REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 046038/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

20/03/2024

In the matter between:

LEGAL PRACTITIONERS INDEMNITY INSURANCE FUND NPC	**FIRST APPLICANT**
WE EMERGENCY RESPOND TEAM (PTY) LTD	**FIRST INTERVENING PARTY** **SECOND APPLICANT**
TSHOLOFELO TLHAJWANG obo MINOR	**SECOND INTERVENING PARTY** **THIRD APPLICANT**
REBECCA MASABATA MOHAPI	**THIRD INTERVENING PARTY** **FOURTH APPLICANT**

CHRISJAN TOLO	**FOURTH INTERVENING PARTY** **FIFTH APPLICANT**
JOHANNA SUSANNA VISAGIE	**FIFTH INTERVENING PARTY** **SIXTH APPLICANT**
LUCKY DUMISANI SEBATLELO	**SIXTH INTERVENING PARTY** **SEVENTH APPLICANT**
A WOLMARANS INCORPORATED	**SEVENTH INTERVENING PARTY** **EIGHTH APPLICANT**
LOUBSER VAN VYK ATTORNEYS	**EIGHTH INTERVENING PARTY** **NINTH APPLICANT**
ABONGILE DUMILE ATTORNEYS INC	**NINTH INTERVENING PARTY** **TENTH APPLICANT**

and

THE ROAD ACCIDENT FUND	**FIRST RESPONDENT**
THE MINISTER OF TRANSPORT	**SECOND RESPONDENT**
CHAIRPERSON OF THE BOARD, ROAD ACCIDENT FUND	**THIRD RESPONDENT**
CHIEF EXECUTIVE OFFICE, ROAD ACCIDENT FUND	**FOURTH RESPONDENT**

THE LEGAL PRACTICE COUNCIL	**FIFTH RESPONDENT**
PRETORIA ATTORNEYS' ASSOCIATION	***AMICUS CURIAE***

JUDGMENT

MOLOPA-SETHOSA J, UNTERHALTER J and MOTHA J:

Introduction

1. This matter concerns how Claimants lodge claims for compensation against the Road Accident Fund (the "RAF"). In terms of s3 of the Road Accident Fund Act 56 of 1996 (the "RAF Act"), the object of the RAF is the payment of compensation, in accordance with the RAF Act, for loss or damage wrongfully caused by the driving of motor vehicles. Section 24(1) of the RAF Act requires that a claim for compensation shall be set out in the prescribed form. The Minister of Transport ('the Minister') is given the power in s26(1) of the RAF Act to make regulations regarding any matter that may be prescribed. This the Minister has done. The Minister amended the Road Accident Fund Regulations of 7 July 2008 ('the Regulations'), by publishing a new RAF 1 Claim Form ('the RAF 1 Form") on 4 July 2022, following the publication by the RAF of a Board Notice in May 2022 ('the Board Notice') to regulate the lodging of claims. The Minister adopted the Board Notice in the RAF 1 Form.

2. The applicants sought to review the Board Notice and the RAF 1 Form in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively under the principle of legality. At the commencement of the proceedings, counsel for the first applicant, addressing the court on behalf of the applicants, submitted that the attack was confined to the RAF 1 Form, since the Board Notice was a precursor to the Ministerial decision. If the RAF 1 Form falls to be set aside, so too must the Board Notice. This was a helpful clarification of the position of the applicants.

The parties

3. The first applicant is the Legal Practitioners Indemnity Insurance Fund, NPC, a non-profit company, which provides professional legal indemnity to legal practitioners with Fidelity Fund Certificates and certain bonds of security. It is registered and incorporated in terms of company laws of the Republic of South Africa, and it is licensed in terms of the Insurance Act 18 of 2017. The first applicant provides professional indemnity insurance to the legal profession and protects the public against indemnifiable and provable losses arising from legal services provided by insured practitioners.

4. The second applicant is WE Emergency Respond Team (Pty) Ltd, a private company, which conducts ambulance services, for the most part, to indigent members of society, and then lodges claims with the Road Accident Fund, including supplier claims in terms of s17(5) of the RAF Act.

5. The third, fourth, fifth, sixth and seventh applicants are: Tsholofelo Tlhajwang obo a minor, Rebecca Masabata Mohapi, Chrisjan Tolo, Johanna Susanna Visagie and Lucky Dumisani Sebatlelo. They are victims of road accidents whose claims were rejected by the RAF for failure to comply with the requirements of the RAF 1 Form.

6. The eight, nineth and tenth applicants are: A Wolmarans Incorporated, Loubser Van Wyk attorneys and Abongile Dumile Attorneys. They are law firms specialising in personal injury and the claims of road accident victims.

