



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 1147/2020

In the matter between:

**ROAD ACCIDENT FUND**

**FIRST APPELLANT**

**THE CHAIRPERSON OF THE BOARD  
OF THE ROAD ACCIDENT FUND**

**SECOND APPELLANT**

**ACTING CHIEF EXECUTIVE OFFICER  
OF THE ROAD ACCIDENT FUND**

**THIRD APPELLANT**

**MINISTER OF TRANSPORT  
APPELLANT**

**FOURTH**

and

**MABUNDA INCORPORATED AND**

**41 OTHERS** **FIRST**  
**RESPONDENT**

**FOURIEFISMER INCORPORATED** **SECOND RESPONDENT**

**PRETORIA ATTORNEYS ASSOCIATION** **THIRD**  
**RESPONDENT**

**DIALE MOGASHOA INCORPORATED** **FOURTH**  
**RESPONDENT**

Case no: 1082/2020

In the matter between:

**MINISTER OF TRANSPORT** **APPELLANT**

and

**THE ROAD ACCIDENT FUND** **FIRST**  
**RESPONDENT**

**THE CHAIRPERSON OF THE BOARD**  
**OF THE ROAD ACCIDENT FUND** **SECOND RESPONDENT**

**ACTING CHIEF EXECUTIVE OFFICER**  
**OF THE ROAD ACCIDENT FUND** **THIRD RESPONDENT**

**FOURIEFISMER INCORPORATED** **FOURTH RESPONDENT**

**LINDSAYKELLER ATTORNEYS**

**FIFTH RESPONDENT**

**PRETORIA ATTORNEYS ASSOCIATION**

**SIXTH RESPONDENT**

**MAPONYA INCORPORATED  
RESPONDENT**

**SEVENTH**

**Neutral citation:** *Road Accident Fund and Others v Mabunda Incorporated and Others* (1147/2020); *Minister of Transport v Road Accident Fund and Others* (1082/2020) [2022] ZASCA 169 (1 December 2022)

**Coram:** ZONDI and GORVEN JJA and MUSI, MAKAULA and MASIPA AJJA

**Heard:** 15 August 2022

**Delivered:** 1 December 2022

**Summary:** Appeal – mootness – interpretation of court order setting aside cancellation of tender – unsuccessful appeal requires tender to be adjudicated – successful appeal would result in cancellation of tender standing – not moot. Administrative Law – Review – cancellation of tender by Road Accident Fund – compliance with Regulation 13(1) of the Preferential Procurement Policy Framework Act 5 of 2000 – changed circumstances shown – cancellation good.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

1 The appeal under case number 1082/2020 is struck from the roll with costs.

2 The application for condonation is granted and the appeal under case number 1147/2020 is reinstated.

3 The appeal under case number 1147/2020 is upheld with costs including those of two counsel where so employed.

4 The order by the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

‘The applications under case numbers 17518/2020, 15876/2020 and 18239/2020 are dismissed with costs including those of two counsel where so employed.’

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## JUDGMENT

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**Gorven JA and Masipa AJA (Zondi JA and Musi and Makaula AJJA concurring)**

[1] Two appeals were set down for hearing; one under case no. 1147/2020, and the other under case no. 1082/2020. The Road Accident Fund (the RAF) is the first appellant in the appeal under case number 1147/2020. The second and third appellants are the Chairperson of the Board

of the RAF and Chief Executive Officer (the CEO) of the RAF respectively. These appellants shall be referred to as the RAF. The Minister of Transport (the Minister), who was the fourth appellant in the previous matter, is the appellant in the appeal under case number 1082/2020. The two appeals were consolidated. Both appeals had lapsed and both sets of appellants sought condonation for the late delivery of the appeal record and the notice of appeal and sought reinstatement of the appeals. The Minister's appeal was struck from the roll due to non-appearance. No more need be said about it. The balance of this judgment deals with the application for condonation and the appeal of the RAF.

[2] A brief background is necessary. The RAF is a juristic person created by the Road Accident Fund Act 56 of 1996 (the RAF Act). Its purpose is to facilitate compensation for damages arising from the negligent driving of motor vehicles. It is safe to say that it has been the country's major litigator for some years.

