HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 15876/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE 27 MARCH 2020
SIGNATURE

In the matter between:

MABUNDA INCORPORATED	1st Applicant
KEKANA HLATSWAYO HADEBE INCORPORATED	2nd Applicant
NOKO MAIMELA INCORPORATE	3rd Applicant
MAPONYA INCORPORATED	4th Applicant
T M CHAUKE INCORPORATED	5th Applicant
NINGIZA MOOSA INCORPORATED	6th Applicant
TASNEEM MOOSA INCORPORATED	7th Applicant
BORMAN DUMA ZITHA ATTORNEYS	8th Applicant
MKHONTO AND NGWENYA INCORPORATED	9th Applicant
MADUBA ATTORNEYS INCORPORATED	10th Applicant
IQBAL MAHOMED INCORPORATED	11th Applicant

TKN INCORPORATED	12th Applicant
DEV HAHARAJ AND ASSOCIATES	13th Applicant
SARAS SAGATHEVAN ATTORNEYS	14th Applicant
SHEREEN MEERSINGH AND ASSOCIATES	15th Applicant
SMITH TABATA ATTORNEYS	16th Applicant
PULE INCORPORATED	17th Applicant
BRIAN RAMABOA ATTORNEYS	18th Applicant
GOVINDASAMI NZINGIZI GOVENDER INCORPORATED	19th Applicant
HAMMA – MOOSA INCORPORATED	20th Applicant
MATHOPO RAMBAU SOGOGO ATTORNEYS	21st Applicant
MAYAT NURICK LANGA INCORPORATED	22nd Applicant
SC MDHLULI ATTOENRYS INCORPORATED	23rd Applicant
HAJRA PATEL INC	24th Applicant
Z & Z NGOGODO INC	25th Applicant
TWALA ATTORNEYS	26th Applicant
SANGHAM INCORPORATED	27th Applicant
RACHOENE ATTORNEYS	28th Applicant
ZUBEDAK K SEEDAT & CO INCORPORATED	29th Applicant
DUDZILE HLEBELA INC	30th Applicant
MOCHE INCORPORATED ATTORNEYS	31st Applicant
MARIVATE ATTORNEYS	32nd Applicant
MGWESHE NGQELENI INC	33rd Applicant

LUKHU PILSON ATTORNEYS INC	34th Applicant
AK ESSACK, MORGAN NAIDOO & COMPANY	35th Applicant
MOLABA ATTOENRYS	36th Applicant
NAIDOO MAHARAJ INC	37th Applicant
HARKOO BRIJLAL & REDDY INC	38th Applicant
MATHIPANE TSEBANE ATTORNEYS	39th Applicant
MORARE THOBEJANE INCORPORATED ATTORNEYS	40th Applicant
NOMPULELO HADEBE INC	41st Applicant
MBOWENI AND PARTNERS INC	42nd Applicant

and

ROAD ACCIDENT FUND	Respondent

and

THE LAW SOCIETY OF THE NORTHEN PROVINCES	1st Amicus Curiae

and

BLACK LAWYERS ASSOCIATION	2nd Amicus Curiae

CASE NO: 18239/2020

DIALE MOGASHOA INC	Applicant

and

ROAD ACCIDENT FUND	Respondent

JUDGMENT

DAVIS, J

[1] Nature of application

1.1 The Road Accident Fund ("RAF") is the statutory body liable for payment of compensation for damages or loss wrongfully caused by the driving of motor vehicles.[1] For the past five years the RAF has utilised a panel of attorneys to represent it in respect of actions instituted for the recovery of such compensation (the "panel attorneys"). The Service Level Agreements and, indeed, the previous tender under which the panel attorneys were appointed, terminated due to the effluxion of time on 29 November 2019. The Service Level Agreements were thereafter extended by way of a "second amendment" with those panel attorneys who chose to do so until 31 May 2020.

1.2 In view of the final termination of the Service Level Agreements, the RAF called for a return of its files.

1.3 In the meantime, the RAF has also revised its "litigation model" due to the inaffordability thereof and has cancelled its invitation to tender in respect of a "new" set of panel attorneys. The RAF intends no longer to utilize such panel.

1.4 The majority of the "old" panel attorneys intend reviewing the RAF's decisions and, in the present urgent applications, seek interim relief. The effect of the interim relief is that, until such time as the panel attorneys'

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[1] See sections 2 and 3 of the Road Accident Fund Act 56 of 1996 (the "RAF Act")

review applications are finally dealt with, they should be allowed to continue to operate as before.

[2] Requirements for an interim interdict:

2.1 The interdicts which the applicants seek in Part A of their respective notices of motion are all interim interdicts, although some of the practical consequences may be irreversible.

