

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG, PRETORIA

JUDGMENT

Case No: 17518/2020
15876/2020
18239/2020

Reportable

In the matter between:

Case no. 17518/2020

FOURIEFISMER INC. and TWO OTHERS **APPLICANTS**

And

ROAD ACCIDENT FUND **1st RESPONDENT**

THE CHAIRMAN OF THE BOARD OF THE RAF **2nd RESPONDNET**

THE CHIEF EXECUTIVE OFFICER OF THE RAF **3rd RESPONDENT**

THE MINISTER OF TRANSPORT **4th RESPONDENT**

Case no. 15876/2020

MABUNDA INC. and FORTY-TWO OTHERS **APPLICANTS**

And

ROAD ACCIDENT FUND **RESPONDENT**

Case no. 18239/2020

DIALE MOGASHOA INC. **APPLICANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *FourieFismer Inc. and Two Others v Road Accident Fund* (17518/2020) [2020] ZAGP (1 June 2020)

Coram: Hughes J

Heard: 5 to 7 May 2020

Delivered: 1 June 2020

Summary: Administrative Law – Review – validity of the extension of an SLA - what constitutes administrative action – Section 217 of the Constitution – duties of the RAF Board – Regulation 13(1)(a) and (b) of the PPPFA – rationality of a decision – just and equitable relief.

ORDER

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1. The forms, service and time period prescribed by the Uniform Rules of Court are dispensed with and the applications are heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. The Intervening Party is joined as the Fourth Applicant in the *FourieFismer* review application.

3. The panel attorneys on the RAF's panel as at the date of the launch of the *FourieFismer* review application shall continue to serve on the RAF panel of attorneys.

4. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.

5. This order shall operate for a period of six (6) months from the date of this order.

6. The Respondents are ordered to pay the costs of the review applications on a party and party scale, jointly and severally.

7. Such costs are to include the costs of two counsel for each legal team where so employed.

JUDGMENT

Hughes J

Introduction

[1] Attorneys contracted to the Road Accident Fund (the RAF), commonly known as panel attorneys initiated the three review applications which serve before this court for determination. The panel attorneys are selected as such after the adjudication of a tender procurement process in terms of section 217 of the Constitution of the Republic of South Africa 1996, which must be fair, equitable, transparent, competitive and cost-effective. Those suitably qualified panel attorneys selected, form a panel contracted to the RAF for a period of five-years. The RAF from time to time would select an attorney from the panel to provide specialist litigation services in the various courts. The role of the panel attorneys is therefore to assist the RAF duly perform its statutory mandate to ensure payment of compensation for loss or damage wrongfully caused by the driving of a motor vehicle[1].

[1] Section 3 of the Road Accident Fund Act 56 of 1996

[2] No jurist, in my view, expresses the pivotal role that this juristic entity, the RAF, plays in our society, better than Moseneke DCJ in *Law Society of South Africa and Others v Minister for Transport and Another*:

'… The right to recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the State. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants.'[2] [My emphasis]

[3] Before embarking on an analysis of the robust arguments advanced by the litigants, I pause to reflect on this social responsibility of the State, which lies at the RAF's feet. This responsibility, in my view, cannot be fulfilled without taking cognisance of section 12(1)(c)[3] read with section 7(2)[4] and section 38[5] of the Constitution. It is thus clear that the RAF as a social security scheme, stands instead of the State to protect the freedom and security of persons and 'is obliged to afford an appropriate remedy to victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence'.[6]

The Proceedings

[4] For easy reference, the three review applications will henceforth be referred to as the *FourieFismer* review, *Mabunda* review and *Diale* review. These review proceedings were intercepted by various interlocutory applications. The latter, in my

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[2] *Law Society of South Africa and Others v Minister for Transport and Another* 2011(1) SA 400 (CC) at para 17.

[3] Section 12(1)(c)-
(1) Everyone has the right to freedom and security of the person, which includes the right-
(c) to be free from all forms of violence from either public or private source;

[4] Section 7(2) - The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

[5] Section 38 – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are - (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

[6] Ibid para 57.

view, are merely technical distractions raised by the various parties, which if granted a greater audience, will side track the main issues to be determined in these reviews.