7. The first respondent is the RAF, a national public entity, as reflected in schedule 3A of the Public Finance Management Act 1 of 1999, established in terms of Section 2 (1) of the RAF Act. It opposes the application.

8. The second respondent is the Minister of Transport 'The Minister'). The Minister enjoys powers under s 26(1) to make regulations prescribed under RAF Act and has done so in adopting and publishing the RAF 1 Form. The Minister does not oppose the application.

9. The third respondent is the Chairperson of the Road Accident Fund Board ('the Board'). The Board exercise overall authority and control over the RAF. The Board opposes the application on behalf of the RAF.

10. The fourth respondent is the Chief Executive Officer of the Road Accident Fund (the "CEO") appointed in terms of section 12 of the RAF Act by the Minister of Transport and he opposes the application on behalf of the RAF.

11. The fifth respondent is The Legal Practice Council, a statutory body established in terms of section 4 of the Legal Practice Act 28 of 2014. No relief is sought against the fifth respondent and it is cited for any interest it may have. It does not oppose the application.

The *amicus curiae* in this matter is the Pretoria Attorney's Association ("the PAA"), a voluntary association of attorneys. They were admitted to assist the court to understand the impact of the RAF 1 Form and the Board Notice upon the public and legal practitioners.

Condonation

12. For reasons that appear below, we find that the Board Notice and the RAF 1 Form constitute administrative action. The Board Notice was published on 6 May 2022. The RAF 1 Form was published on 4 July 2024. In terms of s 7 of PAJA, parties must institute proceedings for judicial review without unreasonable delay, and not later than 180 days from the relevant date set out in s 7. Properly computed, the last day to launch proceedings in respect of the Board Notice in compliance with the 180 day period was 5 November 2022. And the 180 day period in respect of proceedings to challenge the RAF 1 Form was 30 December 2022. All the applicants commenced their proceedings outside the 180 days. Hence, the respondents objected to the late filing of the applications. Some of the applicants applied for condonation. Condonation is not there for the mere asking[1]. Therefore, the failure to comply with s7 of PAJA would exclude our jurisdiction to entertain the applications, save for the grant of condonation in terms s 9. Sections 7 and 9 of PAJA read as follows:

"(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

[1] Nair v Telkom SOC Ltd and Others 2021 ZALCJHB 449 para 19

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reason for it or might reasonably have been expected to have become aware of the action and the reasons…"

"9 Variation of time

(1) The period of-

(a) 90 days referred to in subsection 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

We proceed to consider the position of the applicants.

Application of the first applicant

13. Placing reliance on section 9 (1) of PAJA, the first applicant applied for condonation in its notice of motion. The application was substantiated in the founding affidavit and supplementary affidavit. The first applicant submitted that the matter was of great public importance, and it was in the interest of justice to grant condonation. In its supplementary affidavit, the first respondent lamented the Minister's failure to comply with Rule 53, and placed the delay at the Minister's doorstep.

14. The Board Notice was published in the Government Gazette on 6 May 2022. The first applicant lodged its application on 15 November 2022. In essence, the first applicant was out of time by 10 days. Looking at the totality of the facts placed before us, we are persuaded by the first applicant's condonation application.

15. We take account of the degree of lateness, the accompanying explanation, the prospects of success and the importance of the matter. Taken together, we are of the view that it is in the interest of justice to grant condonation in terms of section 9 (1)(b) of PAJA.

Application of the second applicant.

16. The second applicant did not file any application for condonation, despite its application being eleven months out of time. Having been granted leave to intervene, counsel for the second applicant submitted that it became a co-applicant, and could take advantage of the cause of action of the first applicant. Counsel prevaricated: asking for condonation from the bar, relying on the second applicant's replying affidavit, it which the following appears:
"In any event even under the provisions of PAJA this Honorable Court nonetheless enjoys a discretion to entertain the review even if it is launched late."
It was also submitted that the second applicant did not need condonation because its application was predicated upon a legality review to which the 180 days rule does not apply.

17. Since we find that the Board Notice and the RAF 1 Form constitute administrative action, PAJA is of application. The second applicant brought its application out of time. It requires condonation. Its intervention in these proceedings does not absolve it of the duty to seek condonation, since it seeks judicial review in its own right. The second applicant has made no case for condonation, beyond belatedly asking for it. That does not suffice. We cannot grant condonation absent some reasoned and substantiated basis, placed before us in the affidavits filed on behalf of the second applicant. This we simply do not have. And without the grant of condonation, we cannot entertain the second applicant's judicial review. Its applicant for judicial review is therefore dismissed.

The application of the third applicant.