2.2 For more than a century our law has authoritatively required an applicant seeking a final interdict to:

(1) demonstrate a clear right,

(2) show an injury in the form of irreparable harm actually committed or reasonably apprehended and

(3) the absence of an alternative remedy[2].

2.3 Where an applicant seeks an interim interdict, two further qualifications are added:

(1) The right need not be clear provided it is prima facie established, even if open to some doubt; and

(2) The balance of convenience must favour the relief claimed[3].

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[2] Setlogelo v Setlogelo 1914 (AD) 221 at 227.

[3] Gould v Minister of Justice and another 1955 (2) SA 682 (C) at 688 and Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 to 1190.

2.4 The applicants' rights, even if established on a prima facie basis, are therefore only one of the factors which must be taken into account in an application for interim relief[4].

2.5 The Constitutional Court, in dealing with the requirement of a prima facie right, stated the position to be as follows[5]:

> "*Under the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite*".

[3] Relevant facts

3.1 In 2014, by way of a Request for Bids Ref RAF/2014/00023, the RAF invited bids from attorneys to tender to render services for representation of the RAF in respect of claims instituted against it in the various district, regional and High Courts in South Africa, so-called "Third Party claims".

3.2 Pursuant to a successful tender process, 103 firms of attorneys were appointed, constituting the RAF "panel attorneys". They all entered into

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[4] Reckitt & Coleman S.A. (Pty) Limited v S.C. Johnson & Son S.A. (Pty) Limited 1995 (1) SA 725 (T) at 729 (i) to 730 (g).

[5] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at [41]

Services Level Agreements (SLA's) with the RAF. These SLA's all had 29 November 2019 as their expiry date.

3.3 During the existence of the SLA's, the High Courts have at various stages and in numerous judgments expressed dissatisfaction and concern at how the "litigation model" of the RAF, which, particularly in this Division, clogs the civil trial roll, has been handled over the years. In his answering affidavit, the Acting CEO of the RAF refers to the cases of Modise obo a minor v RAF 2020 (1) SA 221 (GP) and Mncube v RAF (2606/2018) Mpumalanga High Court per Legodi JP. In the lastmentioned judgment, the learned JP said *inter alia* the following:

> *"[14] It is not in the interest of justice or proper conduct towards an attorney's client to settle on the date of trial at a huge legal cost to client or public purse. By completion of a case management form, the parties' legal representatives undertook to settle much earlier to avoid cost occasioned by attendance at court on the date of trail. Had the matter been settled in time, there would not have been a need for any of the parties to appear.*
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> *[18] To have settled in time and remove the matter from the roll without an appearance would have been in the interest of their clients because unnecessary legal costs would have been spared. On the other hand, to come to court on the date of trial and with a blink of an eye settle the matter without any blame on the part of the clients, can only have been driven by the desire to escalate legal costs to the prejudice of client and*

public purse. In this case, the Road Accident Fund funded through the public purse, is involved.

[24] More than 90% of matters on our trial roll are the Road Accident Fund which is funded through public purse. One would have thought the parties and or legal practitioners in dealing with these matters, will be more expedient and professional. However, the contrary appears to be the case. This is despite continuous financial woes the Funds finds itself in.

[25] Things can be done much better by the legal practitioners who are practicing in this field instead of seeing the Funds as an easy quick money making machine. That amounts to an abuse and unprofessional conduct.

..."

To this can be added judgments such as those in Ntombela v RAF 2018 (4) SA 486 (GJ), Kleinhans v RAF [2016] 3 All SA 850 (GP) and many others.

3.4 On average, the value of the claims settled by the RAF per month amounts to approximately R 4.1 billion. The fixed operational expenses for the fund are approximately R800 million per month whereas it receives approximately R3.5 billion per month from the fuel levy. The monthly shortfall is immediately apparent. The RAF's current outstanding (unpaid) amount due to claimants approximate R19 billion.

3.5 The above tendency at one stage resulted in a situation, albeit before the commencement of the panel attorneys' SLA referred to above, where the

RAF attempted to manage its cash-flow by delaying concession of merits in litigation against it. This invited judicial rebuke, inter alia in a judgment by Binns-Ward, J after having reviewed some 17 cases in Daniels and Others v RAF (8853/2010) [2011] ZAWCHC 104 (28 April 2011). The learned judge further remarked that this tendency resulted "*in the Fund having incurred substantial legal expenses in taking to trial, or on appeal, claims which it had no basis to responsibly contest. In the context of the evidence before us, that legal expenses constitute a very significant component of the Find's overall expenditure, this is an aspect of the Fund's conduct which is demanding of conscientious attention by the responsible authorities*".

