IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NUMBER: 1587612

In the application of:

THE LAW SOCIETY OF SOUTH AFRICA	Intervening Amicus Curiae / Applicant

and

MABUNDA INCORPORATED and 42 others	1st to 43rd Respondents

In re the matter of:

MABUNDA INCORPORATED and 41 others	1st to 42nd Applicants

and

THE ROAD ACCIDENT FUND	Respondent

LAW SOCIETY OF SOUTH AFRICA'S HEADS OF ARGUMENT

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INTRODUCTION AND FACTUAL BACKGROUND

1 At the initial hearing of this matter, on 17 March 2020, the honourable Mr Justice Davis granted prayer 2 of the LSSA's intervention application – with the effect that the LSSA is permitted to participate in these proceedings as an *amicus*. We accordingly do not address the requirements of an application to be admitted as *amicus* in detail, other than to address the question of an *amicus*' rights to adduce evidence. We also address the questions which arise in the main application (and particularly in Part A), the LSSA having been permitted to participate in that application.

2 The material facts in this application are largely common cause. Where terms are not defined in these heads of argument, we use the same defined terms as are used in the LSSA's founding affidavit.

3 On 18 February 2020 and 20 February 2020, the RAF notified its panel attorneys (which include the applicants) to return their files, starting with matters with trial dates from 1 June 2020. There was a staggered timeline for the return of files.[1]

4 This gave effect to a decision for the RAF to insource most of its legal work.[2] The source and legality of that decision is discussed in further detail below.

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[1] LSSA founding affidavit, p12, para 33. See also annexures "PBM6" and 'PBM6A" to the main founding affidavit.

[2] LSSA founding affidavit, p13, para 34.

5 On 26 February 2020 and 28 February 2020, the RAF notified participants in Tender No. RAF 2018/00058 (for the appointment of new panel attorneys) that the tender had been cancelled.[3]

6 On 28 February 2020, Letsoalo notified judges of the RAF's decision to discontinue the panel attorney operating model after expiry of the existing contracts on 31 May 2020.[4]

7 The decisions at issue in these proceedings are:

7.1 the decision to compel the panel attorneys to hand over all files in their possession to the RAF, irrespective of the stage at which such matters are at ("**the handover decision**");

7.2 the decision to dispense with the services of panel attorneys, effective from 1 June 2020 ("**the termination of contracts decision**");

7.3 the decision to withdraw Tender No. RAF/2018/00054 for the appointment of new panel attorneys ("**the tender withdrawal decision**"),

(together, "**the impugned decisions**").

8 In Part A of the main application, the applicants have sought to interdict the implementation of the handover decision pending the finalisation and adjudication of the review in Part B. In Part B, the applicants have sought to review and set aside the impugned decisions.

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[3] LSSA founding affidavit, p13, para 35. See also annexures "LSSA2" and "LSSA3" to the LSSA founding affidavit.

[4] LSSA founding affidavit, p13, para 36. See also annexure "LSSA4" to the LSSA founding affidavit.

9 If the impugned decisions are implemented, they will cause severe disruption of trials involving the RAF which are set down from 1 June 2020. This will prejudice all those involved in and affected by the RAF system. This is especially the case for victims of road accidents, who have inevitably suffered trauma and injury and are often indigent. The public interest in this matter is intense and urgent.

10 The RAF's case is underpinned by a fundamentally irrational proposition. This is that an organ of state which is in a dire situation (on anyone's version) will operate more effectively without experienced and professional assistance. Improving the RAF's working system is not incompatible with retaining the services of panel attorneys in order to utilize their services, as and when the need arises in appropriate situations, on appropriate terms, and at appropriate rates. A sensible mix of inhouse management of claims, and professional assistance from well-chosen panel attorneys who – when and if required - are closely instructed and monitored, is the answer to the RAF's problems. But to sever all relationships with panel attorneys is to throw the baby out with the bathwater.

11 The LSSA regulated the attorneys' profession since 1998. With effect from 1 November 2018, however, the Legal Practice Act 28 of 2014 ("**the LPA**") dissolved the provincial law societies as the statutory regulators of the attorneys' profession and replaced them with the South African Legal Practice Council. Notwithstanding these developments, the LSSA remains intimately involved in promoting the interests of the attorneys' profession, having regard at all times to the broader interests of the public whom the profession serves. This involves

striving for a legal system that is fair, just, equitable, certain, and free from unfair discrimination.[5]

12 This matter affects the attorneys' profession, the public, and the constitutional imperatives of administration of justice and access to justice. The LSSA is perhaps uniquely well-placed to comment on these issues and to offer assistance to the court, in line with its role as *amicus*.

