



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 1452/2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND

Applicant

and

THE AUDITOR-GENERAL OF SOUTH AFRICA

First Respondent

THE ACCOUNTING STANDARDS BOARD

Second Respondent

THE MINISTER OF TRANSPORT

Third Respondent

ORDER

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1. Part B of the application is dismissed.
 2. The applicant shall pay the first respondent's costs of the application, including the reserved costs of Part A, which costs shall include the cost of three counsel where employed, one of whom is a senior counsel, as well as the qualifying fees and expenses of Professor Maroun, such costs to be taxed according to Scale C.
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JUDGMENT

THE COURT (Neukircher J, Moshwana J and Girdwood AJ)

[1] On 20 December 2021 the first respondent (the AGSA) issued a disclaimer opinion in respect of the applicant's (the RAF) annual financial statements for the year ending 2020/2021 as follows:

"The overall audit outcome for the [RAF] has regressed compared to the prior year. A disclaimer of opinion with material findings on compliance with legislation was issued. The financial statements submitted for audit were not prepared in accordance with the prescribed financial reporting framework and were not support by full and proper records as required by section 55(1)(a) and (b) of the PFMA¹. The financial statements contained material misstatements in claims expenditure, current and on-current liabilities and disclosure notes which were not adequately corrected subsequently, which resulted in the financial statements receiving a disclaimer of opinion. The accounting authority did not put adequate measures in place to ensure that the financial statements are prepared in accordance with the appropriate accounting framework. This was due to use of IPSAS 42 in formulating account[ing] policy which is in conflict with the standard of GRAP" (the Disclaimer)

¹ Public Finance Management Act 1 of 1999.

- [2] The Disclaimer resulted in the present application which was brought in two parts:
- (a) Part A consisted of an interdict to prevent publication of the Disclaimer – this was dismissed with costs by Collis J²;
 - (b) Part B is the present review application. In this application, the RAF challenges the factual and legal findings in the Disclaimer and argues that it should be set aside³ and remitted to the AGSA.
- [3] The Disclaimer impacts on the RAF's decision during April 2021 to adopt a different accounting methodology than previous years which, according to the RAF, will have the result that *“(a) the Fund’s financial statements will more accurately represent the true state of the Fund’s financial affairs; and (b) the Fund’s financial position will be improved, to the benefit of the public interests, and hundreds of billions of rands.”*
- [4] The result of this change in accounting methodology is that the RAF's liabilities suddenly plunged from the R327 billion reflected in the 2019/2020 financial year, to R34 billion reflected in the 2020/2021 financial year. This astronomical improvement in the RAF'S financial statements is attributable to the RAF adopting an accounting standard known as IPSAS 42,⁴ which effectively changed its treatment of payables and liabilities in its annual financial statements: in previous years, the RAF used IFRS 4 accounting standard on insurance contract. It is this with which the AGSA took issue and thus issued the Disclaimer.

The relief sought

- [5] In the amended notice of motion as it pertains to Part B the RAF seeks orders in the following terms:
- “1. Declaring that the decision of the first respondent (“the AGSA”) to issue a disclaimer of opinion in regard to the annual financial statements of the applicant (“the

² Collis J dismissed an application for leave to appeal. The SCA granted leave but the appeal has been withdrawn by the RAF.

³ It raises 17 self-standing grounds of review of both a procedural and substantive nature.

⁴ An accounting standard published by the International Public Sector Accounting Standard Board (IPSASB) which is associated with (mainly) social benefit activities

Fund”), communicated to the Fund, on 21 December 2021 (“the Decision”), is invalid and unlawful;

2. Reviewing and setting aside the Decision;
3. To the extent necessary, remitting the Decision back to the AGSA with appropriate guidance of the Court in order for the AGSA to remedy the defect;...”

The Review

[6] The parties are *ad idem* that the Promotion of Administrative of Justice Act⁵ (PAJA) does not apply to this review application, and that this is a legality review.

[7] The AGSA is a Chapter 9 institution and has been established by the Constitution of the Republic of South Africa, 1996. The functions of the AGSA are not only regulated by s188 and s189 of the Constitution, but also by the provisions of the Public Finance Management (PFMA). Thus, the AGSA exercises a public power in executing its functions, which is to act as the supreme audit institution of South Africa and provide oversight and accountability in the public sector. Given that the present review impugns an exercise of the statutory powers of the AGSA, the present review application is founded on the principles of legality.

[8] In *Affordable Medicines Trust v Minister of Health*⁶ it was stated that the constitutional principles of legality require that a decision maker exercises powers conferred on him or her lawfully, rationally and in good faith. Thus, in this matter, the scope of the enquiry is limited to questions of whether the AGSA acted lawfully⁷ or rationally⁸ in expressing the audit opinion decision set out in the Disclaimer and the broad review grounds available under PAJA are not available to the RAF⁹. It remains the contention of the RAF that the impugned decision fails to meet the

⁵ 3 of 2000.

⁶ 2006 (3) SA 247 (CC).

⁷ *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC).

⁸ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); *Poverty Alleviation Network v President of the RSA* 2010 6 BCLR 520 (CC).

⁹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (supra); *Poverty Alleviation Network v President of the RSA* (supra).

constitutional standard of legality and rationality and to this end the RAF has raised 17 grounds of review, which will be dealt with in due course.

[9] As to what a legality review means, the Constitutional Court clarified the principle of legality thus:

“What we glean from this is that the exercise of public power which is at variance with principle of legality is inconsistent with the Constitution itself. In short, it is invalid... Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.”¹⁰

[10] In *Minister of Defence and Military Veterans v Motau*¹¹ the Constitutional Court said:

“...The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given...”

[11] Flowing from the above authorities, the legality principle entails (a) lawfulness and (b) rationality. Rationality has been explained by Yacoob ADCJ as “... the decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power could be arbitrary and at odds with the Constitution.”¹² But rationality and reasonableness are conceptually different:

“...where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to

¹⁰ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40 (SITA) at para 40.

¹¹ 2014 (8) BCLR 930 (CC) at para 69.

¹² *DA v President of the RSA* 2014 (8) BCLR 930 (CC) par [27].

determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.”¹³

[12] In *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd*¹⁴ the SCA stated:

“[85] ...When a decision is sought to be reviewed on the basis of irrationality, the test of rationality is concerned with the evaluation of the relationship between the means employed and the ends to be achieved. The evaluation of the relationship seeks to determine, not whether there are means that can achieve the same purpose better than those chosen, but whether the means employed are rationally related to the purpose for which the power was conferred.

[86] A rationality review also determines whether the process leading up to the decision and the decision itself are rational. The Constitutional Court cautioned that it should not be lost from sight that where there is an overlap between the reasonableness and rationality evaluations one is nevertheless dealing with discrete concepts. In Albutt v Centre for the Study of Violence and Reconciliation and Others the following was stated:

‘The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.’”

[13] In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa and Others*¹⁵, the Court stated that rationality “is a

¹³ *Albutt v Center for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC).

¹⁴ 2021 (3) SA 47 (SCA) at par 85-87.

¹⁵ 2000 (2) SA 674 (CC) at para 90.

minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately”.

[14] Given all the above, the issue to determine is whether there is a rational connection between the Disclaimer and the purpose of the legislation that requires the AGSA to render her opinion, which is to inform and guide relevant stakeholders responsible for the control and financing of the RAF.

Judicial deference

[15] This case impacts on the professional field of accounting and more particularly the auditing profession. This Court must at this stage disavow any expertise in the accounting field and shall primarily direct itself to the legal questions¹⁶ raised. This is what is colloquially referred to as the principle of judicial deference and is explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*¹⁷ as follows:

“In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the Executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these

¹⁶ This approach was taken by *Du Plessis J in Registrar of Medical Schemes v Ledwaba NO and others* [2007] ZAGPHC 24 (TPD 18454/06).

¹⁷ 2004 (4) SA 490 (CC) at para 48.

considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by our courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.”