18. The third applicant is in the same position as the second applicant in that she did not apply for condonation. Counsel for the third applicant submitted that he stood by the submissions made by counsel for the second applicant. It is noteworthy that the third applicant's judicial review was brought out of time by some 11 months. For like reasons, there is no basis upon which to grant condonation and the third applicant's application for judicial review is dismissed.

The application of the fourth, fifth, sixth, seventh and ninth applicants.

19. The fourth, fifth, sixth, seventh and nineth applicants each sought condonation in their notice of motion. Their applications are similar. They were made on 20 and 23 November 2023, over twelve months out of time. Their founding affidavits mirror one another. They decry "the RAF1 Form's numerous substitutions over the last year" and submit that the last "withdrawal created a vacuum where no RAF 1 Form existed between 30 May 2022 and 4 July 2022."

20. These applicants do not afford us a detailed explanation as to why more than a year was taken to bring their reviews. They submit that "the interest of justice undoubtedly justifies the granting of condonation, having regard to the importance of the matter and the real possibility of further abuse by the RAF…" [2]

21. The court in *Nair v Telkom SOC Ltd and Others*[3] stated that:

> "Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."[4]

22. The explanation offered by these applicants is thin. But the history of this matter does show that the RAF engaged in a pattern of publishing notices and withdrawing them which may have caused some confusion and doubt as to whether the Board Notice and RAF 1 Form were indeed final, and hence the non-transitory target of attack. This, taken together with the case advanced by these applicants, inclines us to grant condonation, which we do.

The application of the eighth applicant.

23. The eight-applicant applied for condonation in its founding affidavit. Since the application was lodged on 4 April 2023, it was four months out of time. Stating that it would be in the

---

[2] Founding affidavit of 4th applicant at 124, 5th applicant at 123, para 6th at para 122, 7th applicant at para 125 and nineth para 214
[3] (JR59/2020) [2021] ZALCJHB 449
[4] Supra para 14

interest of justice to extend the 180 days as contemplated in section9(1)(b), it furnished the following reasons:

> "First, the applicant acted with the utmost diligence and expedition in seeking to challenge the unlawful decisions when it became aware of the severe harms they were inflicting and threatened to inflict.
>
> Second, the applicant did not delay in the true sense and followed an eminently reasonable approach to lodge its review. It initially did not think that the unlawful decisions were capable of implementation. When it learned that the RAF to implement them, it proceeded to prepare and launch this application as soon as possible whilst simultaneously taking steps to defend the rights of its clients in their actions.
>
> Third, no prejudice arises from the delay by the applicant in lodging its review. To date, the RAF and the Minister have failed to comply with their duty to file the review record under Rule 53(1)(b) and the applicant's review will accordingly not disrupt the timelines for the adjudication of the main review."

24. It also stated that it had excellent prospects of success. We are persuaded that a reasonable explanation has been furnished, and a proper case for condonation in terms of section 9 (1) (b) has been made out. The eighth applicant is granted condonation.

The application of the tenth applicant.

25. The tenth applicant's matter was transferred to this court, in terms of section 27(1)(b) of the Superior Courts Act 10 of 2013, from the Eastern Cape Division, East London Circuit Court. It was six months late. Counsel for the tenth applicant submitted that he was relying on the principle of legality and, therefore, 180 days did not apply. This position is similar to that of the second and third applicants, and as a result the tenth applicant's judicial review is destined to suffer the same fate. It is dismissed.

26. It follows that we may entertain the applications of the first, fourth, fifth, sixth, seventh, eighth and ninth applicants. We shall we refer to them henceforth as the applicants.

Standing

27. The RAF challenged the standing of the first applicant. However, in oral argument, counsel withdrew this challenge. And nothing more need be said of it.

The merits

28. The applicants challenge three decisions. First, the RAF adopted and implemented Board Notice 271 of 2022 of 6 May 2022, published in Government Gazette No 46322 on 6 May 2022 (the Board Notice). The Board Notice was published in terms of s 4(1)(a) of the RAF Act. The Board Notice includes a schedule which sets out the documents the RAF requires for the lodgment of a claim. Second, the Minister, in terms of s 26 of the RAF Act, published Board Notice 302 of 2022 in Government Gazette No 46652 of 4 July 2022. In this board notice, the Minister prescribed the RAF 1 Claim Form (the RAF 1 Form) in a schedule. The RAF 1 Form requires the completion of the form to claim compensation in terms of s17 of the Act. It stipulates that any form that is not completed in its full particulars shall not be acceptable as a claim, and references s 24(4)(a) of the RAF Act. Third, the Minister issued the Road Accident Fund Regulations of 2008 in Government Gazette No 31249 of 21 July 2008, in terms of s26 of the RAF Act (the Regulations). Regulation 7(1) delegates to the RAF the power of the Minister to amend or substitute the RAF 1 Claim Form ('the impugned delegation'). Regulation 7(1) reads as follows: 'A claim for compensation and accompanying medical report referred to in section 24(1)(a) of the Act, shall be in the form RAF 1 attached as Annexure A to these Regulations, or such amendment or substitution thereof as the Fund may from time to time give notice of in the Gazette'. The impugned delegation is said to be unlawful.

