some instances been made. Execution is an available process for failure to make payment as per Court order. Failure to pay compensation in terms of a Court order can never be a breach of section 12(1)(c) of the Constitution nor section 7(2) of the Constitution. Section 12(1)(c) of the Constitution deals with the right to freedom and security which includes being free from all forms of violence. This Court fails to appreciate the correlation of the rights guaranteed in this section with the non-payment of claims. An argument was advanced that the RAF is a social security insurance and its failure to fulfil its social security insurance obligations breaches sections 7(1), 10 and 12 of the Constitution. I disagree. In South Africa, in recognition of the freedom and rights to security and free from violence, the Domestic Violence Act 116 of 1998 (DVA)[12] was enacted. The RAFA was not enacted to deal with security and freedom from violence. In my view, it is a fallacy to

[11] as amended.

[12] as amended. See preamble of DVA.

contend that the RAF is a social security insurance. In terms of section 3 of RAFA, the object of the RAF shall be the payment of compensation in accordance with RAFA for loss or damage wrongfully caused by driving of a motor vehicle. Axiomatically, if the loss or damage is not caused by the wrongful driving of a motor vehicle, the RAF is not liable to pay any compensation. In my view, the Unemployment Insurance Fund (UIF) and the Compensation for Occupational Injuries and Diseases Fund (Compensation Fund) provides social security insurance since they are not based on any wrongfulness or fault. Nevertheless, the RAF is already ordered by a Court or it has agreed to discharge its liabilities to pay compensation. This Court fails to understand the argument advanced by the applicants that the applicants were deprived of their rights per section 38 of the Constitution. Section 38 deals with enforcement of rights. It seeks to regulate what is generally referred to as *locus standi*. This issue of *locus standi* does not arise in the present application.

[26] An attempt to conjure up a case predicated on section 172 of the Constitution regarding the failure to make payment was too fanciful. It is a perspicuous case of legal machination in my view. Section 172 finds application when a constitutional matter is decided. In terms of section 167(7) of the Constitution, a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. The RAF has already been ordered by courts to make payment of outstanding claims and has agreed to make such payments. If it fails and or cause a delay in making payment, there is a perfect legal remedy in the execution steps and rights stipulated in the Constitution cannot be invoked on application of the subsidiarity rule[13]. Since failure to pay as per Court order and or agreement is not a constitutional matter, the just and equitable remedy contemplated in section 172(1)(b) of the Constitution cannot find application. Howbeit, these fancy panoply bolstered by elaborate submissions by Mr van As for the applicants are wholly defeated by the absence of the requirements for urgency stipulated in the Rules in so far as the absence of substantial redress in due course. A Rule 45 process is a substantial address.

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[13] See *South African National Defence Union v Minister of Defence (SANDU)* 2007 5 SA 400 (CC).

The Joinder application

[27] On paper, this application stood unopposed. In terms of Rule 6(5)(d) of the Uniform Rules any person opposing the grant of an order sought in the notice of motion must (i) give notice to oppose and (ii) deliver an answering affidavit. Mr Van Rensburg SC, although this Court allowed him to make submissions since he made an appearance, was not properly before the Court since the party he purported to represent did not enter the boxing ring as it were. His submissions on costs are predicated on nothingness since the application stood unopposed. Mr Skosana SC correctly conceded that if this Court were to grant the review sought to the exclusion of the other reliefs, a joinder will be inappropriate since that relief will not affect the interests of the two parties sought to be joined. Nevertheless, in view of the approach taken that the entire application is to be struck off the roll, the joinder application shall become moot. On those simple basis, the joinder application ought to be struck off with no order as to costs.

Conclusions

[28] In summary, the applicants failed to establish, through objective evidence, the existence of a decision to block the payments to the claimants ever being made or taken. Even if for some decrepit reasons, the alleged instructions given to an attorney may be elevated to a pedestal of a decision being made, the applicants have failed to provide explicit reasons why they could not invoke the execution steps, a substantial redress available to them. Undoubtedly the financial distress claim is clearly disguised as a constitutional matter. However, the alleged constitutional matter – payment in accordance with a Court order – has a perfect remedy. This Court agrees with the submission made by the respondents that this application is aimed at by-passing the Rule 45 procedure, without impugning the constitutionality of the Rule. This Court is unable to do so. Accordingly, this entire application falls to be struck off the roll with costs. Axiomatically, the joinder application is also struck off with no order as to costs.

[29] For all the above reasons, I make the following order:

Order

1. The main application is struck off the roll for want of urgency.

2. The joinder application is struck off with no order as to costs.

3. The applicants are to pay the costs of the main application, the one paying absolving the other.

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GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicants:	Mr JP van den Berg SC and Mr E van As
Instructed by:	VZLR Attorneys, Pretoria
For the Respondents:	Mr DT Skosana SC
Instructed by:	Borman Duma Zitha Attorneys, Midrand
For the Joinder:	Mr J Van Rensburg SC
Instructed by:	Frans Rabie Attorneys, Pretoria
Date of the hearing:	05 March 2024
Date of judgment:	14 March 2024