[16] It is the AGSA’s position that she provides an opinion in matters of a specialist nature and that, therefore, whilst a court should not approach this case with “judicial timidity or unwillingness to perform its judicial functions”¹⁸, it should do so cautiously.

[17] Auditing is a process that involves the conduct of an official financial inspection of a company or its accounts. Most importantly, the purpose of an audit is to form a view on whether the information presented in the financial report, taken as a whole, reflects the financial position of the organisation at a given date. There are various types of audit opinions that can be issued. In this case, the AGSA issued a disclaimer opinion. This entails a statement made by an auditor that no opinion is being given regarding the financial statements of a company. It is usually the most serious type of audit opinion because the auditor actually states that he or she is unable to form an opinion in the circumstances either where the auditee provided insufficient evidence in the form of documentation on which to base an audit opinion, or the lack of sufficient evidence represents a substantial portion of the information contained in the financial statements.

[18] The RAF’s financial year runs from 1 May of any year to 30 April of the following year¹⁹ and in terms of s14(2) of the RAF Act

“2(a) The accounts of the Fund shall be audited annually by the Auditor-General appointed in terms of section 2 of the Auditor-General Act, 1989 (Act no 52 of 1989), in

¹⁸ *Bato Star* at para 45.

¹⁹ Section 3, Road Accident Fund Act 56 of 1996 (RAF Act)

accordance with the said Act and with such other laws as may be referred to in that Act.

(b) The Auditor-General shall submit to the Board copies of any report referred to in section 6 of the Auditor-General Act, 1989.”

[19] The RAF is also required to publish an annual report which includes an audited balance sheet together with a report by the AGSA in respect of the audit.²⁰ In keeping with the above, the RAF submitted its draft financial statements for the 2020/2021 financial year to the AGSA on 31 May 2021.

[20] Section 188 of the Constitution of the Republic of South Africa, 1996, provides:

“188 Functions of Auditor-General

(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of -

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

...

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.”

[21] In terms of chapter 3 of the Public Audit Act²¹ (“the PAA”):

²⁰ Section 13 provides:

“13 Annual Report

- (1) The Board shall publish an annual report containing –
- (a) the audited balance sheet of the Fund together with a report by the auditor, contemplated in section 14, in respect of such audit; and
 - (b) a report on the activities of the Fund during the year to which the audit relates.
- (2) The Minister shall lay upon the Table in Parliament a copy of the annual report within 30 days after receipt thereof if Parliament is then in session, or, if Parliament is not then in session, within 30 days after the commencement of its next ensuing session.”

²¹ 25 of 2004.

- a) the AGSA must prepare a report in respect of each audit, which must reflect such opinions and statements as may be required by any legislation, and must reflect an opinion, conclusion or findings on, amongst others, the financial statements of the auditee in accordance with the applicable financial reporting framework and legislation;²²
- b) The AGSA is required to submit an audit report to the auditee. If the auditee does not table the report before the relevant legislature then the AGSA must promptly publish the report.²³

[22] The two entities' obligations converge in s55 of the PFMA, which requires that the annual financial statements of the public entity must fairly present its state of affairs, business, financial results, performance against pre-determined objectives, and financial position. To this end, an auditee is required to prepare its financial statements in accordance with generally accepted accounting practice, unless the Accounting Standards Bureau (ASB) approves the application of a different generally recognised accounting practice (GRAP) for that public entity.

²² "20 Audit Reports

- (1) The Auditor-General must in respect of each audit referred to in section 11 prepare a report on the audit.
- (2) An audit report must reflect such opinions and statements as may be required by any legislation applicable to the auditee which is the subject of the audit, and must reflect an opinion, conclusion or findings on-
 - (a) the financial statements of the auditee in accordance with the applicable financial reporting framework and legislation;
 - (b) compliance with any applicable legislation relating to financial matters, financial management and other related matters;
 - (c) reported performance of the auditee against its pre-determined objectives. ..."

²³ "21 Submission of Audit Reports

- (1) The Auditor-General must submit an audit report in accordance with any legislation applicable to the auditee which is the subject of the audit.
- (2) ...
- (3) Audit reports must be tabled in the relevant legislature in accordance with any applicable legislation or otherwise within a reasonable time. If an audit report is not tabled in a legislature within one month after its first sitting after the report has been submitted by the Auditor-General, the Auditor-General must promptly publish the report.
- (4) Despite any other legislation, the Auditor-General may in the public interest submit an audit report to –
 - (a) any legislature whether or not that legislature is a relevant legislature; or
 - (b) any organ of state."

[23] The ASB is established in terms of s87 of the PFMA. In accordance with the provisions of s89, the ASB must inter alia set standards²⁴ of GRAP,²⁵ prepare and publish directives, guidelines and interpretations of the Standards of GRAP and make recommendations to the Minister of Finance. Once published by the Minister of Finance in the form of a regulation,²⁶ those then become binding. In particular, s89(3) provides that the ASB may set different standards for different categories of institutions to which the Standards of GRAP apply, and s89(4) provides:

“The standards set by the Board must promote transparency in and effective management of revenue, expenditure, assets and liabilities of the institutions to which these standards apply.”

[24] In addition to the standards developed by the ASB in accordance with the above legislative framework, the ABS also assess whether standards set by the International Accounting Standards Board (IASB) and the International Financial Reporting Standards (IFRS) could be used by entities in South Africa. Bearing in mind that the setting of standards by the ASB is aimed at promoting accountability, transparency and effective management of revenue, expenditure and liabilities of the state institutions, the ASB must consider whether those international standards would result in the fair presentation of the entities' liabilities and whether the aim of providing useful information to the users of financial statements about the entities' obligations and liabilities would be achieved.

[25] As we have stated, the ASB prepares and publishes directives, guidelines and interpretations of the Standards of GRAP, some of which are the following:

(a) GRAP 19;

²⁴ For those entities listed in s89(1)(a)

²⁵ The purpose of an accounting standard is to ensure that the financial statements are reliable, transparent and consistent so that an end user may make financial decisions based on the information contained therein

²⁶ Section 89(1) of the PFMA provides that the ASB must set set standards of generally recognised accounting practice as required by section 216 (1) (a) of the Constitution, for the annual financial statements of, amongst others, public entities. The RAF is designated as a public entity in Schedule 3 to the PFMA.

- (b) GRAP 3;
- (c) Directive 5;
- (d) the IPSASB and IPSAS 42 projects;
- (e) Various interpretive tools, including letters and memos of 2014, 13 July 2016 and 14 March 2018;
- (f) GRAP 19.

GRAP 19

[26] In July 2007 and in accordance with s89 of the PFMA, the ASB issued Standards of GRAP on *Provisions, Contingent Liabilities and Contingent Assets* (“GRAP19”).²⁷

[27] The objective of GRAP19 is to define provisions, contingent liabilities and contingent assets, identified as circumstances in which provisions should be recognised, how they should be measured and the disclosures that should be made about them.²⁸

[28] The scope of GRAP19 is dealt with in paragraph 2 of the document, and requires an entity that prepares and presents financial statements under the accrual basis of accounting (such as public entities) to apply GRAP19 in accounting for provisions, contingent liabilities and contingent assets, except:

“(a) those provisions and contingent liabilities arising from social benefits provided by an entity for which it does not receive consideration that is approximately equal to the value of goods and services provided directly in return from the recipients of those benefits;

(b) those resulting from executory contracts, other than where the contract is onerous subject to paragraph (a) above; and

(c) those covered by another Standard of GRAP.” (our emphasis)²⁹

²⁷ These were later amended and became effective in April 2011 after being gazetted by the Minister of Finance

²⁸ GRAP19, para 1.