29. We commence with the challenge to the RAF 1 Form. The Minister abides the decision of this court, and did not file an affidavit to explain the adoption of the RAF 1 Form. The RAF recognized that its opposition was confined to the challenge made to its own decision, and not the decision-making of the Minister.

30. The first issue we must consider is whether the RAF 1 Form constitutes administrative action. Since the holding of the plurality of the Constitutional Court in *New Clicks*[5], our courts have held that the making of subordinate legislation is administrative action. In

---

[5] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others* 2006 (2) SA 311(CC)

Esau[6], the Supreme Court of Appeal affirmed this position. The RAF 1 Form sets out what is required to lodge a claim. Section 23(3) of the RAF Act provides that no claim lodged in terms of s 23(1) read with ss 17(4)(a) or 24 shall prescribe before the expiry of a period five years from the date on which the cause of action arose. Lodgment thus extends the ordinary period of prescription by two years. The contents of the RAF 1 Form directly affect what is required of persons to lodge a claim. It thus has a direct, external legal effect upon the period of prescription, and this adversely affects the rights of persons who wish to lodge claims under the RAF Act. The RAF 1 Form accordingly falls within the definition of administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and thus constitutes administrative action.

31. The applicants challenge the legality of the RAF 1 Form on a number of grounds. They contend that the Minister adopted the RAF 1 Form with an ulterior motive, under unlawful dictation, without regard to the requirements of procedural fairness, and on by recourse to irrelevant considerations. Furthermore, the RAF 1 Form, they claim, is *ultra vires,* vitiated by a material error of law, arbitrary and capricious, irrational, unreasonable, and fails to respect, protect and promote implicated constitutional rights. They bring these grounds of review under PAJA. Since we have decided that the RAF 1 Form constitutes administrative action, PAJA provides the legal standards against which these grounds of review must be assessed.

32. The record of the Minister's decision is confined to a single memorandum. It is entitled 'Request the Honourable Minister to approve the publication of the revised Road Accident Fund Form 1 for incorporation into the Road Accident Fund Regulations' ('the memorandum'). The memorandum is signed by the Acting Director General of the Department, but not by the Minister. The memorandum recalls the litigation that resulted in the decision of this court in *Mautla*[7]. There, as in the case before us, the issue was whether the RAF enjoyed the power to amend the RAF 1 Form. The Department of Transport was of the opinion that the Minister enjoyed this power, whereas the RAF took a different view, and contended that the power rested with it. The memorandum referred to a meeting of officials of the Department and the RAF at which it was agreed that 'it may be expedient and advantageous that the Minister publish the RAF 1 Form'. One reason to

---

[6] *Esau v Minister of Co-operative Governance and Traditional Affairs* [2021] 2 All SA 357 (SCA) at 379

[7] *Mautla & others v Road Accident Fund & others* 2023 JDR 4259 (GP)

adopt this position was that the proposed RAF 1 Form had previously been published for comment by the RAF.

33. We do not know what reasons actuated the Minister's decision to publish the RAF 1 Form. Nor do we know whether the Minister was moved to do so by the contents of the memorandum. Some significance must attach to the fact that the memorandum was produced as the record of the Minister's decision. The Minister has not favoured us with an affidavit. All that we have in order to decide the challenge is the publication of the RAF 1 Form, its contents, the memorandum that served before the Minister, and what we know of the events leading up to the Minister's decision – more especially, the *Mautla* case, and its consequences.

34. The exercise of a power simply to resolve a difference of opinion as to who enjoys that power cannot, of itself, provide a rational basis for taking an administrative action. The decisionmaker, here the Minister, must have regard to the contents of the RAF 1 Form, to determine whether the adoption and publication of the RAF 1 Form is, as s 26(1) requires, necessary or expedient to achieve or promote the object of the RAF Act. We have no evidence that the Minister did so, nor is there any basis for us to be satisfied that the Minister published the RAF1 Form in compliance with s 26(1). This suffices to render the decision of the Minister unlawful in that it fails to meet the most basic requirement of rationality and legality: that the RAF 1 Form serves to achieve or promote the objects of the RAF Act. It is not the function of the courts to speculate as to what may have actuated the Minister's decision. What we have before us is a memorandum that simply moves the Minister to adopt the RAF 1 Form so as to resolve a dispute as to who enjoys the power to do so, in the face of litigation. That alone cannot suffice to defend the Minister's decision from challenge on the grounds of rationality and legality. To exercise a power simply to show that the power reposes with the Minister, and without regard to the substance of the proposed administrative action, is not rational because it is performative but not based on reason. On this basis, the decision of the Minister to publish the RAF 1 Form falls to be reviewed and set aside.