13 In the remainder of these heads of argument we address the following issues:

13.1 The admission of evidence by an amicus curiae;

13.2 The LSSA's application to be admitted as amicus curiae;

13.3 Requirements for an interim interdict;

13.4 Urgency;

13.5 Conclusion and costs.

THE ADMISSION OF EVIDENCE BY AN *AMICUS CURIAE*

14 The leading case on the admission of evidence by an *amicus curiae* is *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA 620 (CC), where the Constitutional Court considered whether Uniform Rule 16A or section 173 of the Constitution empowered the High Court to allow an *amicus curiae* leave to adduce evidence.

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[5] LSSA founding affidavit, p7, para 15.

15 The Constitutional Court held:

15.1 Rule 16A is permissive and allows for an *amicus* to adduce evidence.

15.2 Section 173 of the Constitution gives courts the inherent power to regulate their own process and this includes the ability to allow *amici* to adduce evidence if the interests of justice so demand.[6]

16 Khampepe J held that "*[t]he admissibility in each particular case will be determined according to whether it is in the interests of justice to do so*". The Court refrained from setting out relevant factors, finding that "*[w]hat the interests of justice will require in a particular case must be left to high courts to decide*".[7]

17 The Constitutional Court made it clear that it would be inappropriate for the High Courts to adopt a strict approach to the admission of evidence:

17.1 Khampepe J warned that the High Courts "***should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level*".**[8]

17.2 Khampepe J noted that a stringent test for the admission of evidence under Rule 16A would lead to the anomalous and paradoxical position where evidence that would meet the test under Rule 31 of the Constitutional Court Rules, would be refused at the High Court.[9] She held:

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[6] Para 17.

[7] Para 32.

[8] Para 29.

[9] Para 28.

Rule 31 provides:

> *This cannot be the case. Courts of first instance must be permitted to admit evidence from an amicus curiae to avoid a situation where appellate courts are inundated with new evidence. In principle courts of first instance should strive to accommodate the reception of evidence if this would be in the interests of justice. They should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level. This is because appeals are generally limited to the record of the court below. Accordingly, the fact that the Constitutional Court, as a court of appeal, is permitted to admit evidence adduced by amici curiae further lends support to the notion that courts of first instance must be permitted to do the same.*[10]

17.3 The Court indicated that the legal submissions of an amicus may "*draw on broader considerations, and thus be premised on facts and evidence not before the court, including statistics and research*". In those circumstances, "*it would make little sense to allow the presentation of bare submissions unsupported by any facts*".[11]

17.4 Finally, the Court stated that: "*Courts adjudicating constitutional issues, in particular those relating to vulnerable groups like children, should be slow to refuse to receive evidence that may assist them in arriving at a just outcome*".[12]

18 Khampepe J noted that although the Constitutional Court rules are "***relatively strict and circumscribed…that is not to say that the same criteria must be***

"*(1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts —*

(a) are common cause or otherwise incontrovertible; or

(b) are of an official, scientific, technical or statistical nature capable of easy verification."

[10] Para 29.

[11] Para 31.

[12] Para 31.

***applied in the high court.*"** Rather, the High Courts must develop jurisprudence on what the interests of justice will require in any case.[13]

19 Although the Court did not provide clear guidance on the specific factors informing the interests of justice in any case, the following principles could be distilled from the judgment:

19.1 The evidence should assist the court in arriving at a just outcome.[14]

19.2 The evidence must provide appreciable assistance to the court in the adjudication of the issues before it.

19.3 The evidence must be relevant.

19.4 The courts should be wary of refusing evidence where the matter involves constitutional issues, and particularly vulnerable groups like children.[15]

19.5 The strict criteria in Rule 31 of the Constitutional Rules are not necessarily applicable.[16]

19.6 The Courts should be wary of refusing evidence where the matter is likely to go on appeal and where the evidence would be adduced at appellate level.[17]

20 It is submitted that the LSSA's evidence –

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[13] Para 32.

[14] Para 33.

[15] Para 33.

[16] Para 32.

[17] Para 29.