[5] However, there is the matter of the interlocutory application of Maponya Incorporated to intervene in the *FourieFismer* review. This interlocutory application is worthy of attention. Initially, *Maponya* was a party to the *Mabunda* review, but subsequently withdrew, with the RAF accepting such withdrawal. At this juncture the *Maponya* intervention application is not opposed and is premised on the relief sought by *FourieFismer*, that the status *quo* of the panel of attorneys remains until a new panel is appointed or alternatively, if the review is not successful, *Maponya* seeks assurance from the RAF that their calculated fees and disbursements be paid by the RAF contrary to clause 14 of the Service Level Agreement (SLA) between the parties.

[6] In terms of rule 12 of the Uniform Rules of Court an applicant seeking leave to intervene must be a person 'entitled to join as a plaintiff or a defendant'. The joinder would be competent either on the basis of convenience or on the basis that the party whose joinder is in question has a direct and substantial interest in the subject-matter of the proceedings.[7] In these proceedings as *Maponya* is one of the affected panel attorneys contracted to the RAF who thus has a right to assert its claim against the RAF, this is sufficient to conclude that it has a direct and substantial interest in the subject matter of the proceedings in the *FourieFismer* review[8]. *Maponya* could have on their own accord asserted their claim against the RAF, however for the sake of convenience and as none of the litigant's will be prejudiced, *Maponya* is granted leave to intervene.

[7] Back to the reviews, notably these were not consolidated, instead the parties reached an agreement that they would be heard simultaneously. On 23 April 2020 Tolmay J ordered that all three review applications be heard all together. Incidentally, none of the parties have requested a formal consolidation in terms of Rule 11 of the Uniform Rules. Turning to the issue of urgency and dispensing with the rules in terms

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[7] Herbstein & Van Winsen – *The Civil Practice of the High Courts of South Africa 5 ed (2009) vol 1* at 225-226.
[8] *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Another* 2009 (1) SA 317 (SCA) at para 19.

of rule 6(12), it is imperative to highlight that all the litigants in these proceedings conceded that these proceedings were urgent, primarily so, their contracts with the RAF comes to an end on 31 May 2020. These proceedings warrant an endorsement as being urgent.

[8] In closings this topic I must mention that Davis J in dealing with Part A of the *Mabunda* application granted leave to the Law Society of South Africa(LSSA) and the Black Lawyers Association(BLA) to enter the fray as *amici curiae.*

The Relief

[9] Collectively the panel attorneys seek the following relief:

(a) That the decision of 18 and 20 February 2020 calling upon the panel attorneys to handover their files, which are not finalised, be reviewed and set aside as constitutionally invalid;

(b) That the cancellation of tender RAF/2018/00054 on 26 and 28 February 2020 be reviewed and set aside and declared unconstitutional and invalid;

(c) That the decision of the RAF to dispenses with the services of the panel attorneys from 1 June 2020 be reviewed and set aside as constitutionally invalid;

(d) That the panel attorneys continue to service the RAF until 30 June 2020 or until the RAF has appointed a panel of attorneys in terms of the tender RAF/2018/00054 or until appointments are made arising from a fresh tender process.

[10] In the *Mabunda* review the litigants additionally seek the withdrawal of the handover notices and the withdrawal of the cancellation of tender notices. Whilst, in the *Diale* review the additional relief sought is that the RAF adjudicate tender RAF/2018/00054. The outcome of which be published within 60 calendar days from this order. *Diale* further seeks that the second addendum to the SLA of 21 November 2019 be reviewed and set aside. On the other hand, *Maponya* as the intervening party to the *FourieFismer* review, seeks not to review the handover notices, but rather requests an undertaking from the RAF, if the reviews fail, to be paid their calculated fees and disbursements contrary to clause 14 of the SLA.

Background Facts

[11] The current 103 panel of attorneys contracted with the RAF pursuant to a procurement tender of 2014, to provide the RAF with specialist litigation service for a period of five years. The SLA duly concluded between the panel attorneys and the RAF, would lapse with the effluxion of time on 29 November 2019. Hence, on 30 November 2018 tender RAF/2018/00054 was published with the closing date recorded as 28 February 2019. Whilst, still busy with the adjudicating of tender RAF/2018/00054, two addendums were made to the SLA. This resulted in an extension in the contract period between the panel attorneys and the RAF, which would culminate on 31 May 2020.