35. That the Minister would need to give careful consideration to the contents of the RAF1 Form in order to decide whether to adopt and publish it is apparent from the provisions of

the RAF Act, interpreted in the light of the Constitution. The object of the RAF Act is the payment of compensation, in accordance with the RAF Act, for loss or damage wrongfully caused by the driving of motor vehicles.[8] The RAF Act sets out the regime of liability of the RAF to pay such compensation, in substitution of the liability that would otherwise attach to negligent drivers at common law.

36. The provisions of the RAF Act require the production of information and documentation from claimants. [9] Of importance are the provisions of ss 24 and 26. Section 24(1) provides that a claim for compensation and the accompanying medical report under s 17(1) 'shall be set out in the prescribed form, which shall be completed in all its particulars'. Section 24(4)(a) specifies the drastic consequence for the failure to complete the prescribed form: it shall not be acceptable as a claim under the RAF Act. Accordingly, when the power to prescribe the form for the making of a claim is exercised in terms of s 26, particular attention must be paid to the contents of what the form contains. And, in particular, what information and documentation are required, what information and documentation would be useful, but are not required, and what is to happen if the information and documentation that is required is not reasonably available. For the drastic consequence specified in s 24(4)(a) is predicated upon what it means to have completed the prescribed form. And the form may be framed so as to allow for 'completion' in different senses so as to achieve or promote the objects of the RAF Act. Completion may be an absolute requirement in respect of some information, a requirement of reasonable efforts in respect of other information, or completion may simply be a matter of substantial compliance. These are all matters that require careful consideration by the Minister in deciding what the RAF 1 Form should contain. Yet there is no evidence before us that the Minister gave any such consideration to the adoption of the RAF 1 Form.

37. This want of consideration is compounded by three further matters. First, the Minister is required by s7(2) of the Constitution to respect, protect and promote the rights in the Bill of Rights. As the *Amicus* reminded us, many persons in our country are poor, too many have compromised literacy, and many have limited access to legal services. The lodging of a claim is an essential step in seeking compensation under the RAF Act. The RAF 1 Form

---

[8] Section 3

[9] Sections 17, 19,22,24, and 26

must not become an instrument that obstructs valid claims, and by so doing visits unfair discrimination upon poor people contrary to s 9(3) of the Constitution. Nor may the RAF 1 Form infringe the rights of persons to dignity (s10) , security of the person (s12), or access to the courts (s34). We do not pronounce upon whether the RAF 1 Form, as it stands, infringes any of these rights. It would be unwise for us to do so in the absence of reasoning from the Minister. But we do affirm that the Minister would need to bring the constitutional rights of persons who would lodge a claim into the reckoning in deciding upon the contents of an RAF 1 Form. There is no evidence that the Minister did so, and hence the Minister is in default of her obligation to observe s 7(2) of the Constitution. This too renders the publication of the RAF 1 Form unlawful.

38. Second, in *Busuku*[10], the Supreme Court of Appeal, interpreting s 24 of the RAF Act, affirmed the proposition, of some considerable pedigree, that what counts is the sufficiency of the information that is provided upon the completion of the claim form, so as to permit of the investigation of the claim. We do not read *Busuku* to mean that a principle of sufficiency is necessarily of application to all documents and information that might reasonably be sought in the RAF 1 Form. But the principle is clearly of importance in deciding upon the contents of the RAF 1 Form, and its construction, so as to achieve or promote the objects of the RAF Act in terms of s26(1). Here too there is no evidence that the Minister had any regard to this principle, and hence the Minister failed to have regard to relevant considerations in deciding to adopt and publish the RAF 1 Form.

39. Finally, we have held that the decision of the Minister constitutes administrative action. It is plainly administrative action that affects the public. Section 4(1) of PAJA required the Minister, before adopting the RAF 1 Form, to hold a public enquiry, follow a notice and comment procedure, or follow another fair or appropriate procedure. The Minister did not do so. That the RAF sought to follow such a procedure in respect of its own efforts to adopt an RAF 1 form did not discharge the Minister's s4(1) obligations. The Minister's power is distinct, and required adherence to s 4(1) of PAJA. Consequently, the adoption and publication of the RAF 1 Form by the Minister was unlawful.