20.1 will assist the court in arriving at a just outcome;

20.2 is relevant;

20.3 will be of appreciable assistance to the court;

20.4 involves constitutional issues and affects vulnerable groups (road accident victims);

20.5 is likely to go on appeal when final relief is granted, given the importance of the matter to all parties.

Accordingly, it is in the interests of justice that the LSSA's evidence is admitted.

THE LSSA'S INTEREST IN THE PROCEEDINGS

21 The LSSA is a voluntary association with legal capacity. Its constituent members are the nine provincial attorneys' associations, the Black Lawyers Association, ("**BLA**") and the National Association of Democratic Lawyers ("**NADEL**").[18]

22 The LSSA, is funded and supported by the collective attorneys' profession. Its functions are *inter alia* to -

22.1 interrogate and provide input on draft policy and legislation in the public interest;

22.2 undertake advocacy initiatives and comment on legislation in the interests of legal practitioners and the public; and

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[18] LSSA founding affidavit, p6 - 7, paras 12 - 14.

22.3 support the efficient administration of the justice system.[19]

23 These functions align neatly with the LSSA's role as *amicus* in these proceedings.

24 The LSSA aims to give effect to the above objectives by participating in these proceedings in the interests of –

24.1 its members;

24.2 the public in general, and

24.3 litigants in RAF matters in particular.[20]

25 Many of the LSSA's members practice in the area of road accident litigation, and represent the vast majority of persons who claim compensation from the RAF. The rights of their clients will be profoundly affected by the summary termination of mandates to panel attorneys and the handover of thousands of files to the RAF to be dealt with in-house.[21]

26 The LSSA has brought this application because of the impact that the impugned decisions will have on the rights of such accident victims, who are the clients of the members of the LSSA, and on members of the public who may be unrepresented.[22]

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[19] LSSA founding affidavit, p9, para 16.

[20] LSSA founding affidavit, p9, para 17.

[21] LSSA founding affidavit, p9, para 18.

[22] LSSA founding affidavit, p9, para 19.

27 The LSSA's *locus* and interest in the matter can be categorized in the following ways:

27.1 The LSSA acts in its own interest. It does so in order to achieve the objects set out in its Constitution. The objects of the LSSA's Constitution relate to both narrower issues concerning the attorneys' profession, and broader issues concerning the administration of justice.[23]

27.2 The LSSA acts on behalf of and in the interest of persons who cannot act in their own name. In bringing this application, the LSSA acts in the interests of persons who may be unrepresented and who might have lodged direct claims with the RAF. It also acts on behalf of prospective road accident victims. Their rights will be fundamentally affected by further inefficiencies at the RAF and delays occasioned by the RAF's proposals.[24]

27.3 The LSSA acts in the public interest. The LSSA also brings this application in the public interest. The RAF system is a very important compulsory insurance scheme, administered by the state. It is in the public interest that it should serve its intended purpose, namely to provide adequate compensation to persons who have been the victims of road accidents.[25]

27.4 The LSSA acts for legal practitioners. Attorneys who act in the field of personal injury are also affected by the impugned decisions. In separate court proceedings, the RAF has acknowledged that up to 20 000 attorneys

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[23] LSSA founding affidavit, p10, para 23.

[24] LSSA founding affidavit, p11, paras 24 – 26.

[25] LSSA founding affidavit, p11, paras 27 – 29.

in over 9000 firms countrywide are affected by the statutory framework applicable to road accident compensation, and by its own decisions. These practitioners have an interest in the legislative framework under which they practice being compliant with the Constitution, and the administrative decisions thereunder being lawful, rational and procedurally fair. The LSSA has been recognized over the years by both the Department of Transport and the RAF as being representative, together with the General Council of the Bar of South Africa, of those legal practitioners who practice in the field. The Department of Transport and the RAF have frequently engaged in debate with these bodies in that capacity, and have invited and responded to submissions by them on behalf of practitioners. Despite this, the LSSA was not advised in advance of the decision to withdraw the tender for panel attorneys and to call for the return of all case files so that they could be handled in-house.[26]

THE LSSA'S *AMICUS* SUBMISSIONS

28 In this section we set out a summary of the LSSA's *amicus* submissions.

<u>The public interest in the issues before the court</u>

29 The issues in this application raise public interest considerations which have not been dealt with adequately in the other affidavits. It is in the public interest that the simultaneous structured handover of approximately 390 000 cases by the

[26] LSSA founding affidavit, p12, para 30.

end of April 2020 be stayed pending a decision on the validity of the impugned decisions.[27]