[29] Paragraph 3 furthermore deals with the scope of application and provides that GRAP19 applies to:

“provisions, contingent liabilities and contingent assets of an insurer (who, for purposes of this Standard, is primarily engaged in insurance activities), other than those arising from its contractual obligations and rights under insurance contracts within the scope of the International Financial Reporting Standard(s) (IFRS Standard(s)) on insurance.”³⁰
(our emphasis)

[30] Provisions that arise from social benefits, those that are covered by another Standard of GRAP and those that fall within IFRS Standard on insurance, have accordingly been scoped out of GRAP19 in order to be addressed through a different Standard of GRAP as the determination of what constitutes the “*obligating event*” and the measurement of the liability required further consideration before a proposed Standard of GRAP is exposed. At the time of issuing GRAP19, there were different views about whether the obligating event occurs when the individual meets the eligibility criteria for the benefit, or at some other stage, or whether the amount of any obligation reflects an estimate of the current period’s entitlement or the present value of all expected future benefits determined on an actuarial basis.³¹

[31] Furthermore, some social benefits may give rise to a liability for which the amount and the timing of the obligation is certain. As such, these are not likely to meet the definition of a “*provision*” in GRAP19, as they are payables.³²

GRAP 3

²⁹ The emphasis serves to elucidate the actual divergence of points of view between the RAF on the one hand and the AGSA and ASB on the other, with the RAF insisting that it provides social benefits and that its accounting standard and policy must therefore reflect this, and the AGSA and ASB insisting that it is not a social insurer and that IFRS 4 caters for the RAF appropriately

³⁰ GRAP19, para 2.

³¹ GRAP19, para 9.

³² GRAP19, para 11.

[32] The Standard of GRAP *Accounting Policies, Changes in Accounting Estimates and Errors* (“GRAP 3”), provides guidance on dealing with matters not specifically dealt with by another Standard of GRAP³³ and dictates when an entity may change its accounting policy. Its objective is to enhance the relevance and reliability of an entity’s financial statements, and the compatibility of those, over time and with the financial statements of other entities. With regard to accounting policies, GRAP3 provides that in the absence of a standard of GRAP that specifically applies to a transaction, other event or condition, management shall use its judgment in developing and applying an accounting policy that results in information that is:

- “(a) relevant to the economic decision-making needs of users;
- (b) reliable, in that the financial statements:
 - (i) represents faithfully the financial position, financial performance and cash flows of the entity;
 - (ii) reflect the economic substance of transactions, other events and conditions, and not merely legal form;
 - (iii) are neutral as in free from bias;
 - (iv) are prudent; and
- (c) are complete in all material respects.”

Directive 5

[33] The Directive on *Determining the GRAP Reporting Framework* (“Directive 5”) was issued in March 2009 with the aim of ensuring consistent application of the GRAP Reporting Framework by entities that apply Standards of GRAP.³⁴

[34] The Reporting Framework comprises the Standards of GRAP, Interpretations of the Standards of GRAP, Guidelines and Directives issued by the ASB and standards and pronouncements of other standard setters that should be applied

³³ GRAP 19, para 10.

³⁴ Directive 5, para 2.

when entities prepare and present their financial statements in accordance with Standards of GRAP (“GRAP Reporting Framework”).³⁵

[35] Directive 5 includes an Appendix which lists the standards and pronouncements that form the GRAP Reporting Framework. Provision is then made for the Appendix to be updated on an annual basis to recognise new Standards of GRAP that have become effective, and standards and pronouncements issued by other standard setters.³⁶ Entities must apply Directive 5 when preparing their financial statement for a particular period.

[36] Paragraph 16 provides that when there is no equivalent Standard of GRAP, an International Public Sector Accounting Standard (“IPSAS”) or IFRS Standard should be used in formulating an accounting policy, unless:

- “(a) that IPSAS or IFRS Standard is in conflict with the current ASB Framework for the Preparation and Presentation of Financial Statements or existing Standards of GRAP; or
- (b) it is not applicable to entities that currently apply the Standards of GRAP.”

[37] Directive 5 also provides that where events or changes are not covered in the GRAP standards, then pursuant to paragraph 8, an entity may consider those international standards that are specified and listed in paragraph 11 of GRAP 3 in descending order. The international standards referred to would, in this case, be those issued by the IPSASB and include, for example, IPSAS 42 which is the accounting standard used by RAF and disclaimed by the AGSA. But, importantly, even when applying the provisions of paragraph 11 of Directive 5, the provisions of GRAP cannot be ignored as, if the entity changes its accounting policy, the change must result in “reliable and more relevant information about the transactions, other events or conditions on the entity’s financial position,

³⁵ Directive 5, para 1.

³⁶ Directive 5, para 5.

financial performance or cash flows” and the accounting policy must not be in conflict with the Standards of GRAP or Conceptual Framework.

- [38] An IPSAS or IFRS Standard, or parts thereof, are in conflict with the ASB *Framework for the Preparation and Presentation of Financial Statements* or Standards of GRAP when they deal with an issue differently to the ASB *Framework for the Preparation and Presentation of Financial Statements* or a Standard of GRAP.³⁷
- [39] Directive 5 then endorses the application of IFRS Standards as a Reporting Framework in paragraph 22 and notes that “the ASB has approved the application of IFRS Standards issued by the IASB for public entities that meet the criteria outlined in Directive 12”.
- [40] Appendix 1 lists the standards and pronouncements that are the GRAP Reporting Framework for Public Entities, Constitutional Institutions, Parliament and the Provincial Legislatures, Municipalities, Municipal Entities and Public TVET Colleges. Once listed, these standards and pronouncements form part of the GRAP Reporting Framework and should be applied by the listed entities.
- [41] IFRS 4 – Insurance Contracts is listed in paragraph A5 as one of the effective IFRS standards that entities may apply, to the extent they are applicable. According to the ASB, the list of appendices has been updated on an annual basis since it was first issued in March 2009. IPSAS is not included in the list and the ASB therefore states that it does not form part of the GRAP Reporting Framework.

Accounting Guidelines on GRAP 19

- [42] In February 2020, National Treasury issued Accounting Guideline GRAP 19 (Provisions, Contingent Liabilities and Contingent Assets issued by National

³⁷ Directive 5, para 17.

Treasury), which provides guidance on the recognition and measurement of provisions as well as the disclosures related to those. It also provides guidance on the information to be disclosed in the notes to the financial statements about contingent liabilities and contingent assets. Paragraph 2 specifically provides:

“GRAP 19 is applicable to all entities preparing their financial statements on the accrual basis of accounting. The following are excluded from the Standard:

- Those provisions and contingent liabilities arising from social benefits provided by an entity for which it does not receive consideration that is approximately equal to the value of goods and services provided directly in return from the recipients of those benefits;

Social benefits include:

- the delivery of health, education, housing, transport and other social services to the community; and
- payment of benefit to families the aged, the disabled, the unemployed etc...
- Those covered by other standards for example:
 - IFRS 4 Standard on Insurance Contracts...”

[43] It bears emphasizing that the ASB argues that provisions relating to insurance activities are covered by IFRS 4 and have, because of the above, been scoped out of GRAP 19.

The IPSASB and IPSAS42 vs IFRS 4

[44] We have already explained that Directive 5 includes an appendix which lists the standards and pronouncements that form the GRAP Reporting Framework, which was issued in March 2009. Its goal was to ensure consistent application of the GRAP Reporting Framework by entities that apply the Standards of GRAP. In 2015, IPSASB³⁸ initiated a project to develop definitions, recognition and measurement requirements for social benefits and subsequently issued a Consultation Paper on *Social Benefits Recognition and Measurement* for

³⁸ The International Public Sector Accounting Standards Board (IPSASB).

comment, engaged with affected stakeholders locally and provided feedback on the process by submitting a comment letter. This comment letter informed the IPSASB of the concerns that the ASB had regarding the proposed standard on social benefits.