---

[10] *RAF v Busuku* 2023(4) SA 507 (SCA) at 515

40. The remaining applicants also framed their challenges to the RAF 1 Form by recourse to further grounds of review. It is unnecessary to traverse them all. For the most part their gravamen is a variation of the same complaint. It suffices that for the reasons we have set out, the RAF 1 Form is unlawful. What remedy should result is considered below.

41. We turn next to the challenge that is made to the Board Notice. It will be recalled that the Board Notice was published by the RAF in terms of s 4(1)(a) of the RAF Act. The Board Notice includes a schedule which sets out the documents the RAF requires for the lodgment of a claim. The Board Notice is also formulated on the basis that it is an amendment of the RAF 1 claim form 'as provided for in Regulation 7(1) of the RAF Regulations, 2008'.

42. Section 4(1)(a) provides that the powers and functions of the RAF include 'the stipulation of the terms and conditions upon which claims for the compensation contemplated in section 3 shall be *administered'.(* our emphasis) Can the RAF's power to administer claims in terms of s 4(1)(a) overlap with the power given to the Minister to prescribe the particulars of the form that must be completed to make a claim under the RAF Act, as detailed in s24 read with s26 of the RAF Act? This cannot be so. The RAF Act affects a division of powers. Section 1 defines 'prescribe' to mean 'by regulations under section 26'. Section 24(1) provides that a claim for compensation and the accompanying medical report under s 17(1) shall 'be set out in the prescribed form, which shall be completed in all its particulars'. Section 26(1) confers the power on the Minister to make regulations 'regarding any matter that shall or may be prescribed in terms of this Act'. One such matter is the prescribed form to make a claim. Section 11(1)(a)(v) provides that the Board of the RAF may make recommendations to the Minister in respect of any regulation to be made under the RAF Act.

43. It is for the Minister then to make the regulation that prescribes what form must be completed (and its contents) to make a claim for compensation. The Board of the RAF may make recommendations to the Minister, but the Minister decides. Whatever power the RAF enjoys to administer claims in terms of s4(1)(a), it cannot trespass upon the Minister's power in terms of s24(1) read with s 26(1). To hold otherwise would contemplate a situation in which the Minister and the RAF could specify for different and contradictory requirements for persons to make a claim. The legislature could never have contemplated such a conferral of powers. What the Board Notice schedule requires is that listed

documents must 'be included and form part of the claim's supporting documents when *lodging a claim with the fund'* (our emphasis) But that is the terrain of s 24 which regulates the procedure for making a claim, referenced as the lodging of a claim (see in particular s23 (3)).

44. Whatever the scope of the power to administer a claim, it does not extend to the making of regulations to prescribe what the form must contain to lodge a claim. Yet that is what the Board Notice does. It is an unlawful encroachment upon the powers of the Minister conferred by s24 of the RAF Act. Hence, the Board Notice is unlawful.

45. What then of the reliance of the RAF upon Regulation 7(1)? It will be recalled that Regulation 7(1) provides as follows: 'A claim for compensation and accompanying medical report referred to in section 24(1)(a) of the Act, shall be in the form RAF 1 attached as Annexure A to these Regulations, or such amendment or substitution thereof as the Fund may from time to time give notice of in the Gazette'. The legality of this delegation is challenged before us. But, absent this delegation being held to be unlawful and set aside, does this not provide the basis for the publication by the RAF of the Board Notice?

46. That cannot be so for two reasons. First, the Board Notice cannot simultaneously be an exercise of power under s4(1)(a) and a delegated competence in terms of s24(1)(a). As we have observed they are different powers, with different areas of application. The Board Notice is thus at odds with itself as to the basis upon which it has been adopted and published by the RAF. Second, the Board Notice was followed by the decision of the Minister to prescribe the RAF 1 Form. That was done following the memorandum. While we do not know the reasons that supported the Minister's administrative action, the memorandum was put up by the Minister as the record of her decision. The record therefore indicates that the RAF 1 Form was promulgated, at least in part, to lay to rest the difference between the RAF and the Department as to who should exercise the power to adopt and publish the Raf 1 claim form. The decision was that the Minister should do so, and that was done. If then, as we have found, the RAF 1 Form is unlawful, the Board Notice cannot survive because it does not amend the RAF 1 claim form. That is what the RAF 1 Form did, even though we have found it to be an unlawful exercise of power.