30 The impugned decisions will seriously undermine the efficiency of the court system and materially impact on the administration of justice. RAF litigation takes up a significant portion of matters scheduled for Rule 37(8) pretrial hearings as well as cases allocated for trial dates. Trial dates are allocated months in advance and there are lengthy queues in all divisions of matters awaiting the allocation either of a Rule 37(8) hearing or a trial date.[28]

31 The summary termination of mandates to all panel attorneys will inevitably result in many matters that are already allocated Rule 37(8) pretrial hearings and / or trial dates being either postponed or stood down to the detriment of other cases awaiting allocation.[29]

32 According to the figures quoted by Letsoalo in "PBM11" a claim currently takes 3.7 years to finalize. Other estimates have placed the average time to finalize a claim closer to 5 years. The simultaneous termination of mandates across the board to all panel attorneys will inevitably cause further significant delays in the finalization of claims for those claimants who have already waited years for resolution.[30]

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[27] LSSA founding affidavit, p14, paras 40 - 41.

[28] LSSA founding affidavit, p15, para 45.

[29] LSSA founding affidavit, p15, para 46.

[30] LSSA founding affidavit, p15, para 47.

33 The removal of experienced representatives from pretrial and trial proceedings will further impede the smooth functioning of the courts, leading to further delays.[31]

Problems with how the impugned decisions are to be implemented

34 In a memorandum attached as "LSSA8" to the LSSA's founding affidavit, the RAF reported how the handover and cancellation notices would be implemented. The LSSA makes the following submissions on this memorandum, which has not been fully addressed elsewhere.[32]

RAF proposal	**LSSA submissions**
Plaintiff attorneys will have to approach the RAF to arrange settlement meetings. The RAF has made extra office space available for purposes of these meetings and is in the process of employing more staff to meet the demand.	A demand has been made for all panel attorneys to hand over their files forthwith in the absence of any systems in place to deal with them. One cannot halt all work being done by the panel attorneys in the expectation that there will be a seamless transition, in circumstances where there is no system in place to properly receive or deal with the files

[31] LSSA founding affidavit, p15 paras 48.

[32] LSSA founding affidavit, p16, para 55.

	received (probably 390 000 thousand files).
There are three phases to the handover: - first, matters already set down for trial; - second, where merits can be settled; and - third, where no trial dates are allocated yet.	There is a presumption that matters will settle. This is misplaced. Matters that are before the Courts require constant attention in respect of the filing of notices, preparation etc. If matters do not settle, this will result in the RAF attending at Courts, in an unprepared fashion, requesting postponements of such matters. This has multiple problems for all concerned: - Plaintiffs will be prejudiced if their matters are postponed. - Trial rolls, which are already overburdened, will be clogged with matters which inevitably will not proceed. - The fund will be mulcted in unnecessary costs orders.

	Plaintiffs will hold out for the highest possible settlement, particularly if they suspect that the attorneys who had previously been appointed by the RAF are no longer involved in the matters and thus the RAF is in a vulnerable position.
Plaintiffs' attorneys are requested by the RAF to assist with block settlements in all matters enrolled for trial from 1 June 2020 to end December 2021.	Once again, this presupposes that all matters are settleable. This is only so if the RAF capitulates to plaintiffs' demands, which may be excessive.
Attorneys are requested to identify matters capable of easy settlement with a view to shorter turn-around times.	The same considerations discussed above, relating to the presumption of easy settlement, apply.
There will be medical experts on site for medico-legal assessments.	Medico-legal assessments on site are impractical. It is unclear if such medico-legal assessments are to be used for the purposes of settlements or if they are intended to be Rule 36 (9)(b) reports.

Should settlement not be reached a mediation option will be available through a RAF collaboration with SAMLA and some plaintiff attorneys. The RAF is encouraging plaintiffs to use this platform before continuing with litigation.	Insofar as matters are pending before the Courts a resort to mediation is inappropriate if the matters are capable of settlement.
The RAF intends to begin making use of in-house attorneys in a manner compliant with section 34 of the LPA. It is also in discussions with the Office of the State Attorney to assist with new summonses in the interim until the internal capacity is enhanced.	This might mean that the plaintiffs will lose their places in the proverbial que and might have to wait another three to four years for a trial date. This amounts to justice denied. The mediation agreement is as yet not signed and it seems there are no proper systems in place. The RAF employs a number of in-house lawyers who are known as "*handlers*". Many of them are not fully qualified as attorneys. They accordingly have no experience to fulfil the role of a trial attorney, which is substantially different to that of a handler. In the short term it is these

	handlers who will be the in-house attorneys. Furthermore, these in-house attorneys must still be appointed. It is not a quick and simple process to appoint competent in-house attorneys to run the affairs such a large and important organ of state.
The RAF will shortly announce roadshows around the country to engage with stakeholders and the public on these changes.	There have been on-going road shows for direct claims to be resolved between the RAF and Claimants, without attorneys. Experience has demonstrated that the RAF was not able to cope with the influx with claims submitted directly.