[12] During the course of 2019, Mr Collins Letsoalo, the Deputy Director General: Finance of the Department of Transport was seconded by the Minister of Transport to the RAF. He was duly appointed as Acting Chief Executive Officer (ACEO) in September of that year. At that stage the functioning of the RAF was in the hands of an interim Board duly appointed on 1 July 2018. This changed, as on 5 December 2019 the Minister of Transport appointed and inducted a permanent Board. According to the induction message of the Minister of Transport, he pressed upon the Board to 'bring stability at leadership level and enable management, with your guidance to turn the tide'. Further, that serious attention of the Board would be required to build internal capacity of the RAF which 'may involve in-sourcing legal work and directly employ[ing] attorneys to process the case load'. This he believed would save the RAF R 2,9 billion per annum.[9]

[13] According to the RAF the issue of in-sourcing versus outsourcing of legal specialist services was an issue that the interim Board as far back as 22 October 2019 had resolved that the RAF was to investigate. The ACEO states in his affidavit that 'this was the genesis of the decision to dispense with the use of panel attorneys'.[10] In addition to the above, on 22 October 2019 management sought approval from the interim Board to extend the SLA of the panel attorneys for a further six months as the

[9] Extracted from Speaking Notes of the Minister of Transport on announcement of the Board on 5 December 2019.
[10] Para 30 of Acting CFO, Collis Letsoalo's affidavit at pare 29 pg. 004-81.

conclusion date of November 2019 was looming. A meeting was convened with the management of the RAF and after submissions were made by management, the interim Board extended the panel attorney's SLA for a further six months ending on 31 May 2020.

[14] In line with the mandate to insource, management conducted a presentation to the Board on 12 December 2019 of their development Strategic Plan 2020/2025 and their Annual Performance Plan 2020/ 2021. It was resolved at the latter meeting that a two-day strategic workshop be held in January 2020. Moving along, on 17 and 18 January 2020 the Board held the two-day strategic workshop. This resulted in the signing of the Boards Performance Agreement on 22 January 2020. In addition, at the strategic session, the following major issues of concern were highlighted:

reduction of fees;
revision of the structures and business processes;
integrated claims assessment system; and
rehabilitation network and revision of supply chain management structures.

Incidentally, these were prioritised by the Minister of Transport in his induction speak to the Board on 5 December 2019.

[15] On 28 January 2020 the Board held its first quarterly meeting for the year. The Board resolved at this meeting that a working group be formed, duly selected from its members. This working group would meet with management on 30 January 2020 to finalise the draft Strategic Plan 2020-2025 and Annual Performance Plan 2020/2021, prior to its approval by round robin resolution. According to the ACEO that meeting did take place on 30 January 2020, however no minutes are available for that meeting or could be produced. Be that as it may, the ACEO states that, at that meeting management presented a detailed business strategy where the reduction of legal costs was interrogated by the Board members of the working group.

[16] On 31 January 2020 the Strategic Plan was approved by the Board apparently by round robin resolution as per the resolution of 27 February 2020, which resolution

was certified as such on 9 March 2020. In essence, the round robin resolution taken to approve the Strategic Plan 2020/2025 and the Annual Performance Plan 2020/ 2021 was only certified as such on 9 March 2020.

[17] The next meeting of the Board took place on 27 February 2020. At that meeting, the ACEO states that he had '… indicated that the Fund was incurring unnecessary legal costs within its claims litigation'. It was also in this meeting that the Board noted the minutes of the meeting held by the interim Board on 22 October 2019 when management was directed to investigate insourcing of legal services. Critically, according to the ACEO's recollection as set out at para 71.8 of his answering affidavit, he states 'that it was agreed in the meeting of 22 October 2019 that the contracts with the panel of attorneys will be extended while consideration was being given to the best interest of the Fund and reduction of legal fees.'

[18] According to the resolution taken by the Board at the meeting of 27 February 2020, certified as such on 11 March 2020, management was tasked to prepare a detailed handover plan, which could be substantiated and implemented. I must point out that the Board actually resolved that the handing over of files from panel attorneys would be as per the extract:

'1. The Board would write a letter to the Law Society of South Africa and request a meeting.
2. Management was requested to prepare a detailed handover plan which could be substantiated and implemented.
3. The Board delegated the oversight of the implementation of the detailed plan to the OPSIT Committee. The Chairperson of the OPSIT Committee would serve as liaison with management.
4. Reporting should take place on a weekly basis.
5. Should there be failure in terms of the implementation of this particular plan there will be consequences movement.' [11]

[19] According to the ACEO it was at this meeting on 27 February 2020 that 'the Board supported or ratified the decision by the (BAC) [Bid Adjudication Committee] to cancel the tender.'[12] In the record bundle at page 003-98 it is noted that the Board by

[11] Resolution of the Board of meeting on 27 February 2020 certified on 11 March 2020.
[12] Ibid para 30.

round robin resolution on 27 February 2020 resolved to approve the Strategic Plan 2020-2025 and the Annual Performance Plan 2020/2021. This resolution was certified on 9 March 2020.