3.6 On 1 March 2019 in De Rebus, an article appeared by a well known author in the field of "third party" claims, Prof Klopper, a professor emeritus at the Department of Private Law at the University of Pretoria. The article gives very alarming statistics. An analysis of claims against the fund revealed that, although over the years, there has been a decrease in the claims lodged, legal costs have increased exponentially. As an example, in 2005 there were 185 773 claims lodged which resulted in legal costs of R 941 million. In 2018, when there were only 92 101 claims, the legal costs had ballooned to R8, 8 million. In 2019 the legal costs have increased to R10.6 million. The various applicants in the two urgent applications before me have not refuted these statistics and neither the fact of the rise in costs during the period of their SLA's. They were at pains, however to point out that more than half the costs were those paid to plaintiffs and further they pointed out that these costs not only consisted of that of legal practitioners, but also included experts' costs. I shall return to this aspect later.

3.7 Prof Klopper's conclusion was that, should the RAF change its litigation model and properly deal with and settle all meritorious claims expeditiously, it could save up to R10 billion of public funds.

3.8 The current CEO for the time being of the RAF is also the deponent to its answering affidavits. He is in the full-time employment of the Department of Transport as a Director General: Finance and is the Departments' CFO. He was seconded to the RAF as its Acting CEO with a mandate from the Minister to "... *turn the RAF financial woes around by inter alia cutting the legal costs incurred by the RAF*". He commenced acting in his position on 9 September 2019.

3.9 In the meantime, the RAF had already on 25 July directed a "handover letter" to the panel attorneys with the following wording:

> "*The Services Level Agreement (SLA) entered into between you and the RAF is due to expire on 25 November 2019. Pursuant to clause 14 of the SLA, you are hereby noticed of your obligation to prepare all unfinalised files in your possession for handover to the RAF*". (An attached excel spreadsheet template indicating certain required information per file as required by clause 14 was also sent. Nothing turns on the difference between the alleged expiry date of 25 November 2019 and that of 29 November 2019 as mentioned elsewhere or in respect of certain of the panel attorneys).

3.10 The relevant parts of Clause 14 read as follows:

> "*14.1 Four months before the expiry of this Service Level Agreement by the effluxion of time the Fund ... shall deliver ... a Notice*

of Handover advising [the panel attorney] to start to prepare all unfinalised files in this possession for the hand over process;

14.2 The Firm [panel attorneys] waives any and all rights of retention over documents in respect of any work done by it on behalf of the Fund;

14.3 During the period referred to in clause 14.1 above the fund reserves the right to issue or not to issue further new instructions ...;

14.4.1 Immediately on a Notice of Handover being given by the Fund, the firm shall commence preparations for handover of the unfinalised files;

14.4.2 The firm shall within 10 days of Notice of Handover provide ... a list in excel format ... containing ... (a host of information is then provided for)".

3.11 Counsel in the urgent applications confirmed that, on the evidence before court, the panel attorneys did nothing to comply with this notice.

3.12 Shortly after his appointment, the Acting CEO suspended the hand-over process on 20 September 2019. In the letter of suspension, it was mentioned that the tender evaluation for panel attorneys (being tender RAF/2018/00054 issued the previous year) was incomplete and required more time. I interpose to state that scant detail is furnished regarding this tender. From the papers it appeared that the closing date for bids was 25 January 2019 and that bids only had a validity period of 120 days. This

period had already lapsed by 20 September 2019, which would have resulted in the tender process then already having terminated[6]. I was however assured by counsel that the bid validity periods have been extended. For present purposes I need not decide this issue.

3.13 Subsequent to the suspension, the Acting CEO met with the panel attorneys on 18 November 2019. At the meeting, he informed the attorneys that their SLA's were coming to an end and that the RAF was busy conducting research regarding a new RAF model. The panel attorneys were invited to provide the Acting CEO with their inputs and suggestions. He states that, to date of the initiation of the urgent applications, he had not received any such suggestions.

3.14 The Acting CEO also informed the panel attorneys at the meeting that the "current model is not working". He further informed them that the then existing hand-over requirements, including the agreed fee of R4 per page copy, are unsustainable. This fee is not a trivial issue, the copying fee alone could relate to R 1, 1 billion in costs. The panel attorneys assured the Acting CEO that they were not the ones who had inserted that clause and the costs of copying, but that it was the RAF. The RAF had since been in contact with the Legal Practice Council's officials who were of the view that electronic copies of those portions of the files which the attorneys need to retain copies of, would suffice.