35 The problem with the RAF's proposals is that they are only proposals. There is very little, if anything, in the way of concrete, formalised, signed-off arrangements which a Court could be satisfied will inevitably lead to a smooth transition process. Additionally, it is unclear why panel attorneys should be ousted altogether. Panel attorneys are creatures of instruction and are paid according to the work they do. The RAF has not explained why they do not simply use panel attorneys as and when they need them while they work to improve the system.

36 In Professor Klopper's article, attached to the RAF's answering affidavit as "AA4", the Professor notes that blaming legal practitioners for the RAF's situation is simplistic. He says that the situation is complex and cannot be due only to the actions of legal practitioners. One fundamental issue, for example, is the unacceptably high level of road accidents. He concludes as follows:

> *The RAF's legal bill emanates from the high number of annual claims and the RAF's litigation policy and practice. It is not simply the RAF being dragged to court by legal practitioners but based on recent judicial pronouncements, largely the RAF's approach to claims handling and litigation, which is and remains in urgent need of review because it is costing motorists and our country approximately R10 billion per annum. The RAF can substantially curtail litigation (as is clearly intended by the Act) by astutely and effectively making use of s 17(3)(b) of the Road Accident fund Act 56 of 1996, which reads: 'In issuing any order as to costs on making such an award, the court may take into account any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served'.*

37 Therefore, Professor's Kloppers recommendations fall on the RAF to manage settlements more astutely and invoke provisions such as section 17(3)(b) which would deter irresponsible litigation through the spectre of adverse costs orders or costs *de bonis propriis*. There are no doubt many other ways that the RAF could improve its situation, but any such measures must be taken by the RAF. By blaming panel attorneys, who simply act on the RAF's instruction, the RAF is only avoiding the difficult work required to turn itself around.

38 In *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA), the Supreme Court of Appeal affirmed the general rule that a company cannot conduct a case in court except by the appearance of counsel (while acknowledging that the rule could be relaxed in "*rare*", "*exceptional*" and

"*unusual*" circumstances). In doing so, the court made the following observations[33]:

38.1 A court will be served by persons who observe the rules of their profession, are subject to a disciplinary code, and are familiar with the methods and scope of advocacy to be employed in presenting argument.

38.2 Litigation is based on the adversarial system. A court is dependent on the way in which the case is presented. Factual admissions or denials are made from time to time and a course of conduct has to be chosen by the litigants. When a corporation instructs an attorney who in turn instructs an advocate the law recognises their authority to bind the corporation for the purposes of litigation. In those circumstances a court need not concern itself about authority. Litigation will become difficult if a court has to be concerned at every step of proceedings as to the authority of the person conducting the litigation to make binding decisions.

38.3 Corporate officers could cause impecunious companies to litigate hopeless causes without any fear of personal risk.

38.4 The rule may be relaxed in limited circumstances, such as where the litigant is a small entity which is essentially the alter ego of its controlling mind. In those circumstances the principle that a company is a separate entity would suffer no erosion.

[33] Paras 4 – 15.

38.5 Given the increasing complexity of litigation, an unqualified and inexperienced person may do more harm than good to the corporate litigant that he purports to assist.

38.6 Leave for an unqualified individual to represent a juristic entity would have to be obtained in every case, and it would be impermissible for a non-professional representative to take any step in the proceedings, including the signing of pleadings, notices or heads of argument (as occurred here), without the requisite leave of the court first having been sought and obtained.

39 Therefore, to the extent that the RAF is contemplating having unqualified "*handlers*" take any step in the proceedings, it is not permitted to do so. But even if such insourced attorneys are duly qualified, the benefits of instructing independent and experienced trial attorneys are clear and important. Ultimately, whether litigation is handled by inhouse employees or panel attorneys, the responsibility will fall on the RAF to choose such persons well and to monitor and instruct them appropriately.