- [45] The intention was that IPSASB would then develop a proposed IPSAS and once that was available, the ASB would again consult with stakeholders. In addition to this project, the IASB has been working on a revised IFRS 4 on insurance, which would be issued in the latter part of 2016. As a result of these developments, stakeholders requested clarity from the ASB on whether IFRS 4 should be applied even though IPSASB was debating whether “insurance-like” activities are, in fact, social benefits or insurance and, thus, whether insurance accounting should be applied. A further question was whether entities should adopt the new IFRS on insurance accounting when it is published by the IASB.
- [46] The ASB’s position was that IFRS 4 provides appropriate information to hold entities accountable and make decisions, and thus, as outlined in Directive 5, IFRS 4 should be utilized. The ASB also advised that the new IFRS on insurance should not be adopted as the ASB had not revised its Standards of GRAP to align them with the new IFRS. The ASB’s view was that the new IFRS on insurance was likely to be incompatible with Standards of GRAP. The ASB also still needed to assess the applicability of the new IPSAS Standard on Social Benefits to public sector entities,³⁹ and made submissions to the IPSASB on why IPSAS 42 is not appropriate for the local environment.
- [47] In 2019, IPSASB issued IPSAS 42 on Social Benefits and decided to confine IPSAS 42 to cash benefits (including social insurance). This was amid ongoing discussions on accounting for non-cash benefits and diverse views about
- (a) whether the treatment should be the same for cash and non-cash benefits;
 - (b) the event that gives rise to a liability for government; and

³⁹ This was eventually approved by the IPSASB in September 2017.

(c) the quantum or extent of the liability that should be recognized.

[48] Given the issues with the application of IPSAS 42 in the local environment, the ASB undertook a 3-year program to develop a Standard of GRAP on social benefits as part of the 2021-2023 work program. Two main issues have crystalized vis-à-vis the use of IPSAS 42:

(a) the manner in which social benefits are distinguished from other types of benefits. Social benefits were assessed as where a scheme addressed the needs of society as a whole, rather than an individual;

(b) whether social benefits would include “in-kind” benefits.

[49] But in general, the approach was that IPSAS 42 was not supported locally as it did not result in relevant information to users about government’s obligations to provide social benefits. This is because IPSAS 42 is rule-based and does not allow entities to consider the economic substance of their schemes when assessing the past event and extent of liability to recognize. Even within the RAF there were divergent views on the applicability of IPSAS 42 to them. According to the ASB, a key distinguishing factor between social benefits in IPSAS 42 and insurance arrangements and provisions in GRAP 19, is that social benefits are provided to mitigate a social risk and addresses the needs of society as a whole. Different benefits may require different accounting depending on their nature. As a result, the past events that give rise to liabilities could differ.

The letters of 2014, 2016 and the engagements between the AGSA, ASB and the RAF

[50] During 2014, the ASB issued a communication to specific public entities (being the “social security entities”) advising them that even when the insurance activity is set out in legislation, rather than an insurance contract, the principles in IFRS 4 were still appropriate. It further advised that:

“It was also noted that in accordance with the GRAP reporting framework as set out in Directive 5, that public sector entities should be using IFRS 4 to account for

their insurance activities. Despite this requirement, the Board noted significant inconsistencies between public sector entities reporting their insurance activities. Preparers are asked to assess their compliance with IFRS 4 and to amend the disclosures in their financial statements accordingly.

‘The Board also confirmed that the activities were insurance, rather than a social benefit, until such time as the IPSASB completes their project on social benefits. That project may provide further clarity on activities that are similar to insurance.’”

- [51] Then, the RAF began to enquire whether (a) IFRS 4 should be applied even though the IPSASB is debating whether “insurance-like” activities are, in fact, social benefits or insurance (and whether insurance accounting should be applied); and (b) entities should adopt the new IFRS on insurance accounting when it is published by IPSASB. In response, on 13 July 2016, and in a letter to the RAF, the ASB advised that from a consistency and accountability perspective, the entities should continue to account for their benefit as insurance benefits. It stated:

“ASB is of the view that the current reporting requirements should be maintained, i.e. there is no change from the position articulated in 2014. Entities should still consider IFRS 4 in developing accounting policies for their insurance, or insurance-like, activities, as outlined in Directive 5 Determining the GRAP Reporting Framework. Although there is debate internationally about whether certain benefits provided by entities are, in fact, social benefits or insurance, the ASB is of the view that applying IFRS 4 currently provides appropriate information to hold entities accountable and make decisions.”

- [52] On 22 January 2021, the AGSA, transmitted an audit engagement letter to the RAF, in terms of which the RAF was required to prepare an annual report and financial statements as per section 55(2)(a) of the PFMA in accordance with the Performance Management and Reporting Framework (“PMRF”).

[53] On 27 January 2021, a similar audit engagement letter was addressed to the RAF, the terms of which were acknowledged and signed by the Acting Chairperson of the RAF Board.

[54] On 1 February 2021, the ASB acknowledged that one of the key stakeholders affected by the accounting guidance/process for social benefits is the RAF and as a result of the uncertainty on how to account for social benefits, the proposed way forward was that:

- (a) entities were asked to develop accounting policies, including considering the applicability of IFRS 4 to ensure that entities do not continuously change accounting policies; and
- (b) accounting policies were to be developed in the context of the requirements of GRAP and considering IFRS 4.

[55] The letter concluded by stating that any changes to the accounting policy should be made if required by a standard, or when management believes that the change in policy would result in financial statements that provide more relevant information. The letter states, inter alia, the following:

“There has been a significant debate - both internationally and locally - about whether these benefits are insurance benefits or not. While it is clear that some benefits are not insurance benefits, others are provided in terms of legislation to address specific social risks. The Board in 2014 agreed that these specific benefits could be similar to insurance and that certain entities should consider the application of IFRS 4 on Insurance in formulating their accounting policies.

Correspondence was sent to a number of entities in 2014 that the applicability of IFRS 4 should be considered. The letter was not authoritative in that it did not prescribe IFRS 4 to entities, but asked entities to consider IFRS 4 in identifying activities that are similar to insurance but arise from legislation rather than contracts, and to formulate relevant accounting policies.

Given developments internationally on social benefits, an updated letter was sent to affected entities in July 2016 explaining that entities should maintain the status quo

until the ASB has issued a Standard of GRAP on social benefits. The correspondence in 2014 and 2016 accompanies this letter.

In terms of the application of IFRS 4, the Standard -for the most part- does not prescribe any specific accounting principles related to the recognition and measurement of insurance. Some mandatory requirements included precluding entities from measuring liabilities at undiscounted amounts and introducing a liability adequacy test. However, how the liabilities were to be determined was not explicitly described in IFRS 4.

As IFRS 4 does not prescribe specific principles related to the recognition and measurement of insurance arrangements, the RAF would have developed its accounting policies to account for the benefits it provides. The accounting policies applied by the RAF would have been determined by management based on what they believed is appropriate given the prescripts of legislation and relevant facts and circumstances. As a result, when a liability arises, the extent of the liability recognised and how liabilities are measured is based on what management believes is relevant to the information needs of users of the financial statements. The development and application of accounting policies would need to continue in the absence of a specific Standard of GRAP on social benefits and/or insurance...⁴⁰

Way forward

As a result of the uncertainty on how to account for social benefits locally, entities were asked to develop accounting policies, including considering the applicability of IFRS 4. To ensure that entities do not continuously change accounting policies, the Secretariat corresponded with affected entities in 2016 to indicate that they should maintain the status quo. Accounting policies should be developed in the context of the requirements of the Standards of GRAP and considering IFRS 4. Any changes in accounting policies should be made using the principles in GRAP 3 on Accounting Policies, Changes in Accounting Estimates and Errors. We draw attention to paragraph .13 of GRAP 3 indicates that changes in accounting policies should be made if required by a Standard, or when management believes that the change in policy will result in financial statements that provide reliable and more relevant information...”