[20] The last of such resolutions was as a result of a virtual Microsoft teams meeting of the Board on 29 April 2020. Here the Board resolved that the Chairperson of the Board would depose to an answering affidavit in the *FourieFismer* review, on behalf of the Board. Further, that the Board supported the new operating model and that 'The Board supported management in the execution of the provisions of the service level agreement, as amended, entered into between the Road Accident Fund("RAF") and the RAF's Panel of Attorneys (Operations)'.[13] This resolution was certified by the Vice-Chairperson on 30 April 2010 a day after the virtual meeting was held. Of interest is the fact that the ACEO in his answering affidavit contends that by the 14th April 2020 not all of the Board members were forwarded the handover plan as directed by the Board. This is so as the OPSIT Chairperson, Mr Moses Nyama who was tasked to serve as liaison with management, sent the plan that he received from the Chief Operations Officer (COO) to the Chairperson of the Board on 26 March 2020. However, after he had requested that the Chairperson disseminated the handover plan to other members of the Board on 30 March 2020, he was made aware that by the 14th April 2020 other members of the Board had still not received the handover plan.

The notifications for return of the RAF's files

[21] On 18 February 2020 the panel attorneys received correspondence from the COO, Ms Lindelwa Xingwana-Jabavu, which had the heading: 'Notification of handover pursuant to clause 14 of the service level agreement with RAF panel attorneys'. This notification set out the handover schedule to be adopted by the panel attorneys and the condition thereto. However, on 20 February 2020 the initial notification was retracted and replaced. What differed in the latter notification is that the schedule for the handover process differed and there were additional conditions in respect to handing over the files.

[13] Extract from resolution of Board meeting on 29 April 2020.

[22] It is worthy to note for further discussion below that the second notification contained the following paragraph:

'Further be advised that you are to fully comply with the provisions of clause 14.4.7 of the SLA by ensuring that the following is contained in the file:

- Opinion on merits
- Opinion on quantum
- Areas of dispute
- Stage of pleadings
- Current status
- Recommendations'

The notifications to cancel tender RAF/2018/00054

[23] On 21 February 2020 the COO requested the Acting General Manager - Supply Chain Management, Mr John Modisa, to facilitate the cancellation of the tender for panel attorneys RAF/2018/00054, as it was unaffordable and there were changed business circumstances in the RAF, which tender was advertised in November 2018. The services of the panel attorneys in respect of the 2014 tender would expire on 29 November 2019, but as an extension of a further six months was granted the services of the panel attorneys would come to an end on 31 May 2020. The rationale behind the cancellation was that the RAF had decided to adopt a new litigation model where litigation would be facilitated in-house and as such there would be no need for legal representation by the panel attorneys. Hence, the tender was no longer required.

[24] Following on the above, Ms Thuthuka Kweyama, one of the Supply Chain Management Practitioners, issued by an internal memorandum on 25 February 2020. In this internal memorandum she sought approval from the Bid Adjudication Committee (BAC) to cancel the 2018 tender RAF/2018/00054 for the procurement of specialised legal services. She informed the BAC that the cancellation was necessary as the services were unaffordable and there were now changed circumstances within the RAF.

[25] It was noted on the memorandum that the bids in respect of the tender sought to be cancelled had an extended validity period which would only end on 14 June 2020. On the same day, 25 February 2020, the memorandum was distributed, discussions were held and the BAC recommended the approval of the cancellation for the reasons advanced above. It was also recorded that these reasons were in line with regulation 13 of the Preferential Procurement Regulations of 2017[14]. The resolution having been passed on 25 February 2020 where the BAC approved the cancellation of tender RAF/2018/00054 'due to unaffordability of services as advertised in the tender, as well as changed circumstances'.

[26] Consequently, on 26 February 2020 the Chief Financial Officer (CFO) issued a letter to all bidders notifying them of the cancellation of tender RAF/2018/00054. However, no reasons were advanced for the cancellation. Hence, on 28 February 2020 a follow up notification was issued to all bidders. The notification of 26 February 2020 was withdrawn and this time the CFO advised the bidders the reasons for the cancellation. I find it prudent to set out the two reasons advanced:

'(a) The RAF's dire 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 requires 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.'