47. It follows that we do not need to decide whether the delegation in terms of Regulation 7(1) was unlawful. If it was lawful, it is an added reason why the Minister was divested of the power to adopt and publish the RAF 1 Form. If it was unlawful, it is an added reason as to why the RAF could not adopt the Board Notice in reliance upon a delegated competence in terms of Regulation 7(1). Since we have found that these decisions are unlawful for other reasons, we do not need to determine the legality of the delegation.

48. We conclude that both the RAF 1 Form and the Board Notice are unlawful. And we turn to consider the question of relief.

Relief

49. Ordinarily, our finding that the RAF 1 Form and the Board Notice are unlawful would simply require that we review these decisions, set them aside, and remit them for reconsideration. Our task is more complicated. And for two principal reasons. First, there must be a regulatory regime in place so that persons who would lodge a claim know what is required to do so. There must also be certainty as to the lodgment of a claim, given its legal consequences. And the RAF must also be placed in a position where it can commence its investigative duties. A lacuna would serve no one. Second, there are persons who have successfully lodged claims in terms of the regime created by the Board Notice and the RAF 1 Form. There are also persons who have sought to do so and have failed to secure lodgment. Their position must also be considered. While, therefore, we are bound to declare unlawful the RAF 1 Form and the Board Notice, we must put in place orders that are just and equitable to avoid a regulatory lacuna, until such time as the Minister has lawfully exercised the power to prescribe the form by which a claim is made and lodgment is secured.

50. There were a number of remedial permutations debated before us. We have given careful consideration to these submissions, as also to the orders made in *Mautla.* The following appears salient. First, as indicated, we are obliged to declare the Board Notice and the RAF 1 Form unlawful. Second, there is no reason why we should not review and set aside the Board Notice. It has been used as the basis upon which the RAF decides whether a claim may be lodged. The Board Notice falls outside the RAF's remit and may thus be set aside.

51. Third, the RAF 1 Form raises more difficult issues. It would be problematic to leave a regulatory lacuna, pending the Minister's lawful exercise of powers to put in place a revised RAF 1 claim form. Nothing we have decided dictates what information or documents the Minister might reflect in a revised RAF 1 claim form, nor the regime that is to be applied to the information and documents so that a claim may be lodged. We have simply indicated the kinds of considerations relevant to the lawful exercise of the Minister's power. It is manifestly in the public interest that the Minister must engage upon this matter with some urgency and undertake what is required to effect procedurally fair administrative action. That should be done in a period of 6 months.

52. But what regime should apply in the interim. One answer, pressed in argument before us, was to leave in place the RAF 1 Form, but subject compliance to the principle of substantial compliance. There is some merit in doing so, as it interferes as little as possible with the content of the RAF 1 Form. It does however risk that, given the extent of what is required in the RAF 1 Form, many disputes will arise with the RAF as to what constitutes substantial compliance. On balance, we think it preferable to revert to the RAF 1 claim form that came into operation on 1 August 2008 and formed part of the Regulations published by the Minister 2008 ('the 2008 RAF 1 Form). That was a simpler form; it included the principle of substantial compliance, and, on the evidence before us, worked without undue difficulty for many years. The RAF has more recently encountered many difficulties, and a reversion to the 2008 RAF 1 Form will not assist it to pursue a policy of 'front-loading' the process by which claims are made. But the history of this case, and its precursor in *Mautla,* shows that careful thought is now required as to how lawfully to fashion a regulatory regime that recognizes the capacity of many claimants, who are poor, to make claims, and the needs of the RAF to run an efficient process that promotes the objects of the RAF Act.

53. Fourth, there is the question as to how to regulate the position of persons who have sought to lodge claims under the regime of the Board Notice and the RAF 1 NOTICE. Some have been successful in securing lodgment, others have not. There is no reason to interfere with those claims that have been successfully lodged. They have done so under the rigours of the Board Notice and the RAF 1 NOTICE. Some of the claims that were unsuccessfully lodged may have failed to secure lodgment by reason of the requirements of the Board Notice or the RAF 1 NOTICE. We have not decided whether all of these requirements are lawful. For example, we have not determined whether foreigners must show they are

lawfully in South Africa or whether guardians claiming on behalf of minor children must produce unabridged birth certificates. The reversion to the 2008 RAF 1 Form avoids the need to do so. However, those who have failed to secure lodgment of their claims under the regime of the Board Notice and the RAF 1 Form should be given an opportunity to resubmit their claims under the 2008 RAF 1 Form to secure lodgment and enjoy the benefits thereof should they then be successful.

54. Fifth, the applicants have prevailed, in a matter of some complexity, and are entitled to their costs, including the costs of two counsel, where so employed, as against the RAF, which opposed the relief sought against it. The Minister did not oppose the reviews. Costs should thus be awarded on an unopposed basis as against the Minister. Those applications, brought out of time to review the Board Notice and the RAF 1 Form, and which failed to seek condonation, must be dismissed. We do not order costs in these unsuccessful applications, as they sought to engage legal issues of public interest.