⁴⁰ This was used by the RAF to bolster its argument that the ASB has not issued authoritative directives on the use of the IPSAS 42 and that it had not taken a specific stance that IPSAS 42 was not permitted for use as an accounting standard in South Africa

- [56] In March 2021, the ASB issued a newsletter reminding the readers of the concept of “substance over form” and that the legal form of arrangements in law or contracts may differ to the economic reality of the arrangement represented in the financial statements of an entity. This means that although the RAF may not have an insurance contract as defined in legislation, the acceptance of insurance risk by the RAF would drive the selection and application of the accounting policies in its financial statements.
- [57] On 1 April 2020, (in respect of the 2020/2021 financial year), the RAF changed its accounting policy from insurance accounting (IFRS 4) to social benefit accounting (IPSAS 42). There was a de-recognition of claims provision and the de-recognised portion of claims liability.
- [58] On 23 April 2021, the RAF held a presentation⁴¹ on the change in accounting policy. Management had come to the conclusion that applying IFRS 4 was not resulting in reliable and relevant information. The RAF held that the criteria for the implementation of the insurance approach is that:
- (a) the social benefit scheme must be intended to be fully funded from contributions; and
 - (b) there must be evidence that the entity manages the scheme in the same way as an insurer of insurance contracts, including assessing the financial performance and financial position of the scheme on a regular basis.
- [59] On 24 May 2021, the RAF shared that presentation with the AGSA – it is titled “*IPSAS 42 Recognition Criteria and measurements of liabilities*”. According to the RAF, upon the adoption of IPSAS 42, the RAF is required to apply the principles in the standard in respect of when a liability should be recognised in the Annual Financial Statements, as well as what the value of the liability should be. According to it, an entity shall recognise a liability for a social benefit scheme when:

⁴¹ One of several engagements with the AGSA

- (a) the entity has a present obligation for an outflow of resources that results from a past event; and
- (b) the present obligation can be measured in a way that achieves the qualitative characteristics and take account of constraints on information in general purpose financial reports as set out in the Conceptual Framework for General Purpose Financial Reporting by Public Sector Entities.
- (c) a liability must involve an outflow of resources from the entity for it to be settled. An obligation that can be settled without an outflow of resources from the entity is not an obligation;
- (d) the past event that gives rise to a liability for a social benefit scheme is the satisfaction by each beneficiary of all eligibility criteria to receive a social benefit payment. The satisfaction of eligibility criteria for each social benefit payment is a separate past event.

[60] Thus, on RAF's construction, the use of IPSAS 42 allows it to only consider as liabilities in the annual financial statements those RAF's claims in respect of which the eligibility criteria⁴² have been assessed already as being valid and an offer made (or a court order issued). This is a vastly different view from that adopted by the AGSA who assesses the liability as arising as at date of the accident (that is the date of death or injury).

[61] At the behest of the RAF, on 24 May 2021, PWC issued a report on the Technical Review on the IPSAS 42 Social Benefit Implementation. The report was done in two parts, Annexure A being the Accounting Technical Findings and Annexure B comprising the extracts of the Financial Statement as provided by management on 5 May 2021, and it concludes as follows:

- (a) in terms of GRAP 3 and the PFMA, the RAF may change the accounting policy if this will result in more relevant and reliable information being presented;

⁴² As set out in s17 of the RAF Act, 1996

- (b) in the absence of a standard dealing with social benefits, both locally and internationally, the RAF applied IFRS 4, as per the GRAP Reporting Framework Directive 5 and the guidance of the ASB. The ASB's Directive is not authoritative and states that entities may apply the Directive to the extent that it is applicable;
- (c) the RAF is developing its own accounting policy based on IPSAS 42 and the definition of social benefits is met as the RAF provides compulsory social insurance cover to all users. Though RAF accepts an insurance risk, it does not receive a premium for the insurance, as it is funded through fuel levy.
- (d) the report concludes on this score, by stating that on analysis of the scope of the IFRS 4 and the IPSAS 42, it is clear that the social insurance claims paid by the RAF are better matched to the scope of IPSAS 42 than IFRS 4.
- (e) RAF should be using the general approach. One of the key differences between the IFRS 4 and IPSAS 42 is the timing of the recognition of liability.
- (f) PWC concluded as follows on the Accounting Technical Findings:

“The use of IPSAS 42 better represents the substance of the RAF's social insurance activities. At the time the RAF would not have been incorrect in their use of IFRS 4, as it was designed as an interim standard for the accounting of insurance contracts by entities. In South Africa and internationally there was no Standard dealing specifically with Social Benefits until 2019. Therefore, leaving entities, like the RAF with no alternative but to use IFRS 4 to develop accounting policies.

The introduction of IPSAS 42 by the IPSASB has therefore provided public sector entities with social insurance objectives with an alternative standard to consider when developing their accounting policies. The RAF management are of the opinion that implementing IPSAS 42 general approach will provide users of the RAF financial statements with more relevant and reliable information for decision making in the public sector.

GRAP 3, requires that the change in accounting policy results in **more relevant, reliable and complete information**. The relevance and reliability has been established as discussed above.

Based on our discussion with management and the background information provided by management the completeness of the social benefits liability will be tested by reviewing all offers recorded on the offer system after reporting date i.e. year end (31March) and the date the financial statements are authorised for issue, to establish if any claims loaded on the offer system met the eligibility criteria before year end. These will be treated as adjusting events after reporting date, in terms of GRAP 14 (Events after reporting date).

It must be further noted that GRAP 19 paragraph 9 states that for a provision **or contingency** arising from a social benefit to be excluded from the scope of this Standard, the entity providing the benefit will not receive consideration that is approximately equal to the value of goods and services provided, directly in return from recipients of the benefit. This exclusion would encompass those circumstances where a charge is levied in respect of the benefit, but there is no direct relationship between the charge and the benefit received.

In terms of the exclusion there is no requirement in terms of the GRAP Reporting Framework to disclose the IBNR and portion of the OCR claims (i.e. the open claims which have not met the eligibility criteria and been loaded on the offer system) as contingent liabilities.”

[62] On 26 May 2021, the AGSA, informed the RAF that its position was that the use of the IPSAS 42 by the RAF is inappropriate, especially in view of the correspondence from the ASB of 1 February 2021, and that;

“Based on the ASB’s conclusion with regards to the use of IPSAS 42 Social Benefits in the correspondence dated 01 February 2021, IPSAS 42 Social Benefits is not well suited for the South African environment and as such it is our view that the RAF should not apply this standard but rather should maintain the status quo while the ASB develops a standard specifically tailored for the South African environment...”

- [63] But the RAF's stance was implacable. It maintained that the ASB was clear that it could change its accounting policy to a relevant standard and that IPSAS 42 was the most relevant accounting standard. As a result, on 31 May 2021, the RAF submitted their annual financial statements for audit, in which the RAF stated that the IPSAS 42 Social Benefit Standard has been adopted as there is currently no standard of GRAP that can be applied.
- [64] From June 2021 until August 2021, there were numerous engagements and interactions between the parties, which are unnecessary to repeat here.
- [65] On 24 August 2021, the RAF addressed a letter to the Minister, informing him of the disagreement between the RAF and the AGSA and the consequent referral of the matter to the Office of the Accountant General ("the OAG") for dispute resolution, which had led to the audit timelines needing extension as the audit could only, on estimation, be concluded on 31 October 2021.
- [66] On 1 September 2021, the Acting Accountant-General responded to the request for disagreement resolution between the RAF and the AGSA. In essence, the OAG expressed that having considered the correspondence and the supporting documentation, it did not support the conclusions expressed by the RAF. The reason for the OAG's disagreement was firstly on the classification and nature of the RAF as a public entity and a social security scheme, and secondly, the application of Directive 5 issued by the ASB.
- [67] The National Treasury encouraged the RAF to revert to the accounting policy adopted in the 2019/2020 financial year and to continue to participate with the ASB in the development of a suitable standard on accounting for social benefits in the South African public sector.
- [68] On 9 September 2021, the RAF responded and took issue with the fact that it had expected the OAG to engage parties as an independent mediator rather than

meeting with one party. The RAF also expressed that it had expected the OAG to mediate rather than to express an opinion on the matter. According to it, the OAG did not deal with what was at the centre of the dispute (that is the interpretation of GRAP 3), specifically paragraphs 8 to 11, stating that the issue in dispute was the formulation of the accounting policy using a relevant standard from an international accounting standard's body and then the application of that accounting policy. The RAF urged the OAG to facilitate a dispute resolution process which would result in a fair and mutually inclusive outcome that would be in the best interest of the users of financial statements.