Capacity to handle claims in-house

40 There were 103 423 new personal claims registered for the 2019 financial year, and in the same year only 29 230 personal claims were settled. In the previous financial year ending 31 March 2018, 92 101 new personal claims were registered and only 42 078 personal claims were settled during the entire year. If this trend continues, outstanding claims will continue to escalate and the

average time period for settling claims will increase to the detriment of claimants and their families.[34]

41 Clearly, the administration of the RAF is not able to cope with its present work load, even with the help of panel attorneys. Letsoalo has not explained how he intends to capacitate the RAF's internal team when it cannot even cope with processing new claims and existing outstanding matters. The RAF has to date not initiated the process.[35]

42 The applicants have pointed out that the RAF will not be able to appoint attorneys *ad hoc* without contravening Treasury Rules and possibly the Public Finance Management Act No. 1 of 999 ("**the PFMA**"). The RAF will also be precluded from appointing counsel directly unless such counsel is an advocate in possession of a Fidelity Fund Certificate as contemplated in Section 34(2)(a)(ii) as read with section 34(2)(b) of the LPA. The vast majority of counsel are affiliated to a bar and are not in possession of Fidelity Fund Certificates.[36]

43 In fact, the RAF has expressly excluded even the possibility of appointing attorneys on an *ad hoc* basis.[37]

44 To compound matters, Letsoalo has advised that the RAF will be procuring an integrated claims management system that will facilitate the digitization of claims and improve efficiencies. The implementation of new systems is often

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[34] LSSA founding affidavit, p24, paras 65 – 66.

[35] LSSA founding affidavit, p24, paras 67 – 68.

[36] LSSA founding affidavit, p24, para 69. See also "PBM4".

[37] RAF answering affidavit, p ?, para 140.6

accompanied by teething problems and delays in implementation. For example, the new system implemented by the office of the Compensation Commissioner has resulted in a complete breakdown of the payment system since August 2019.[38]

Financial status of the RAF

45 The RAF by its own admission is in a precarious financial situation. Many of the litigated cases deal with significant claims. According to the 2018 - 2019 financial statements –

45.1 the average loss of earning claim amounted to R767 506.00 per claim,

45.2 the average loss of support claims amounted to R412 464.00 per claim, and

45.3 general damages averaged at R462 130.00 per claim.

During the same year the RAF paid an amount of R40 billion in claims and incurred liability for R11.2 billion in claims finalized but which could not be paid out due to cash constraints. During the course of that year outstanding claims increased by 26% to 309 710. There were 103 423 new personal claims registered for that financial year and 29 230 personal claims were settled.[39]

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[38] LSSA founding affidavit, p24, para 70.

[39] LSSA founding affidavit, p25, para 71.

46 Attempting to litigate matters amounting to billions of rand per annum without professional advice could expose the RAF to considerable additional financial risks in respect of both capital awards and costs.[40]

47 All panel attorneys will no doubt prepare bills of cost in respect of all their attendances and will require payment. This will create another significant current liability in respect of legal costs which will further impact on the RAF's ability to pay outstanding claims which as at the end of 2019 financial year were already in the order of R11 Billion.[41]

REQUIREMENTS FOR AN INTERIM INTERDICT

***Prima facie* right**

48 In *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC), Moseneke ACJ held as follows:

> *"[25] A prima facie right may be established by demonstrating prospects of success in the review".*[42]

(The case also involved an application for an interim interdict pending review).

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[40] LSSA founding affidavit, p25, para 72.

[41] LSSA founding affidavit, p25, para 73.

[42] At para 25.

49 The applicants have sought to review the impugned decisions under the legality principle. The legality principle governs the use of all public power, rather than the narrower realm of administrative action.[43]

50 Public powers and public functions have been characterised as follows:

> *The exercise of a public power would, on the meanings that I have quoted, mean: the exercise of a power that concerns all members of the community; the exercise of a power that relates to or involves government and governmental agencies; and, the exercise of a power belonging to the community as a whole, and administered through its representatives in government.*
>
> *The performance of a public function using the same meanings from the dictionary quoted above means: the performance of a function that concerns all members of the community; the performance of a function that relates to or involves government and governmental agencies; and, the performance of a function belonging to the community as a whole, and administered through its representatives in government.*[44]

51 In the case of *South African National Parks v MTO Forestry (PTY) LTD And Another* 2018 (5) SA 177 (SCA), Dambuza JA discussed the intersection between public law and contract, and some of the seminal cases related thereto:

> *[23] The submission on behalf of SanParks, that the exercise by an organ of state of rights under a contract attracts no public-law obligation, was considered by this court in Logbro Properties CC v Bedderson NO and Others. As in this case, the appellant in Logbro relied on Cape Metro Council v Metro Inspection Services (Western Cape) CC and Others for the contention that public-law responsibilities had no place in a contract concluded by a state organ.*
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> *[24] In Logbro the contention was that conditions stipulated in a tender gave the Western Cape Province a contractual right to withdraw a tender 'without having to pass the scrutiny of lawful*

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[43] *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 59.