3.15 On 19 November 2019 the RAF advised the panel attorneys that the RAF was willing to extend the SLA's to those attorneys amenable thereto with certain amendments. Relevant to the present dispute is the amendment of

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[6] Telkom SA Ltd v Merid Trading (Pty) Ltd & Others [2011] ZAGPPHC 1 per Southwood, J and Joubert Galpin Searle and Others v RAF (3191/2013) [2014] ZAECHC (25 March 2014) per Plaskett, J

clause 14.1 which reads as follows in the "second addendum", constituting the SLA extensions:

> "*At least one month before the expiry of the Service Level Agreement (as amended) the Fund's Panel Manager shall deliver to the firm in writing a Notice of Handover advising the firm to start to prepare all unfinished files in its possession for the handover process and the logistics thereof. The Notice of Handover will stipulate the handover procedure to be followed* ..." (The waiver of the right of retention contained in clause 14.2 remained intact).

3.16 The panel attorneys were required to sign the addendum, should they wish their SLA's to be extended. 84 of the panel attorneys signed the addenda, resulting in the validity period of their SLA's being extended to 31 May 2020.

3.17 During the investigation of alternate litigation models, the Acting CEO met with, inter alia, the Legal Aid Board (who had also previously utilised the model of having a panel of attorneys but who had discovered that in-souring 96% of its work had considerably reduced its litigation costs), various Judges President of at least three Divisions, the Legal Practice Council, Prof Klopper and the Office of the State Attorney.

3.18 The Acting CEO reported that the RAF's strategic plan for the five year period 2020 – 2025, in compliance with the Government's Medium-Term Strategic Framework ("MTSF"), and with due regard to presentations made by the Minister of Transport in a public forum, was presented to the Fund's Board at a Strategic session held on 16 and 17 January 2020. On 31 January 2020, the Board approved the plan. In the meantime, the Chairperson of the Board had signed a revised Board Performance

agreement. Therein, five priorities requiring attention were identified. These were (a) a reduction in legal costs, (b) revision of the structure and business process, (c) integrated claims assessment system, (d) rehabilitation network and (e) revision of the supply claim management structure.

3.19 In order to attain the abovementioned objectives, the RAF came to the realization that it must drastically adopt a different model than the previously utilised "counter-productive legal strategy". To continue therewith, was to increase the RAF's exposure to claimants on a virtually daily basis whilst at the same time increase its insolvency, all at the expense of the public purse. Should the old litigation model (including the retention of a panel of attorneys) be retained many, including Board members, had warned that the RAF then risked going down the path envisaged in section 21(2)(a) of the RAF Act, which comes into operation when the RAF becomes unable to pay claims against it. The consequence thereof would be dire for claimants as it would terminate the RAF's position as statutory defendant for claims arising out of the driving of a motorvehicle and would re-institute the common law position. The "insured driver" as it is now known, would ceased to be insured leaving claimants with huge claims against impecunious defendants.

3.20 The RAF's "new model" consists of the intention to settle as many as possible meritorious claims within 120 days. The aim is to achieve a 98% settlement rate. The immediate aim is to target those claims already on the civil rolls from 1 June 2020 onwards. For this purpose, the RAF intends capacitating itself with an integrated claims assessment system, an additional approximately 255 employees ranging from legally qualified to whatever other skills may needed, to insource the assessment and

settlement process and to mediate mattes where settlement appears difficult to attain. To achieve the lastmentioned process, the RAF has already approached the South African Medico-Legal Association ("SAMLA") whereby medico-legal experts from SAMLA will assist the RAF in settling the majority of its quantum claims. A confirmatory affidavit of a well known expert, Dr Edeling has also been provided confirming this. In the immediate future, the RAF will be sending teams of staff from its outlying offices to the busiest High Court Divisions to cope with the influx of files in respect of matters already set down on the trial rolls.

3.21 The RAF also recognized that not all matters can or will be settled, either at all or within the 120 days. To cater for the scenario where the RAF would still need representation in court in defence of those matters with real triable issues, the RAF will either and hoc instruct attorneys or utilize some of the attorneys on its corporate panel (of which there are some 20, some of which are also panel attorneys such as the eighth applicant in case 15876/2020 currently before court). As a further resource, the RAF has approached the State Attorney, who has in principle agreed to employ attorneys dedicated to handling RAF matters at the RAF's costs but operating within the State Attorneys Act and the Legal Practice Act. The State Attorney is reported as having informed the RAF that such an arrangement is "nothing new" and already exists in respect of other State entities. All this will cost the RAF substantially less than the panel attorneys.

3.22 The Acting CEO stated "*this new method is aimed at fulfilling the Fund's legislative mandate of investigating and settling matters as set out inter alia in section 4(1)(b) and 7 of the RAF Act as opposed to this unmitigated litigation*".