[69] Between 16 September 2021, and 13 December 2021, meetings were held between the parties, presentations were made, and much correspondence flowed vis-à-vis the RAF's change in accounting policy and its insistence that IPSAS42 was an authorised and appropriate accounting standard for it to apply. However, the RAF's stance on IPSAS 42 remained firm.

[70] On 13 December 2021, a meeting was held between the AGSA's team and the RAF management, the Board and the Audit Committee, but without much improvement on the deadlock between the parties. The AGSA also sent the RAF a Technical Report that it had commissioned. The AGSA's Final Management Report was sent to the RAF on 21 December 2021. The purpose of the management report was to communicate its audit findings and other key audit observations to the Board. The comments made in the report were that the increase in accumulated deficit as at 31 March 2021 was due to the continued efforts of the RAF to complete and settle (Finalised but not yet paid) more claims, and that the claims liability has been steadily increasing year-on-year. In the current year, the RAF management had changed the RAF's accounting policy for claims liability resulting in a gross understatement of claims liability. The AGSA was of the view that the use of IPSAS 42 was inappropriate and did not result in a fair presentation of the financial statements. The overall conclusion of the AGSA was that the RAF should not apply this standard (IPSAS 42) but should

rather maintain the status quo while the ASB develops a standard specifically tailored for the South African environment.

[71] On 21 December 2021, the AGSA informed the RAF that it had concluded the audit reporting process for the 2020/2021 financial year and attached the final signed Audit Report, the final Management report, as well as a covering letter with detailed guidance on how the Audit Report ought to be incorporated into the RAF annual report. It also noted that:

- (a) the amended and approved annual financial statements, after making the corrections for audit findings relating to claims expenditure and irregular expenditure (identified both by management and auditors), had not been received;
- (b) the written representations signed by the Board confirming that the Board has fulfilled its responsibility for the preparation and fair presentation of the financial statements in accordance GRAP had not been received;
- (c) the AGSA also included a disclaimer paragraph relating to the non-disclosure of a material uncertainty where management had indicated that such does not exist. In light of the understatement of claims liabilities and claims expenditures that had been disclaimed and its impact on fair presentation, which was indicative of material uncertainty as to the ability of the entity to meet its obligations in the foreseeable future;
- (d) The RAF was issued with a disclaimer of opinion with material findings on compliance with legislation.

[72] According to the RAF, the first time there is any prohibition to the use of IPSAS 42 is when the ASB gave notice thereof to chief financial officers in its notification dated 30 September 2021. In this notification the following is stated:

- (a) "The ASB updates Directive 5 each year to include the reporting framework for the upcoming reporting period.
- (b) The Annexure outlines the pronouncements issued by the ASB, IPSASB

and IASB that should either be applied or considered by entities in preparing their financial statements.

- (c) The table in the Annexure explains which IPSAS or IFRS Standards should not be applied with supporting rationale.
- (d) The Annexure records that IPSAS42 Standard on Social Benefits is not to be applied. The explanation given: “The Board did not support aspects of both the insurance and general approach in IPSAS42. The application of the general approach to some schemes locally may not result in the fair presentation of the scheme liabilities. As a result, IPSAS42 should not be applied. The Board has started a project to develop a Standard of GRAP on social benefits”.

[73] Interestingly, the RAF’s argument is that this letter comes after the fact; it argues that, prior to this, the ASB had never specifically prohibited the use of IPSAS 42, but had rather left it to the entity to develop its own accounting policy in line with GRAP 19 and Directive 5. It argues that previous directives stating that IPSAS 42 was not available for local use were not binding (they were advisory rather than mandatory) and that the first prohibition on the use of IPSAS 42 came in September 2021.

The Challenges

[74] As stated supra, the RAF has mounted several challenges in this legality review, many of which are be grouped together for purposes of the ensuing discussion, because their substance remains interwoven.

[75] The first of those challenges is the procedural fairness challenge⁴³. In this regard, the RAF’s main complaint is that there was no engagement between the AGSA and it before the adverse audit finding was published. But this is very clearly incorrect when viewed against the plethora of correspondence, the meetings and the procedure adopted via the OAG. The chronology confirms that a fair and exhaustive process was followed where the RAF was given several opportunities to make its case and respond to the AGSA’s position and views. It

⁴³ Grounds 1, 2, 3 and 13.

remains very clear that no matter how much more engagement there was to be, no matter the fact that the AGSA, the ASB and the OAG were speaking from one mouth, the RAF was not going to change its mind – it had adopted a stance and was impervious to persuasion that it was wrong. Thus this challenge must be dismissed.

[76] The positions of the AGSA and the RAF were entrenched long before 21 December 2021. Both parties had reached a deadlock. In *Williams v Benoni Town Council*⁴⁴, Roper J said:

“A dispute exists when one party maintains one point of view and the other party a contrary view or a different one. When that position has arisen, the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any less a dispute.”⁴⁵

[77] Early on, the RAF and the AGSA had reached a deadlock or dispute stage, even if the AGSA appeared to have been willing to listen. In *Saamwerk Southwerke (Pty) Ltd v Minister of Mineral Resources and another*⁴⁶, Van der Merwe JA stated the following:

[66] After its initial prevarication, the Department formally withdrew its opposition... The policy of the Department was not to finalise a mining right whilst litigation was pending regarding the validity of that right. It was in my view perfectly in keeping with public and legal policy not to undermine the legal process by determining that which courts were called upon to decide.

[67] In my view, policy and legal consideration do not regard the omissions as unlawful conduct... As Saamwerk failed to prove that the omissions were wrongful, its claim against the Minister must fail.”

⁴⁴ 1949 (1) SA 501 (W).

⁴⁵ Followed in *Newu v Sithole & Others* [2004] 11 BLLR 1085 (LAC). In *Edgars Stores Ltd v SACCAWU and another* [1998] 5 BLLR 447 (LAC) the Labour Appeal Court approved of a dictum in *Durban City Council v Minister of Labour and others* 1953 (3) SA 708 (A) at 712A namely, a dispute “must as a minimum ...postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions”.

⁴⁶ (1098/2015, 206/2016) [2017] ZASCA 56 (19 May 2017) at para 68-67.

[78] The RAF then argues that the OAG is tasked with resolving disputes of this nature and that the AGSA abandoned the dispute resolution process. Thus, argues the RAF, the dispute resolution process was incomplete when the AGSA issued its opinion. But this is simply incorrect: the AGSA did participate in the dispute resolution process. The OAG considered the parties' input and issued an opinion on 21 September 2021. The fact is that the OAG did not agree with the RAF's position on the adoption of IPSAS 42 and encouraged the RAF to revert to the accounting standard adopted in the 2019/2020 financial year whilst continuing to participate with the ASB in developing a suitable accounting standard. The fact also remains that the AGSA informed the OAG that the AGSA had a statutory responsibility to audit and issued the audit report within legislated timelines; that the matter had been ongoing for the past 7 months and that should it not be resolved by 5 December 2021, the AGSA would sign and issue the audit report. Given the entrenched position of the RAF, we see nothing wrong with this. We also find nothing untoward in the OAG's conduct of the dispute resolution process – it had been finalized by the time the AGSA issued the audit report. Similarly, this challenge must fail.