[3] Pursuant to a tender awarded in 2014, the RAF contracted a panel of 103 attorneys for a period of five years. The procurement of any such panel must comply with the prescripts of s 217 of the Constitution.<sup>1</sup> These attorneys were to provide specialised legal services to the RAF. Identical

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<sup>1</sup> Section 217 of the Constitution of the Republic of South Africa 1996 provides:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

Service Level Agreements (the SLAs) were concluded with the attorneys on the panel.

[4] The SLAs were due to lapse towards the end of November 2019. On 25 July 2019, the interim Board of the RAF notified the attorneys on the panel to prepare all unfinalised files in their possession for handover by that date. In preparation for the lapsing of the SLAs, the RAF had put out a new invitation to tender on 30 November 2018, RAF/2018/00054 (the 2018 tender). This sought bids for a five year period. The closing date for submission was 28 February 2020, which was subsequently extended to 14 June 2020.

[5] On 19 September 2019, the Board appointed a new CEO. The following day, the Board sent a letter suspending the instruction of 25 July requiring unfinalised files to be handed over. On 22 October 2019, the Board resolved to extend the SLAs to 31 May 2020. On 19 November, the Board sent an addendum to the SLAs to the attorneys on the panel for signature by 21 November (the second addendum). The second addendum extended the SLAs to 31 May 2020. It also contained somewhat less generous financial terms, including a requirement for the attorneys to prepare reports, without charge, on unfinished matters when the files were handed back to the RAF. The mandate of the attorneys who signed would therefore terminate by effluxion of time on 31 May 2020. All of the present attorney respondents (the panel attorneys) were some of the total of 89 attorneys who signed the second addendum. Those attorneys who did not sign the second addendum were obliged to hand back their files and their SLAs lapsed towards the end of November 2019.

[6] The interim Board of the RAF was replaced by a permanent Board (the Board) on 5 December 2019. On 12 December 2019, the management of the RAF made a presentation to the Board giving an overview of its affairs and its financial status. The presentation reflected income for the period under review of R28,645 million, expenditure of R74,358 million and a resultant deficit of R45,713 million. It reported that, for that period, 99.65 percent of matters set down for trial in the Gauteng Division of the High Court, Pretoria, settled on the trial day. Only 0.35 percent of matters set down for trial proceeded. This meant that trial fees were unnecessarily incurred.

[7] As a consequence, the management of the RAF proposed developing a strategic plan involving an entirely new model of operation, including the insourcing of legal specialist services, rather than utilising private attorneys. A strategic plan for the period 2020 to 2025 incorporating the new model was presented to the Board in December 2019 and was accepted by the Board on 31 January 2020.

[8] On 18 February 2020, the panel attorneys and the others who had signed the second addendum were notified to begin a phased handover of files, which was to be completed by 31 May. Due to numerous requests to reconsider the timeline, a second letter dated 20 February was sent with a new timeline (the handover decision). On 26 February 2020, the RAF cancelled the 2018 tender (the tender withdrawal decision). This was communicated to the panel attorneys and the other signatories to the second addendum. In the notification, the cancellation was said to be 'due to

unaffordability of services as advertised in the tender, as well as changed circumstances’.

[9] This prompted three separate applications to the Gauteng Division of the High Court, Pretoria, seeking to review one or both of the handover decision and the tender withdrawal decision. Along with these, it was sought to declare the second addendum unlawful and invalid. The applicants in those matters were the present respondents and certain other parties. They contended that the impugned decisions were unlawful on three main grounds:

- ‘1. That the impugned decisions are irrational and unreasonable in light of their own purported objectives.
2. That the impugned decisions were taken without the first appellant having in place any proper or adequate plan to deal with the situation after 1 June 2020.
3. That the impugned decisions are unlawful and invalid for the reasons set out in the first respondent’s affidavits.’

In addition, the first respondent, Mabunda Incorporated (Mabunda) contended that the impugned decisions fell to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000.

[10] The matter was heard by Hughes J who, on 1 June 2020, granted an order which was subsequently amended, the final and material terms of which were:

1. The decision of the respondent communicated in a letter dated 18 February and 20 February 2020 demanding that the panel of attorneys hand over all unfinished files in their possession to the respondent is reviewed and set aside.
2. The decision of the respondent to cancel tender number RAF/2018/00054 on or about 26 February 2020 is reviewed and set aside.