3.23 Consequently, on 18 February 2020 the Fund addressed a new hand-over letter to the panel attorneys in respect of the extended SLA's which are to terminate due to the effluxion of time on 31 May 2020 as already stated earlier. In the letter a list of all open files (as per the excel template furnished) was requested by 20 March 2020. In addition, handover of the files in terms of clause 14 of the SLA (as extended and amended) was requested in four tranches:

- The files with trial dates from 01/06/2021 – 31/12/2020 by 28 February 2020
- The files with trial dates from 01/01/2021 – 31/12/2021 by 31 March 2020
- The files with trial dates from 01/01/2022 – 31/12/2022 by 15 April 2020
- All open files not yet returned by 31 May 2020.

3.24 Due to a reaction by the panel attorneys, the timelines for the hand-over were adjusted in a subsequent letter from the Fund dated 20 February 2020. It reads as follows:

> "*We refer to the letter that was communicated to you dated 18 February 2020. We have been inundated with requests from a number of firms requesting us to consider the timelines for the delivery of files. In light of the requests received, the RAF has taken into consideration all the concerns raised and hereby amend the handover schedule as follows*
>
> - *Files with trial dates 01/06/2020 – 31/06/2020 by 13 March 2020*

- *Files with trial dates 01/01/2020 – 31/12/2020 by 10 April 2020*
- *All outstanding files by 30 April 2020*".

In addition, panel attorneys were reminded of their obligations in terms of clause 14.4.7 of the SLA regarding the furnishing of particulars of the state of pleadings, the status of each matter and their opinions as to the merits and quantum.

3.25 On 25 February 2020 the RAF Bid Adjudication Committee ("the BAC") cancelled tender RAF/2018/00054. The BAC acted within its delegated powers. By way of "Tender Cancellation Letters" dated 26 February 2020 the BAC stated that the cancellation was in accordance with Regulation 13(1)(a) of the Preferential Procurement Regulations 2017 issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 in that:

> "*(a) The RAF's financial situation has necessitated a review of its operating model, which resulted in a conclusion that there is no need to have the panel of attorneys. Consequently the RAF no longer require the services which were specified in the invitation.*
>
> *(b) In addition to (a) above the RAF's financial situation which continues to worsen on a daily basis has rendered the funds no longer available to cover the total envisaged expenditure*".

3.26 It is against this background that the relief claimed by the various applicants must be adjudicated.

[4] The relief claimed

4.1 Of the 84 remaining attorneys acting in terms of the extended SLA's, 42 launched an urgent application on 4 March 2020 in case no 15876/2020 with extremely truncated time periods for the exchange of affidavits (the "Mabunda-application").

4.2 The relief claimed in the Mabunda application is in two parts. In part A, the applicants therein simply claim that, pending the adjudication and finalization of the review in part B, the RAF be *"... interdicted and restrained from implementing and/or giving effect to its notices of handover addressed to the applicants and all panel attorneys ... dated 18 February 2020 and 20 February 2020 respectively*".

4.3 In part B of the Mabunda application, the applicants seek a review of the decision to demand a handover of the unfinalised files and of the "purported" cancellation of the 2018 tender and the setting aside of both the decision and cancellation.

4.4 The Mabunda application was allocated to by me the Judge President of this Division to be heard as a special urgent application on 17 March 2020.

4.5 At the hearing of the matter, I granted the Law Society of South Africa (the "LSSA") and the Black Lawyers Association (the "BLA") leave to intervene as amici curiae (friends of the court) pursuant to applications by them in this regard. The LSSA's interpretation necessitated a standing down of the matter to 18 March 2020 to accommodate further papers to be filed, dealing with issues raised by them.

4.6 At the eventual hearing of the matter, it appeared that a further firm of panel attorneys had launched a separate urgent application, also with truncated

time periods and for relief dealing with the same subject-matter. This application (the "Diale Application") was under case no18239/2020 and was set down on the urgent roll of the next week, 24 March 2020.

4.7 After some argument about costs and after consultation with the Acting Deputy Judge President, I ordered a consolidation of the two matters in order to avoid a multiplicity of actions. I heard the Mabunda application on 18 March 2020. I heard the Diale Matter on 20 March 2020 after the parties had filed all their papers, at which hearing counsel for the applicants in the Mabunda matter, the LSSA and the BLA also addressed the court. The RAF was represented by the same set of counsel in both applications.

4.8 In the Diale application, more extensive relief was sought in the amended part A thereof, namely, pending "the determination" of part B, a suspension of the implementation of the RAF's notices of 18 and 20 February 2020, an interdict prohibiting enforcement of the notices and invoking clause 14 of the SLA's, a suspension of the cancellation of the 2018 tender and a suspension of a notice of breach issued on 17 March 2020 (due to none of the applicants complying with the hand-over notices).