[79] The next challenge put up by the RAF is in respect of the Technical Report sent to it by the AGSA on 13 December 2021. The RAF's contention has vacillated: first it says that it was never sent the report. Then, when pointed to the relevant documents and correspondence, its stance is that it was simply a summary that was provided and that no Technical Report was sent. But the AGSA's position is that the document sent to the RAF was the internal Technical Report, which was given to the RAF and that this contains the reasons for the position adopted by the AGSA. Given this, the RAF was entitled to engage with the AGSA regarding the content. There is no true substance⁴⁷ to the RAF's argument on this issue. They cannot complain that they were kept in the dark regarding either the position adopted by the AGSA vis-s-vis IPSAS 42 or the reasons that underpinned that position. In any event, one cannot lose sight of the fact that the

⁴⁷ Auditor-General of SA v MEC for Economic Opportunities, Western Cape and Another (671/2020) 2021 ZASCA 133 (4 October 2021) para [22].

content of the Technical Report was actually disclosed to the RAF as far back as June 2021.⁴⁸ This challenge must, too, fail.

[80] The most important challenge is launched against the AGSA's position regarding IPSAS42 and Directive 5.⁴⁹ In this regard, we have already set out the framework within which the ASB develops and adopts accounting standards and, in particular, the Standards of GRAP relevant to public entities such as the RAF. What is important is that the RAF used GRAP 19 and IFRS 4 in previous accounting years to formulate its accounting policy. In terms of these standards, the question of when a liability arises is determined by a past event. In the case of the RAF, that would be the motor vehicle accident where a third party suffers loss or death as a result of bodily injury to himself or herself or the death of or bodily injury to another person. This is the determination used by the AGSA as its view is that the motor vehicle accident which results in the death or injury of a person is the obligating event⁵⁰ which creates a provisional liability for the RAF – it is not when claims are submitted and assessed as valid. The timing and amount of payment being uncertain at the time of the accident, an actuarial calculation is then used in order to be able to account for this liability. The RAF has, in past years, adopted this very criterion.

[81] But the RAF changed its stance on this issue in 2021: it is now of the view that it only attracts liability once a claim arising from the driving of a motor vehicle has been lodged, assessed, accepted, and an offer of payment has been made or a court order issued.

[82] The difference in view arose because the RAF, in its determination, carved itself out of the GRAP19 obligations on the basis that it considers itself as a social benefit entity. As indicated earlier, the GRAP applies to accounting standards. As its objectives, GRAP19 provides that it is there to define provisions,

⁴⁸ They were contained in the communication regarding the AGSA's audit findings.

⁴⁹ Grounds 2, 5, 6, 7, 9, 10.

⁵⁰ Our emphasis

contingent liabilities and contingent assets, identify the circumstances in which provisions should be recognised, how they should be measured and the disclosures that should be made about them. It also requires that certain information be disclosed about contingent liabilities and contingent assets in the notes to the financial statements to enable users to understand their nature, timing and amount.

[83] The GRAP19 standard is geared towards fostering an understanding of the nature, timing and amount of a liability⁵¹. Indisputably, GRAP19 requires an entity that prepares financial statements under the accrual basis of accounting to apply it for provisions, contingent liabilities and contingent assets. The only time this requirement finds no application is when the provisions and contingent liabilities arise from social benefits provided by an entity for which it does not receive consideration that is approximately equal to the value of goods and services provided directly in return from the recipients of those benefits.

[84] In order to benefit from this exception, the RAF, for the financial year in question, conveniently considered itself to be providing social benefits to the victims of motor vehicle accidents. This, after having been a different animal the previous financial year. We must remark that this is at odds with the principle of consistency, which is the cornerstone of accounting.⁵² GRAP19 records that it finds application to provisions, contingent liabilities and contingent assets of an insurer who, for the purposes of the standard, is primarily engaged in insurance activities. The RAF, for what appears to be unsound reasons, in our view, suddenly did not consider itself an entity engaged in insurance-like activities anymore.

⁵¹ The above objectives are consistent with the legislative provisions in section 89 (4) of the PFMA, which provides that the standards set must promote transparency in an effective management of revenue, expenditure, assets and liabilities of the institutions to which the standards apply.

⁵² The consistency principle states that business should maintain the same accounting methods or principles throughout the accounting periods, so that users of the financial statements or information are able to make meaningful conclusions from the data.

[85] The difficulty with this self-consideration is that the standard provides that, for its purposes, social benefits refers to goods, services and other benefits provided in pursuit of the social policy objectives of a government. Although nothing much turns on this finding, we take the view that the RAF does not exist in pursuit of a social policy⁵³ objectives of the government of the Republic of South Africa. In the first instance, by simply considering the history of the RAF, it is not too difficult to observe that it provided and continues to provide insurance or insurance-like activities. Accordingly, it is legally incorrect, in our considered view, to consider the RAF to be providing social benefits. This finding thus places the RAF squarely within the scope of GRAP19. Therefore, it was and is still required, as it prepares financial statements, to provide for contingent liabilities. In terms of the standard, amongst others, a contingent liability is a possible obligation that arises from past events, and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity. There can be no doubt that out of every motor vehicle accident, an event outside the control of the RAF, a possible obligation to pay compensation to a victim, arises. There can be no quibble that in accounting parlance, contingent liabilities are liabilities that may be incurred by an entity depending on the outcome of an uncertain future event. A pending lawsuit may, for example, qualify as such an uncertain event. The RAF simply ignores this in its 2020/2021 financial statements. It even, without proper explanation, fails to make provision for any contingent liabilities at all.

[86] The Standard asserts that a legal obligation is an obligation that derives from legislation. The RAF asserts that this means a valid claim in terms of the RAF Act. But this assertion is incorrect as it does not speak to the validity of the claim but rather to the derivation of an obligation or, in other terms, the source of the potential liability. Section 3 of the RAF Act provides that the object of the RAF shall be the payment of compensation in accordance with the RAF Act for loss or damage wrongfully caused by the driving of motor vehicles. Mr Motepe

⁵³ Social policy refers to any government action aimed at addressing social needs such as issues of employment, education, healthcare, housing and sustenance.

submitted that where the section refers to payment of compensation in accordance with the RAF Act, it means that a valid claim must exist. This submission seems to ignore the definition of the word 'object' as employed by the legislature. The word simply means the purpose or goal of something. Thus, the purpose of the RAF's existence is to pay compensation for loss caused by the driving of a motor vehicle. Therefore, any loss or damage occasioned by a motor vehicle accident in South Africa is a risk covered by the RAF. Section 17 (1) (a) and (b) of the RAF Act makes it clear that a claim for compensation arising from the driving of a motor vehicle creates a liability for the RAF. In practical terms, a victim who suffers an injury or loss arising from a driving of a motor vehicle is entitled to claim against the RAF. Once a claim is lodged, a potential liability for the RAF arises, it being its object to cover for such risks.

- [87] The RAF then argues that an "obligating event" arises when it offers compensation. Before that event, if its argument is accepted, all the lodged and unassessed claims amount to nothingness from a contingent liability point of view. With due respect, this is a self-serving approach: the contingent liabilities are within the control of the RAF - for example, if the RAF decides not to assess any of the claims lodged within a particular financial year, and makes zero offers, then in that year it will account for no contingent liabilities at all. This approach is not useful to the users of financial records at all and presents a skewed overview of the financial position of the RAF.
- [88] The Standard defines the term 'obligating event' to mean an event that creates a legal or constructive obligation that results in an entity having no realistic alternative to settling that obligation. Making an offer of settlement does not create a legal obligation, but it accepts the already existing obligation. More pointedly, the Standard refers to an event which creates a legal obligation. An offer of settlement has the potential to create a contractual liability if accepted by the offeree. On the other hand, an occurrence of an event – a motor vehicle accident – brings into existence a legal obligation which may result in the RAF

having no realistic alternative but to pay. “Realistic” does not necessarily mean certainty, it simply means “having or showing sensible and practical idea of what can be achieved or expected”⁵⁴. From an accounting perspective, a financial risk is created once an event may lead to payment of financial compensation. On Mr Motepe’s argument, pending litigation does not create a contingent liability until and unless an offer of settlement or a court order is made as it is only then that there is no longer uncertainty. This is contrary to the definition of contingent liability in the Standard. This argument is untenable.