3. The panel attorneys on the RAF's panel as at the date of the launch of the FourieFismer review application shall continue to serve on the RAF panel of attorneys.
4. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.
5. This order shall operate for a period of six months from this order.
6. The respondents are ordered to pay the costs of the review application on a party and party scale, jointly and severally.
7. Such costs are to include the costs of two counsel for each legal team where so employed.

It is this order which is appealed against by leave of this Court, leave having been refused by Hughes J.

[11] Pursuant to s 18(1) of the Superior Courts Act 10 of 2013 (the Act), this resulted in the order of the high court being suspended. In turn, the panel attorneys and some other parties launched an application in terms of s 18(3) of the Act for its immediate implementation. This was granted by Hughes J but reversed on appeal by the Full Court of the Gauteng Division of the High Court, Pretoria (the Full Court) in terms of s 18(4) of the Act. The Full Court granted an order as follows:

- '(a) The appeal is upheld.
- (b) The order granted by the Court a quo in terms of section 18(3), and the additional relief in paragraph (e) of the order, is set aside and replaced with the following order:  
"The application is dismissed with costs including costs of two counsel."
- (c) With the exclusion of the Law Society of Southern Africa and the Minister of Transport, the respondents and other intervening parties shall pay the appellants' costs of the appeal jointly and severally the one paying the others to be absolved, which costs shall include the costs of senior and junior counsel where so employed.'

[12] It is convenient to summarise the grounds on which the respondents opposed the present appeal. They contended that:

- a) It had become moot;
- b) The cancellation of the 2018 tender was invalid; and
- c) The handover decision was unlawful;
- d) The second addendum was invalid.

[13] The only attorneys who participated in the appeal were the first respondent, comprising Mabunda Incorporated and forty-one other attorneys (Mabunda), FourieFismer Incorporated (FourieFismer) and Diale Mogoshoa Incorporated (Diale). The Pretoria Attorneys' Association also participated and was represented by counsel also representing FourieFismer. Other litigants before the high court elected not to participate any further. In addition, Diale limited its submissions to the lawfulness of the cancellation of the tender. By the time the appeal was heard both Diale and FourieFismer had handed over all of the files they had received from the RAF. Mabunda, on the other hand, continued to support all of the relief granted.

### **Whether the appeal is moot**

[14] Mabunda and FourieFismer submitted that it is clear that the order was to operate for a period of six months from the date of issue, being 1 June 2020. They contended that its operation was not suspended by the application for leave to appeal. As such, it expired on 1 December 2020. Leaving aside for a moment the provisions of s 18(1) and the Full Court order made under s 18(4) of the Act, this still does not resolve all of the issues in the appeal. It is clear that paragraphs 1, 2, 6 and 7 of the order are outright orders. They are not limited by the six month period referred to in

paragraph 5. The six month period clearly applies only to paragraphs 3 and 4. The cancellation of a tender, when set aside as was done by the high court, results in the reinstatement of the tender. Diale, in particular, claimed that the tender must still be adjudicated. This leaves the efficacy of the cancellation as a live issue. It is not necessary to consider the submissions of all of the parties concerning the effect of a pending appeal and whether it suspends the operation of the six month period. The point of mootness has no basis.

### **The cancellation of the 2018 tender**

[15] This was assailed on two fronts. First, that the entity which purported to cancel the tender lacked the authority to do so. Secondly, that the basis for cancellation did not comply with the provisions of Regulation 13(1) of the Preferential Procurement Policy Framework Act 5 of 2000.<sup>2</sup>

#### ***Authority to cancel***

[16] FourieFismer argued that the decision to cancel the tender was taken by the CEO and not the Board. Further, that since the Board had not taken the decision to cancel the tender, its subsequent ratification, which was admitted, could not validate that decision.