[44] M&G Media LTD And Others v 2010 FIFA World Cup Organising Committee South Africa LTD And Another 2011 (5) SA 163 (GSJ) at paras 221 – 222.

administrative action'. In paras 7 – 8 of the judgment Cameron JA held as follows:

'Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties towards the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights — such as the entitlement to give no reasons — would necessarily yield before its public duties under the Constitution and any applicable legislation.

This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.'

[25] Logbro highlighted that Cape Metropolitan Council is no authority for a general principle that a public authority empowered by statute to contract may always exercise its contractual rights without regard to public duties of fairness. More importantly, the court in Logbro stressed the distinguishing factors in that case that underpinned the court's decision. It noted that the tender and employment cases were not relevant to the facts in Cape Metropolitan Council because of the equal power of the contracting parties in that case.

[26] The reliance by the appellant on Government of the Republic of South Africa v Thabiso Chemicals does not take the matter any further. Unlike in this case, the dispute in Thabiso, as well as in Cape Metropolitan Council, turned on the contract entered into between the two parties. The pivotal issue in Thabiso was the limited factual determination into whether the facts relied on by the government in cancelling a tender could sustain the cancellation under the relevant clause in the contract. Thabiso did not concern the effect that the exercise of a power sourced in a contract would have on the public and its interests.

[27] Already in the pre-constitutional era this court acknowledged that in a contractual context circumstances may be such as to compel notions of fairness and the application of the principle of legitimate expectation. In this regard, see Lunt v University of Cape Town and Another. Professor Hoexter warns against the dangers of formalism in that an exclusive focus on the concept of a contract might distract from the reasons why fairness ought to

> *be observed in a particular case, whether it be of a private or of a public nature.*[45]

52 The impugned decisions are therefore not insulated from review by the existence of a contract between the parties and/or tender conditions. It cannot be disputed that they constituted an exercise of public power and functions.

53 There are good prospects of success on review, for the following reasons:

53.1 The impugned decisions were made at a time when a tender was pending for the appointment of further panel attorneys, and constitute an infringement of the constitutional rights of those members of the LSSA who tendered. The subsequent purported cancellation of the tender on 26 February 2020 and 28 February 2020, whether valid or not, will not disturb the irrationality of having taken the decisions at a time when there was a tender pending for the appointment of panel attorneys.

53.2 The decision is irrational *per se*. The stated purpose of saving legal costs will not be achieved. The decision itself will cause a liability for legal costs running into billions of Rands.

53.3 There is no rational or proportional link between what the RAF seeks to achieve, and the impugned decisions. All of the RAF's proposals can be implemented without severing the relationships with panel attorneys entirely.

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[45] Paras 24 – 27.

53.4 The impugned decisions are constitutionally invalid insofar as they breach the State's duties in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights contained in the Bill of Rights, including the rights of victims of motor vehicle accidents to be afforded a remedy for bodily injury (section 12(1)(c) of the Constitution); to social security in the form compensation for personal injuries (section 27(1)(c) of the Constitution); and to access to courts, including to have their matters heard before Court (in terms of section 34 of the Constitution).[46]

53.5 It is unclear what the involvement of the Board was in the first two decisions. It seems that the Board had no involvement in the tender withdrawal decision.[47] The RAF has alleged that the Board delegated its authority to the BAC to make the decision, and attaches the RAF's supply chain management policy and certain delegation forms in support of this allegation.[48] It is entirely unclear to us how these documents support this allegation; *prima facie* they do not,

53.6 It also appears that the handover decision was not made by the Board or an authorised functionary. In this regard, Adv. Thomas (SC) opined that "***The Board was not informed, nor was it consulted by the COO prior to addressing these handover notices to the Panel Attorneys and is***

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[46] LSSA founding affidavit, p28, para 85.