4.9 Part B of the Diale application is aimed at a review and setting aside of the decision to cancel the 2018 tender and a mandamus forcing the tender process to continue. A declaration of invalidity of the second addendum to the SLA's extending their life is also claimed. Furthermore, it is claimed that, pending final adjudication of the tender and publication of its outcome, the applicant and the RAF shall continue to perform in terms of SLA concluded on 28 November 2014.

4.10 In short, the panel attorneys want to prevent the RAF from doing away with them and they want to be allowed to perform as always until a new panel has been appointed.

[5] Ad prima facie right

5.1 Once a tender has been awarded, the relationships between the parties is governed by the law of contract[7].

5.2 Prima facie, the notices of handover issued by the RAF in February 2020 were in the exercise of their contractual rights and were foreshadowed by the termination of the extended SLA's by the effluxion of time. There was no cancellation of the SLA's exercised by the RAF, their lifetime shall simply end on 31 May 2020. The case is therefore to be distinguished from those cases where cancellation of a contract is done by an organ of State[8].

5.3 Insofar as Logbro in paragraph [7] dealt with an organ of State's duties to act lawfully, procedurally and fairly in exercising its contractual rights in a tender process, the present matter is not one where the organ's contractual rights must yield before its public duties, on the contrary. The contractual right to a handover of files existed in the initial SLA and is not attacked. Where the time-period or logistics of such handover had been amended at the instance of the RAF when it offered an extension, the amendments are justifiable having regard to the shortened time period of the extension, irrespective the issue of whether the tender process is to be completed or whether a new business model is to be contemplated or implemented.

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[7] Government of South Africa v Thabiso Chemicals 2009 (1) SA 163 (SCA) at para18.
[8] Such as in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others 2001 (3) SA 1013 (SCA) as qualified by Logbro Properties CC v Bedderson NO 2003 (2) SA 460 (SCA) ("Logbro")

5.4 Initially the applicants alleged that they were held over a barrel and had signed the extensions under duress and that as a result of the duress the extensions or, so they allege, the amendment of clause 14.1 was "unlawful".

5.5 Wisely, the reliance on an invalid extension was jettisoned. This argument's logical consequence, if successful, would have meant that the extensions would have fallen away, leaving the applicants not only presently without any contractual rights to act on behalf of the RAF (and earn and claim fees) but it would have meant that they had since the demise of the original SLA's on 29 November 2019 been acting in that fashion without a mandate.

5.6 In avoiding the consequence of the RAF validly and lawfully exercising its contractual rights relating to the hand over of its files in terms of valid contracts (the extended SLA's), the various applicants' cases were somewhat difficult to pinpoint. Numerous and repeated questions by me resulted in the following explanation (irrespective of what the papers said or did not say): the hand-over notices signaled the end of panel attorneys' contracts (and their appointments as panel attorneys) which were inextricably linked to the RAF's decision to withdraw or cancel the 2018 tender prior to its consideration process being undertaken or completed and prior to any tender being awarded. The applicants say that they are entitled to review this cancellation and, in the case of the Diale Application, to have it suspended, which in turn, so they say, entitles them to suspension of the RAF's contractual rights.

5.7 The review of the decision to cancel a tender prior to its consideration or award is a very narrow one. Such a decision is not an administrative act

but an executive one. It is therefore not reviewable under the Promotion of Administrative Justice Act, 2000 ("PAJA")[9].

5.8 The review of executive authority cancelling a tender can only be based on the principle of legality[10]. This much the applicants conceded.

5.9 As part of their legality attack, the applicants attacked the cancellation of the tender on the basis of rationality. I do not wish to encroach on the jurisdiction of the court which is to hear part B of the application by dealing with this attack. I have been informed from the bar that another application by yet another panel attorney for review of the cancellation is on the roll for hearing on 21 April 2020. I was informed that parts B of the Mabunda and Diale applications would be consolidated with that review but no-one could furnish me with particulars of the status of the matter or the papers therein. It might well be that the review will not be heard on 21 April 2020 as in the nature of these things, experience has shown that all kinds of disputes regarding the furnishing of the record, the sufficiency thereof and any number of interlocutory issues might result in the envisaged review only being dealt with or finality being reached in respect thereof at some, possibly distant date in the future. This is, of course, without even considering any possible appeal processes which may follow.

5.10 I therefore need not consider whether the RAF has crossed the rather low hurdle of indicating that the exercise of the executive authority to cancel the tender is rationally connected to the saving of costs occasioned by doing away with panel attorneys[11]. This is a matter for the review court

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[9] City of Tshwane Metropolitan Municipality v Nambiti Technologies (Pty) Ltd 2016 (2) SA 494 (SCA) ("Nambiti").
[10] SAAB Grinted Defence (Pty) Ltd v SAPS and others (316/2015) [2016] ZASCA 104 (5 July 2016 ("SAAB").