[17] Despite the submission that the CEO took the decision, the evidence is clear that the BAC did so after the CEO proposed the cancellation. The decision was communicated to the panel attorneys on 26 February 2020. The power to cancel had been delegated to the BAC by the Board in 2015 in

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<sup>2</sup> The regulations were promulgated under the Preferential Procurement Policy Framework Act 5 of 2000.

accordance with items 8 and 9 of the RAF's Supply Chain Management Policy.<sup>3</sup> This much was accepted by the panel attorneys. Section 11(1)(h) of the RAF Act empowers the Board to withdraw or amend any decision made by virtue of its delegation. The cancellation was subsequently discussed at a Board meeting on 27 February 2020 and was not withdrawn or amended.

[18] The high court held that, because a new Board had been appointed after the delegation had been made, the legal effect was that the delegation fell away. In this, the high court clearly erred. The fact that the delegation was made by a previous Board is of no moment. The appointment of a new Board does not invalidate a delegation by a previous Board. The delegation remains effective until it is withdrawn or terminated. The contention that the BAC lacked the requisite authority to cancel the tender is devoid of merit.

### ***Compliance with Regulation 13(1)***

[19] The BAC recorded the reasons as being in line with Regulation 13(1) of the Preferential Procurement Regulations of 2017. That regulation provides:

'(1) An organ of state may, before the award of a tender, cancel a tender invitation if-

- (a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;
- (b) funds are no longer available to cover the total envisaged expenditure;
- (c) no acceptable tender is received; or
- (d) there is a material irregularity in the tender process'.

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<sup>3</sup> In terms of paragraph 7.3.4.6 of the Road Accident Fund Supply Chain Management Policy adopted on 9 November 2015, dealing with contract management, 'the BAC must in respect of proposed contract cancellation or variation proposals, consider and approve such proposals.'

[20] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another*,<sup>4</sup> the Constitutional Court stated that a public body can only cancel a tender if one of the grounds existed which was stipulated in the regulation at the time. This read as does the present Regulation 13. However, this Court doubted that *dictum* and distinguished that matter in *Tshwane City and Others v Nambiti Technologies (Pty) Ltd*.<sup>5</sup> *Trencon* involved the question of whether a substitution order of one tenderer should have been made rather than with the grounds on which to cancel a tender. As Wallis JA explained of *Trencon*: ‘[T]he reality was that a contract had been awarded and it was the intention to proceed with the work. So cancellation was not an issue. Furthermore the statement in question was based on a concession by counsel that was accepted as correct without explanation.’<sup>6</sup> He saw the wording of the Regulation as permissive rather than peremptory. He held, however, that the issue need not be decided in that matter since a change in circumstances had been demonstrated.<sup>7</sup> In the present matter, if, on the facts, the RAF showed that the provisions of the Regulation were complied with, it will likewise be unnecessary to determine whether the *Trencon dictum* binds us. This must be considered next.

[21] As previously indicated, the reasons advanced by the RAF for the cancellation of the tender at the time were that it was ‘due to unaffordability of services as advertised in the tender, as well as changed circumstances’. The RAF attempted to add two further grounds *ex-post facto* to allege irregularities, fraud and corruption in the current model and irregularities in

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<sup>4</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 68.

<sup>5</sup> *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167; 2016 (2) SA 494 (SCA); [2016] 1 All SA 332 (SCA).

<sup>6</sup> *Ibid* para 29.

<sup>7</sup> *Ibid* para 30.

the existing tender process. These grounds are not considered in this judgment, as the RAF is bound by the reasons provided in the termination letters and should generally not be permitted to change or add to them at its convenience.<sup>8</sup>

[22] The grounds advanced by the RAF were twofold. First, that set out in Regulation 13(1)(a) that, due to changed circumstances, there is no longer a need for the goods or services specified in the invitation to tender. Secondly, that set out in Regulation 13(1)(b) that funds are no longer available to cover the total envisaged expenditure. We shall deal with each of these in turn.

#### *Changed circumstances*

[23] The RAF claimed that it had adopted a new model to facilitate the compensation of qualifying persons. It will be recalled that, in January 2020, the Board adopted a strategic plan for 2020 to 2025. The new model was devised to give effect to the strategic plan. It entailed taking measures to settle claims within 120 days, failing which to attempt to resolve matters through mediation. Use was to be made of in-house attorneys and the state attorney. The new model was aimed at reducing costs since it was evident that the existing model had not proved to be cost effective. Only in instances where those measures failed would the services of private attorneys be engaged.