[47] LSSA founding affidavit, p29, para 91.

[48] RAF answering affidavit, p?, para 117.

now concerned about their impact on Fund matters, as well as on their impact on the administration of justice in general."[49]

53.7 In terms of Section 11 of the RAF Act, the Board has the obligation to accept overall control over the operation and management of the Fund. This would include, as it has in the past, the procurement of the services of panel attorneys representing the RAF.[50]

Reasonable apprehension of irreparable harm

54 For the reasons set out above, there is a reasonable apprehension of irreparable harm. This will flow from the largescale disruption to RAF litigation and to the administration of the courts in general. The interests of litigants will be irreparably damaged, as will those of the RAF. The administrative rights of the applicants will be irreparably damaged, as will their practices which in many instances rely heavily on RAF work. Inevitably, jobs will be lost.

No alternative remedy

55 There is no alternative remedy to an interim interdict which protects the status quo. The RAF is simply not adequately prepared for the handover which they have proposed. Until the RAF has presented a detailed, feasible, and realistic plan for an improved system, the court should not put the lives and livelihoods of so many vulnerable litigants at risk.

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[49] LSSA founding affidavit, p29, para 92.

[50] LSSA founding affidavit, p29, para 93.

Balance of convenience

56 The balance of convenience clearly favours the granting of an interim interdict. An interim interdict will simply preserve the status quo, which - imperfect as it may be - has the benefit of functioning in a predictable way until a feasible alternative plan is presented. The result of not granting an interim interdict will be catastrophic.

57 The LSSA supports the proposal, advanced in separate proceedings, that Part B is expedited and all related matters are consolidated for Part B. If Part B is heard on an expedited basis, the inconvenience (such as it is) to the RAF will be limited.

URGENCY

58 The effect of the impugned decisions referred to in the notice of motion is that the RAF will be without legal representation by panel attorneys and counsel instructed by such panel attorneys from 1 June 2020. All trial matters involving the RAF from 1 June 2020 are affected. The disruption of the trial roll will be immense.[51]

59 The RAF's handlers are not ready to take over matters which have previously been dealt with by the panel attorneys.[52]

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[51] LSSA founding affidavit, p30 para 100.

[52] LSSA founding affidavit, p30, para 101.

60 No provision has been made for proper representation of the RAF in trial matters with effect from 1 June 2020. The resulting chaos will adversely affect all participants in the litigation process.[53]

61 The LSSA's deponent came to learn of the main application on 3 March 2020. He instructed the LSSA's attorneys to obtain a copy of the papers on Wednesday 4 March 2020.[54]

62 Discussions were then held within the council of the LSSA to formulate the LSSA's views on the matter. A decision was taken to instruct attorneys on the LSSA's behalf on or about 5 March 2020. The LSSA's attorney of record requested a mandate to instruct senior counsel on the matter.[55]

63 These instructions were obtained on 9 March 2020 and consultations were held with senior counsel on 10 March 2020. Once draft papers had been prepared, they were circulated to the relevant officials. The papers were finalized by the afternoon of Thursday 12 March 2020 for service on 13 March 2020.[56]

64 On 11 March 2020, the LSSA's attorney was instructed to furnish a letter to the RAF's attorneys of record for consent to be joined as an *amicus curiae* in terms of Rule 16A.[57]

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[53] LSSA founding affidavit, p30, para 102.

[54] LSSA founding affidavit, p31, para 103.

[55] LSSA founding affidavit, p31, para 104.

[56] LSSA founding affidavit, p31, para 105.

[57] LSSA founding affidavit, p31, para 106.

65 The RAF's attorneys responded on 12 March 2020 at approximately 18h00. The response indicated a refusal to furnish consent and raised certain other issues which needed to be considered with committee members and the LSSA's attorney of record.[58]

66 These comments necessitated further amendments to the papers and accordingly the intervention application could not be served as anticipated on Friday 13 March 2020. An unsigned copy was served on 14 March 2020, and a signed copy on 16 March 2020.[59]

CONCLUSION AND COSTS

67 For the reasons set out herein, the LSSA respectfully seeks an order as set out in its notice of motion, with the LSSA's costs (including that of two counsel) to be borne by the RAF.

RA Solomon SC

MD Williams

Chambers, Sandton

16 March 2020

(LSSA's counsel)

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[58] LSSA founding affidavit, p31, para 107.

[59] LSSA founding affidavit, p31, para 108.