[11] National Energy Regulator of South Africa v PG Groups (Pty) Ltd 2019 (10) BCLR 1185 (CC) and Pharmaceutical Manufacturers Association of SA: In Re Ex parte President of South Africa 2000 (2) SA 674 (CC) paragraphs [85] and [90].

as is the decision of whether a court may or should in this instance interfere with the wide discretion afforded to an executive power in selecting the means to achieve its Constitutionally permissible objectives[12]. Similarly, I need not consider whether the reasons for cancellation accords with aforementioned regulation 13, even if, on the face of it, they do[13].

5.11 The position is then that the extended SLA's are going to terminate through effluxion of time on 31 May 2020 and that, both to avoid the foreseeable chaos which might ensue should all the panel attorneys "dump" all their files on the RAF's doorstep on that day and that to ensure that the agreed to hand-over takes pace orderly, the RAF has exercised its contractual rights by sending out the handover notices. Against this factual backdrop, the applicants are exercising their rights of review of a separate executive decision on the basis of rationality. What then are the applicants' rights in the interim in these circumstances? Until the cancellation is reviewed and set aside, it constitutes the valid exercise of executive authority. SAAB quoted Nambiti with approval in the following words: "... *it is always open to a public authority, as it would to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender*". Nambiti further held at [32]: "*A decision not to procure services does not have any direct external legal effect. No rights are infringed thereby. Disappointment may be the sentiment of a tenderer, optimistic that its bid would be the successful one, but its rights are not affected*".

5.12 The result of the above is that the applicants currently have no rights which are currently being infringed nor would they have rights which would be

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[12] Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC)
[13] Trencon Construction (Pty) Ltd v IDC [2015] ZACC22

infringed post 31 May 2020. Their rights of review remain intact even if no interim order is granted. Even if they are successful on review in setting aside the cancellation of the tender, their rights would then be to demand that a fair and lawful tender process be concluded. This does not translate to any right to represent the RAF in the meantime.

5.13 There is an added dimension to the matter and that relates to the nature of the services to be rendered. There is no automatic or Constitutional right of an attorney to insist that a specific client, even an organ of State, must use its services or, absent an existing agreement, can be compelled to furnish it with instructions or a mandate to act on its behalf.

5.14 The applicants' last ditch agreement that, should any other attorneys be utilized by the RAF in the interim and the applicants succeed in resurrecting the panel attorney system, that their "work" will already have been given away to some one else, is also flawed. Any "work" in the interim would, if all goes according to plan, be limited and/or on an ad hoc basis. The panel attorney system was in any event on an "as and when" basis and, even if the panel is reinstated, no attorney can insist on being given specific work.

5.15 I therefore find that the applicants have failed to satisfy the requirements of indicating a prima facie right in law. Absent any such right, there can also be no harm or perceived imminent harm against which an interim order should offer protection.

[6] Balance of convenience

6.1 Even if I am wrong in the above conclusion and even if the applicants had some immediate or interim right to cling to their mandates and be given instructions by the RAF or to hold onto their files beyond the hand-over

dates or beyond 31 May 2020, the balance of convenience favours the RAF and not the applicants.

6.2 The applicants' "convenience" is to continue to litigate as before and to charge fees as they have always done. Whilst I appreciate the fact that, over the years, panel attorneys have come to build their practices around the work received from the RAF, in some instances exclusively so, and that they have expended funds and commitment regarding infrastructure and personnel to cope with the flow of instructions, this all relate to each particular firm's own "convenience". They argued that they were exclusively concerned for the RAF's wellbeing and the administration of justice and the rights of claimants, but in the end, it still appears to be about the retention of their lucrative practices.

6.3 And money, or rather the lack of it, is where the RAF's "convenience" lies. Each passing day that the present litigation model continues to exist, the deeper the RAF's financial outlook sinks. The deeper the RAF sinks, the less it is in a position to satisfy claims, both timeously on at all. And this impacts on the public purse and on the pockets of fuel-using public. Any, and I stress any, reduction of the R10 billion costs expense, be it a saving in costs paid to claimants due to early settlement or due to a saving of having done away with the panel, far outweighs each individual applicant's private (as opposed to public) "convenience".

6.4 The applicants ague that "there would be chaos" if the RAF is left unrepresented on 1 June 2020 with over 6 000 files to attend to. This fear appears to be more illusory than real: on 1 June 2020 there would only be the then as yet unsettled matters on the trial roll to attend to. This is far less than the spectre of 6000 alleged by the applicants. What little could

not be settled or referred to mediation, will have to be dealt with by way of ad hoc instructions.