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<sup>8</sup> *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA); [2012] 1 All SA 451 (SCA) paras 27-28; *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) para 39.

[24] FourieFismer contended that there was nothing to show that there was no longer a need for the services specified in the tender due to changed circumstances. It submitted that it was not in dispute that the RAF would still be engaged in litigation in spite of the new model. Consequently, the services of attorneys would be required. Diale's argument was that the changed circumstances must result in the RAF no longer requiring the services of any attorneys. It submitted that this was not the case, since the RAF would still require the services of attorneys.

[25] Neither of these submissions is correct. The tender invited bids for a panel of attorneys based on the old model of operation. The fact that, as a last resort, the RAF might have to engage the assistance of private attorneys does not negate the fact that, under the proposed new model, most, if not all, of the attorneys utilised would either be in-house employees or provided by the State Attorney. It certainly cannot be said that, because the RAF envisaged utilising attorneys at all, the circumstances under which it had issued the tender had not changed. It seems to us that this showed that the circumstances to be ushered in by the new model had changed significantly.

*Required funds no longer available*

[26] In addition to the RAF showing that there were changed circumstances warranting the cancellation of the tender, it also relied on the reason that funds were no longer available to cover the total envisaged expenditure. The presentation of management to the Board in December 2019 has already been mentioned where, for the period under review, a deficit of R45,713 million had accrued.

[27] It is common cause that the RAF has been technically insolvent for many years. But the repeated deficits have seemingly been exacerbated by the mounting legal fees which the RAF has been obliged to meet; both those of the attorneys on the panel and those of attorneys and counsel representing claimants. According to an article written by Professor Hennie Klopper, a professor *emeritus* at the University of Pretoria,<sup>9</sup> there had been a reduction in claims lodged but legal costs increased exponentially. In 2005, 185 773 claims were lodged with attendant legal costs of up to R941 million. In 2018, there were only 92 101 claims lodged and legal costs of R8.8 billion were incurred. By 2019, legal costs had increased to R10.6 billion.

[28] The panel attorneys contended that the article of Professor Klopper did not constitute admissible evidence. They did not, however, challenge the figures put up by him. They submitted, in addition, that the RAF has for many years been operating at a deficit and the present situation is not a new one. But that is to conflate changed circumstances with the enquiry whether there are sufficient funds to meet the total envisaged expenditure. For many years, the RAF has lacked such funds. That this still obtained at the time the decision was taken is made clear by the report to the Board mentioned above, even if no regard is had to the article of Professor Klopper.

[29] All of this means that two of the jurisdictional facts referred to in Regulation 13 existed at the time the decision to cancel the tender was made. One such fact is sufficient to entitle the Board to cancel the tender. As such, Regulation 13 provided grounds for cancellation and the review of that decision should have failed. For these reasons, the present matter echoes that

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<sup>9</sup> H Klopper 'Is the Road Accident Fund's litigation in urgent need of review?' *De Rebus* March 2019.



of *Nambiti Technologies* and no further engagement need take place regarding the dictum in *Trencon*.

### **The handover decision**

[30] No argument was advanced at the hearing on this issue. Presumably this was because both FourieFismer and Diale had already handed over their files. As regards Mabunda, it argued that both the handover decision and the second addendum were unlawful. Since the handover decision gave effect to the second addendum, it follows that if the latter should have been set aside, the former would follow suit.

### **The second addendum**

[31] The complaint was that the RAF had changed certain terms concerning fees which the panel attorneys were entitled to charge under the original SLAs. That may be so, but the panel attorneys all signed the second addendum, thus amending the original SLAs. Those who refused to do so simply handed back their files prior to the original November 2019 date at which their SLAs expired.

[32] It bears mention that the high court did not review and set aside the second addendum. It is trite that appeals lie against orders and not against reasons for the judgment.<sup>10</sup> There is therefore no need to pronounce on this issue, even if strong indications emerge from the judgment of the high court that the second addendum was not lawful. As such, even if the panel attorneys could make out a case for the unlawfulness of the second

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<sup>10</sup> *Absa Bank Ltd v Mkhize* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) para 64; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) para 39.

addendum, the issue was not before us on appeal. In any event, as indicated above, we hold the view that no case was made out in the applications for any such order or finding.