Discussion

[27] I propose to commence this discussion from whence the wheels started turning in order to bring the cancellation of the tender with the panel attorneys into the fray. This in my view would have been the extension of the SLA which was due to come to a head on 29 November 2019.

Is the second addendum of the SLA invalid and unlawful?

[14] Regulation 13 of the Preferential Procurement Regulations of 2017 reads as follows:

(1) An organ of state may, before the award of a tender, cancel a tender invitation if-
   (a) Due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;
   (b) Funds are no longer available to cover the total envisaged expenditure.

[28] It is trite that the panel of attorneys are contracted to the RAF to render specialised legal services. Their relationship is governed by a SLA concluded between them. Incidentally, the SLA between these panel attorneys comes to ahead on 31 May 2020. Prior to this, that specific SLA was due to end on 29 November 2020 through the effluxion of time and it is clause 14 that sets out the handover prescripts. The initial SLA catered for notification 4 months before the SLA come to an end.[15] Fast forward, the RAF by way of a second addendum reduced this notification period to 1 month.

[29] I am mindful that in terms of clause 7.3 of the SLA the RAF has a right to extend the contract with its service provider, the panel attorney, as it deems fit and necessary in the circumstances. Indeed, this is subject to the panel attorney's right to terminate the contract in terms of clause 12 of the SLA. Even so, counsel for *Diale* submits that the RAF does not derive its power to extend the contract from the SLA, but rather from section 217 of the Constitution. They further argue that the extension sought by the RAF was to procure and to extended the specialised legal services of their panel attorneys duly contracted. Thus, the procurement of such services is sought in terms of section 217. In light of the aforesaid they conclude that the second addendum is not valid nor is it lawful.

[30] Following on the last submission the question then is why so? Counsel for *Diale* argues that they were not consulted as regards the period of the extension. Further, that the period was not mutually agreed upon and was merely imposed by the RAF on the panel attorneys. This in essence led to the panel attorneys being coerced to agree to the second addendum imposed. To bolster their submissions, they refer to the letter that the RAF sent to them about the second addendum requesting their signature. The invalidity and unlawfulness is also exacerbated by the fact that the period set out for the handover in the second addendum is not in line with the purpose envisaged in the initial clause 14, as a period of 1 month and that of 4 months initially envisaged, does not cater for that which ought to be attended to prior to an orderly handover of the files.

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[15] Clause 14 Handover Process (by effluxion of time)
14.1 Four (4) months before the expiry of this Service Level Agreement by effluxion of time the Fund 's Contract Manager shall deliver to the Firm in writing, a Notice of Handover advising the Firm to start to prepare all unfinalised files in its possession for the hand over process.

[31] Added to the aforesaid is the submission made by *Diale* in his founding affidavit para 4.9, which was pointed out was not denied by the RAF. This is that the reason behind the extension via the second addendum till 31 May 2020, was to enable the RAF to complete the adjudication process of the said tender. This is substantiated, in my view, by the fact that the first addendum extended the validity period of the bid to 17 February 2020, whilst the second addendum extended the validity period of the bid to 14 June 2020. These factors are extracted from the memorandum of 25 February 2020 between the SCM practitioner and the BAC.

[32] For easy reference the RAF's letter addressing the second addendum to the panel attorneys relied upon by *Diale* is set out below:

'The RAF has approved an extension of the SLA period up to 31 May 2020. In addition to the extended period, the RAF has proposed to align the SLA with its operational and administrative requirements.

You are required to sign the attached addendum and return it to the RAF by no later than 15:00 on 21 November 2019…

In the event that you do not agree to the provisions of the Second Addendum, you are required to return all original files to the RAF Regional Office closest to you by close of business on 22 November 2019'.[16] [Emphasis by *Diale*]

[33] In addressing the submissions advanced above, I commence by stating the obvious, as long as one's contract at the outset is governed by administrative characteristics, those remain, even if one seeks an extension of that very same contract. One cannot unclothe the contracts characteristics just because one adds an addendum thereto. Hence, the argument of the RAF that it was exercising its contractual rights in a private law relationship is misplaced. The administrative characteristic still remains as it performs its social duty for the State and as such it would be bound to exercise its contractual rights in a procedurally fair and lawful manner. In my view, and in the circumstances of this case, as well as the prescripts of the Constitution, the RAF's contractual rights can never trump the RAF's public social responsibility. Though this case dealt with contractual rights arising from a tender the principle remains the same, as Cameron JA stated:

[16] At para 4.11 of *Diale's* founding Affidavit pg. 001-222.