6.5 The real chaos is the result which would occur should the panel attorneys not hand over the files to the RAF. By refusing or failing to do so, it would be the panel attorneys who, by clinging to their files dispite their agreed waiver of retention, would disable the RAF from attempting to finalise matters out of court, more cheaply and expeditiously.

6.6 The applicants have, as already indicated, failed or refused (on the papers before me) to heed the initial hand-over instructions given in July 2019 (prior to its suspension). They have since, on their own version, failed or refused to heed any of the hand-over instructions given on 18 and 20 February 2020. They alleged that it was "impossible" to do so and that they cannot give opinions as to merits or quantum without expert reports. This is a nonsense argument. Any client would at any stage in litigation be entitled to be informed by his attorney what the state of his case was, what the stage of the litigation was, whether his attorney knew of or were in possession of particulars of any witnesses or their statements regarding the merits or what the trial readiness of the case is regarding quantum. Should the attorneys not yet have all the facts or lack any identifiable expert assistance, then any responsible attorney would be able to tell his client so and give his opinion or advice in respect of the remainder of the particulars sought. The applicants have not even attempted to do so, not in respect of even a single file of those requested, let alone those on the roll for June 2020. Currently the applicants are all in breach of their extended SLA's.

6.7 For this reason further, not only can no interim order be granted to the applicants (which is also what had happened in the matter before Plasket,

J in the case mentioned in footnote 6 above where he dealt with 34 panel attorneys), but the counter application in the Diale application should succeed. One can but express the expectation that the applicants in the Mabunda application would, as responsible officers of the court, commence the already delayed hand-over of files without a further application by the RAF in similar terms as the counter application being necessary.

[7] Costs

7.1 I can see no compelling reason why costs should not follow the event as between the various applicants and the RAF.

7.2 The RAF claims that costs should be awarded on a punitive scale but, in the exercise of my discretion and despite the severe truncation of time periods occasioned by the applicants, which caused the RAF to scramble to respond (which it admirably did), I do not deem this necessary.

7.3 The RAF also claimed costs against the amici curiae, arguing that they had not beneficially contributed to the matter. Although no evidence of note had been produced by them and although they appeared to align themselves virtually squarely with the applicants rather than being "friends of the court", their arguments contributed usefully to the debate. They claimed costs from the RAF but did not claim costs from the applicants and, again in the exercise of my discretion, I find it to be fair that they pay their own costs.

[8] Order

8.1 In case no 15876/2020, the Applicants' claim for relief in part A of the Notice of Motion is dismissed.

8.2 The Applicants in case no15876/2020 are ordered to pay the Respondent's costs, including costs of two counsel, where employed, in respect of that application.

8.3 In case no 18239/2020, the Applicant's claim for relief in part A of the Notice of Motion is dismissed.

8.4 In case no 18239/2020 the Applicant is ordered to pay the Respondent's costs, including the costs of two counsel, where employed, in respect of that application.

8.5 The applicant in case no 18239/2020 is ordered to comply with the RAF's handover notice of 20 February 2020 and, insofar as any time period mentioned therein may already have expired, then within seven days from date of this order (which is electronically submitted to the parties). If, due to National emergency measures the said applicant is unable to comply, it is to inform the RAF electronically thereof and to furnish all possible information requested electronically, starting with the matters with trial dates from 1 June 2020.

8.6 The Law Society of South Africa and the Black Lawyers Association shall bear their own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 17 and 18 March 2020 (case no: 15876/2020)
Judgment delivered: 27 March 2020

APPEARANCES: CASE NO: 15876/2020

For the Applicants:	Adv W.R Mokhari SC with Adv C Lithole
Attorney for Applicants:	Mabunda Incorporated, Johannesburg c/o Ramaselala MC Attorneys, Pretoria
For the Respondent:	Adv J.A Motepe SC with Adv M Vimbi
Attorney for Respondent:	Van Greunen & Associates Inc., Pretoria
For the Law Society of SA	Adv R.A Solomons SC with Adv M Williams
Attorney for the Law Society of South Africa	Mothle Jooma Sabdia Incorporated, Pretoria
For the Black Lawyers Association	Adv P Makhambeni with Adv J Khan
Attorney for the Black Lawyers Association	MS C Maphalla, Pretoria

Date of Hearing: 20 March 2020
Judgment delivered: 27 March 2020

APPEARANCES: CASE NO: 18239/2020

For the Applicants:	Adv N.K Tsatsawane SC with Adv S Tisani
Attorney for Applicants:	Diale Mogashoa Attorneys, Pretoria
For the Respondent:	Adv J.A Motepe SC with Adv M Vimbi
Attorney for Respondent:	Van Greunen & Associates Inc., Pretoria