### **The reinstatement of the appeal**

[33] As was indicated at the outset, the appeal had lapsed. The RAF brought a substantive application for its reinstatement setting out the reasons for the non-compliance. The principles applicable for the granting of condonation are well known and we do not propose traversing them. The ground of opposition by Mabunda and FourieFismer was that the appeal was moot. In addition, Mabunda contended that the failure to comply with the rules was wilful. Finally, FourieFismer opposed the application since, in its view, it was based on an application by the RAF to lead further evidence on appeal.

[34] This latter application fell away so that ground of opposition need not be dealt with. The issue of mootness was disposed of earlier in this judgment. Where there is non-compliance with procedural requirements of the court, satisfactory explanations must be provided. The court has an overriding discretion to consider all circumstances of the case.<sup>11</sup> The overriding factor was set out in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*<sup>12</sup> as being the interests of justice. The RAF gave a cogent explanation for its default. In addition, we are of the view that, in the light of the issues in this matter and the order of the high court which had the effect of reinstating a tender which had been

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<sup>11</sup> See *Shaik and Others v Pillay and Others* 2008 (3) SA 59 (N) at 61E-F.

<sup>12</sup> *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477 A-B.

validly cancelled, it is in the interests of justice that condonation is granted. Finally, the prospects of success weigh in favour of granting condonation and reinstating the appeal.

### **The continued operation of the SLA**

[35] Much argument was directed at the six month period in the order of the high court. Most of this argument related to the effect of the grant of leave to appeal and whether it suspended this part of the order. It will be recalled that this related to paragraphs 3 and 4 of the order:

3. The panel attorneys on the RAF's panel as at the date of the launch of the FourieFismer review application shall continue to serve on the RAF panel of attorneys.
4. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.

[36] The second addendum extended the SLAs to 31 May 2020. On that date, on any version, the extended SLAs lapsed through effluxion of time. This much was common cause. The orders referred to above were clearly geared at attempting to maintain the status quo during the six month period so that the RAF could give effect to the tender reinstated by the order of the high court. However, the high court order was handed down on 1 June 2020. By that date, there were no SLAs to extend. This means that paragraphs 3 and 4 were clearly incompetent. In the first of these, the high court purported to make a contract for parties who were no longer contractually bound to each other.<sup>13</sup> The second of these referred to the terms and conditions which were to govern such a contract, if one was in existence, but did so by

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<sup>13</sup> *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 (3) SA 583 (C) at 591H – 592A.

reference to ‘the existing Service Level Agreement’. There was, of course, no such agreement in operation on that date. As a result, those orders must also clearly be set aside on appeal.

[37] Whatever regulated the relationship between the parties after 1 June 2020 will have to be debated between the parties since no contract referred to in the papers governed their conduct. One can only express a strong desire that they arrive at an equitable outcome.

[38] For all the above reasons, we are satisfied that the RAF has made out a case for the relief sought. The appeal should therefore succeed and the costs should follow the result.

In the result, the following order issues:

1 The appeal under case number 1082/2020 is struck from the roll with costs.

2 The application for condonation is granted and the appeal under case number 1147/2020 is reinstated.

3 The appeal is upheld with costs including those of two counsel where so employed.

4 The order by the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

‘The applications under case numbers 17518/2020, 15876/2020 and 18239/2020 are dismissed with costs including those of two counsel where so employed.’

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T R GORVEN  
JUDGE OF APPEAL

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M B S MASIPA  
ACTING JUDGE OF APPEAL

## Appearances

For appellants: CE Puckrin SC with R Schoeman and  
NC Hartman

Instructed by: Mpoyana Ledwaba Inc, Pretoria  
Modisenyane Attorneys Incorporated,  
Bloemfontein

For first respondent: WR Mokhare SC

Instructed by: Mabunda Incorporated, Bedfordview  
Webbers Attorneys, Bloemfontein

For second & third respondents: EC Labuschagne SC

Instructed by: FourieFismer Inc, Pretoria  
E Horn, Bloemfontein

For fourth respondent: K Tsatsawane SC

Instructed by: Diale Mogashoa Attorneys, Pretoria  
Honey Attorneys, Bloemfontein