[89] Regard being had to the purpose of the RAF, it is practical and sensible to expect it to pay compensation when loss or damage arises out of the driving of a motor vehicle. Practically, once a motor vehicle accident is reported and victims are injured or perish, irrespective of whether a valid and legal claim may ultimately arise, the purse of the RAF is instantaneously placed at risk. In accounting parlance, a contingent risk emerges. For all the above reasons, there is no error of law committed by the AGSA, which is capable of vitiating the Disclaimer.

[90] The RAF then strenuously argued that by insisting that IFRS 4 was determined for insurance-like entities as communicated in the letters of 2014 and July 2016, which it considered to be authoritative, the AGSA overlooked Directive 5, and that this constitutes an error of law. There is no merit in this argument. The objective of Directive 5 is to set out the principles in determining the GRAP Reporting Framework. Its aim is to ensure consistent application of the GRAP Reporting Framework by entities that apply the standards of GRAP. There is overwhelming and sufficient evidence to demonstrate that IFRS 4 was used by insurance and insurance-like industries. Application of the *Plascon-Evans*⁵⁵ rule places us at a point where it must be accepted that IFRS 4 was the applicable reporting standard. In the 2019/2020 financial year the RAF used the IFRS 4. On an argument conveniently suitable for the RAF now, it says that this was used in error. It was the usage of the IFRS4 that revealed the R300+ billion liability,

⁵⁴ Definition of “realistic” : Oxford Dictionary

⁵⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

which was drastically reduced when the new accounting policy was formulated the following financial year.

[91] Directive 5 provides that where there is no equivalent standard of GRAP, an international Public Sector Accounting Standard (IPSAS) or (International Reporting Standards) IFRS should be used in formulating accounting policy. This is the default position that must be taken in instances where there is no equivalent standard of GRAP. The RAF artificially placed itself in the category of 'where there is no equivalent standard' after it carved itself out of GRAP19 and repositioned itself as a 'social benefit' provider. It then argued that it could rely on GRAP 3 to develop an accounting policy, since there was no standard for 'social benefit' entities, and then it changed its accounting policy. The purpose of this was to give the RAF a "facelift" from a financial perspective. In its reformed appearance, it will shed off a significant portion of its liabilities.

[92] One can also not ignore that GRAP3's objective is to enhance the relevance and reliability of an entity's financial statements, and the comparability of those financial statements over time and with the financial statements of other entities⁵⁶. With regard to accounting policies, GRAP3 provides that in the absence of a standard of GRAP that specifically applies to a transaction, other event or condition, management shall use its judgment in developing and applying an accounting policy that results in information that is:

(a) relevant to the economic decision-making needs of users;

(b) reliable, in that the financial statements:

(i) represent faithfully the financial position, financial performance and cash flows of the entity;

(ii) reflect the economic substance of transactions, other events and conditions, and not merely legal form;

(iii) are neutral as in free from bias;

(iv) are prudent; and

⁵⁶ By prescribing the criteria for selecting and changing accounting policies, together with the accounting treatment and disclosure of changes in accounting policies, changes in accounting estimates and corrections of errors

(c) complete in all material respects.

[93] But the RAF was bereft of a jurisdictional basis (absence of a standard of GRAP) to apply a different accounting policy. Even if this Court were to assume that a jurisdictional basis exists for the RAF to apply or adopt an accounting policy, there is sufficient doubt that such a policy meets the criteria outlined above. It being common cause that owing to the application of this new policy, the liabilities of the RAF substantially transformed by almost a sizeable percentage, the question then becomes, how relevant, reliable and faithful is that to the users? A reduction in liabilities from R300+ billion to R30-odd billion completely changes the financial position and performance of the entity. Such a policy cannot, by any stretch of imagination, be neutral, prudent and complete in all material respects. In simple terms, Directive 5 and GRAP3 were simply unavailable for the RAF. The conclusion to reach is that the AGSA did not commit any error of law and that the decision to issue the Disclaimer on the terms she did, was lawful and rational.

[94] The last string in the RAF's bow is the argument that the change in its accounting policy is an administrative decision which has gone unchallenged by either the AGSA or the ASB who have failed to launch a reactive challenge. It argues thus that the principles set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁵⁷ apply and that its decision to change its accounting policy is presumptively valid, lawful and binding until set aside by a court. But the RAF's decision has no direct, external, legal consequences for the AGSA⁵⁸. The effect of that determination, other than it existing factually, is simply that the RAF changed or applied an accounting policy. Even in the presence of a changed policy, the AGSA was still legally obligated to perform an audit, express an opinion after the audit and report. Thus, the fact that the RAF changed its accounting policy under the circumstances that it did does not prevent the AGSA

⁵⁷ 2004 (6) SA 222 (SCA) at para 26; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 65.

⁵⁸ In terms of section 1 of PAJA, an administrative action is one which adversely affects the rights of any person and which has direct, external legal effect.

to do what the law enjoins her to do⁵⁹. More importantly, the AGSA is accountable to the National Assembly only⁶⁰. By ignoring any alleged legal effect of the RAF's decision, the AGSA did not act *ultra vires* in any manner or form. The AGSA had no reason to approach a Court of law to review a decision, be it executive or administrative, that does not adversely affect its rights, in particular auditing rights. If that were to be the case, the AGSA would be a permanent resident of the palaces of justice, because it is conceivable to believe that every time the Board of an entity incorrectly changes its accounting policy, the AGSA would have to approach court to set aside that decision. The AGSA must simply be satisfied that the financial records have been recorded appropriately. Therefore, the AGSA did not commit any material error of law inimical to the Disclaimer.

[95] We have already set out the legislative framework within which the ASB sets and considers the best accounting practices both locally and internationally. There is an obligation on the ASB to set standards that promote transparency in an effective management of revenue, expenditure, assets and liabilities of the institutions to which the standards apply. The ASB is unequivocal in its position that IPSAS 42 has not been adopted as an accounting standard in South Africa because of the manner in which it treats liabilities. Mr Motepe argued that the RAF did not adopt the IPSAS42 as an accounting standard, but it used it to adopt its accounting policy and, in particular, those parts that dealt with cash payments. At the same time Mr Motepe submitted that in stating that IPSAS42 was not available for use, the AGSA committed an error. We disagree. The AGSA is not entitled to adopt accounting standards or develop accounting policies – it is enjoined to follow the prescripts set by the ASB. Where the ASB has determined that ISPSAS 42 is not available for use locally by public entities, that is the standard to be applied by the AGSA and, in doing so, the AGSA acted rationally

⁵⁹ Section 3(c) of the PAA provides that the Auditor General must be impartial and must exercise the powers and perform the functions of office without fear, favour or prejudice.

⁶⁰ Section 3(d) of the PAA.

and lawfully. There is thus a rational connection between the AGSA's Disclaimer and the reasons for issuing it.

Costs

[96] RAF and AGSA agreed that costs should follow the result. The ASB did not oppose the application. The AGSA motivated for the costs of three counsel. Given the issues at stake, the complexity and the novel issues raised, and the sheer volume of paper, the matter warrants the costs of three counsel. The costs shall include the qualifying fees and expenses of Professor Maroun.

Order

1. Part B of the application is dismissed.
2. The applicant shall pay the first respondent's costs of the application, including the reserved costs of Part A, which costs shall include the cost of three counsel where employed, one of whom is a senior counsel, as well as the qualifying fees and expenses of Professor Maroun, such costs to be taxed according to Scale C.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

**GW GIRDWOOD
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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For the Third Respondent:

No appearance

Date of the hearing:

30,31 January 2024, 1 February 2024

Date of judgment:

19 April 2024