55. In the result, we make the following order:

(i) The applications of the second, third, and tenth applicants are dismissed;

(ii) Condonation is granted to the first, fourth, fifth, sixth, seventh, eighth, and ninth applicants for the late institution of their review applications;

(iii) Board Notice 271 of 2022 published in Government Gazette No 46322 of 6 May 2022 ('the Board Notice') is declared unlawful and is reviewed and set aside;

(iv) Form RAF 1, prescribed by the Minister of Transport ('the Minister') in terms of s 26 of the Road Accident Fund Act 56 of 1996 ('the RAF Act'), and published in Board Notice 302 of 2022 in Government Gazette No 46653 of 4 July 2022 ('the RAF 1 Form') is declared unlawful and is reviewed and set aside;

(v) It is declared that Claimants whose claims were accepted by the Second Respondent ('the RAF') to have been lodged in compliance with the Board Notice and/ or the RAF 1 Form are deemed to have been lodged in terms of the RAF Act, and the RAF will continue to investigate and process these claims as lodged claims;

(vi) From 6 May 2022, the prescribed form contemplated in s24 (1)(a) of the RAF Act shall be deemed to be the RAF 1 third party claim form ('the 2008 RAF 1

Form), forming part of the Regulations published by the Minister on 7 July 2008 in Government Gazette No 31249, until such time as the Minister prescribes an amendment to the 2008 RAF 1 Form in terms of s 26 of the RAF Act;

(vii) Claimants who sought the lodgment of their claims in terms of the Board Notice or the RAF 1 Form, but lodgment was declined by the RAF or was not acknowledged by the RAF , are afforded a period until 30 September 2024 to resubmit their claims to the RAF in terms of the 2008 RAF 1 Form and those claimants who thereby secure lodgment will enjoy the benefits of such lodgment as from the date on which lodgment was originally sought by them;

(viii) The RAF will take all reasonable measures to inform Claimants referenced in (v) and (vii) above of the contents of this order, which measures shall include the publication of this order in at least three newspapers circulated nationally, and, in addition, the RAF will take reasonable measures to inform the public of this order;

(ix) The Minister is ordered to adopt and publish a revised RAF 1 Form within 6 months hereof;

(x) The RAF is ordered to pay the costs, including the costs of two counsel, where so employed, of the first, fourth, fifth, sixth, seventh, eighth and ninth applicants in respect of the relief sought against the RAF;

(xi) The Minister is ordered to pay the costs, on an unopposed basis, of the first, fouth, fifth, sixth, seventh, eighth and ninth applicants in respect of the relief sought against the Minister.

MOLOPA-SETHOSA J
JUDGE OF THE HIGH COURT

UNTERHALTER J
JUDGE OF THE HIGH COURT



MOTHA J

JUDGE OF THE HIGH COURT

Heard on:	26 & 27 February 2024
Judgment:	20 March 2024

Appearances

For the 1st Applicant:	Adv JP van den Berg SC
	Adv E van As
	Adv V Mabuza
Instructed by:	Adams & Adams Attorneys
For the 2nd Applicant/1st intervening Party	Adv B Geach SC
	Adv R Hawman
Instructed by:	Roets & van Rensburg Inc
For the 3rd Applicant/2nd intervening Party	Adv B Geach SC
	Adv R Hawman
Instructed by:	Mduzulwana Attorneys

For the 4th to 7th Applicant/3rd to 6th	
Intervening party	Adv B Geach SC
	Adv G Lubbe
	Adv JRF Ernst
	Adv ACJ Van Dyk
	Adv FDW Keet
	Adv CAF Jordaan
Instructed by:	Van Dyk Steenkamp Attorneys Inc
For the 8th Applicant/7th Intervening	
Party	Adv N Ferreira
	Adv D Sive
Instructed by:	A Wolmarans Inc
For the 9th Applicant/8th Intervening	
Party	Adv CAF Jordaan
	Adv ACJ van Dyk
Instructed by:	Loubser Van Wyk Inc
For the 10th Applicant/9th Intervening	
Party	Adv S Vobi
	Adv M Matikinca

	Adv A Nase
Instructed by:	Abongile Dumile Attorneys Inc
Amicus Curiae:	Adv S J Myburgh
	Adv ACJ van Dyk
Instructed by:	DWM Attorneys
For the 1st, 3rd & 4th Respondents:	Adv J Motepe SC
	Adv N Mahlangu
	Adv T N Makola
Instructed by:	Van Dyk Steenkamp Attorneys Inc