'[7] … 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 toward 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

[8] …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'.[17]

[34] I would be remiss if I did not restate the default position again, in this instance, it is trite that the panel attorneys are standing instead of the RAF performing a social duty for the State. It was thus expected of the RAF to perform its obligations in a fair and lawful manner.[18] I am persuaded by the argument on behalf of *Diale* that the extension of the procurement of services, as was the initial procurement, had to be in line with section 217 of the Constitution and this could never be compromised.

[35] Was the RAF acting from a position of power, authority or superiority when it dictated the terms for the addendum? A resounding yes. This is evident from the letter of the RAF to the panel attorneys to agree to the addendum. Further, it is also evident from the fact that the panel attorneys had no say whatsoever with regards to the period of time of the extension. Even though it went against the purpose initially envisaged in clause 14. Orderly handover was now more than ever unlikely to be achieve an orderly handover. As I see it the RAF exerted its superiority and abused its public power when it imposed the addendum on the panel attorneys. Counsel for *Diale* is correct in my view when he places emphasis on the last paragraph of the correspondence set out in para 33 above. The RAF from that comment alone was abusing its public position and authority over the panel attorneys by threatening to recall ALL its files if they did not agree to the second addendum which they were not engaged about prior to its existence. This in my view, was unfair to the panel attorneys as they were coerced to

[17] *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para's 7 & 8
[18] *Ibid* 7 -11.

sign the addendum. This addendum which was unilaterally prescribed by the RAF. The RAF was clearly abusing its authority and power, whilst performing its public duty to the State.

[36] Another factor to take into account is that the RAF was not transparent[19] in the addition of the second addendum. The reason they advance for the addendum is that 'the RAF has proposed to align the SLA with its operational and administrative requirements'. Though the panel attorneys did not enquire what this meant, understandably so considering the RAF conduct as regards this addendum, *Diale* presumed that extension was sought to attain time to adjudicate the bids for the tender. The RAF brushes this aside as being irrelevant. They view the circumstances surrounding the second addendum as inadmissible. Further, they contend that, that only contained in the addendum is of relevance. Even if they were found to be right on this point, which in my view the submission is misplace in these circumstances, the conclusion asserted by *Diale* about needing further time to adjudicate the tender is not denied and the extension sort assists in extending the validity of the bid to 14 June 2020. On the probabilities and without a definitive response from the RAF, and not the one it advanced above, it can be accepted that the extension was sought to further adjudicate the tender taking into account that the extension of time also comes with the extension of the validity of the bid. This, by the way, is adduced from the addendum itself.

[37] I am mindful of the fact that the RAF derives its ability to procure services from the panel attorneys in terms of section 217 of the Constitution. The SLA is merely the instrument used to facilitate the services so procured. This is confirmed by clause 3.6 of the SLA: 'This ***Service Level Agreement*** serves to record the ***Service Level Agreement*** between the ***Parties*** and to regulate all aspects of the ***Services*** to be supplied by the ***Firm*** and the general business relationship between the ***Parties***.'

[38] The RAF derives its power to procure services from the panel attorneys from the Constitution. It therefore stands to reason, to me, that an extension sought of the procurement of those services would also be subject to the Constitution. This is so as the initial time frame sought for the procurement of those services are were sought to

[19] Section 217 of the Constitution.

be extended by the second addendum. If the imposition of the second addendum was not transparent and fair, as I have concluded, then the second addendum would have been imposed upon the panel attorneys in contravention of section 217 of the Constitution. This then amounts to the second addendum being invalid and unlawful.

The issuing of the two notifications for the handover.

[39] I propose to deal with this topic as if my finding was wrong as set out above as regards the status of the second addendum, which gave rise to the extended SLA. The reasoning behind this is because, if the second addendum resulting in the extended SLA is invalid and unlawful, it stands to reason that the notifications of 18 and 20 February 2020, arising from the extension would also be invalid and unlawful. *Seale* held:

'[13] Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[6] which adopted the analysis by Christopher Forsyth of why an act which is invalid may nevertheless have valid consequences and concluded:

'Thus the proper enquiry in each case ─ at least at first ─ is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect *for so long as the initial act is not set aside by a competent court*.'[20] [Without footnotes]

[40] The RAF argues that the notices for the handover were issued in accordance with clause 14.1 of the extended SLA. Furthermore, that in issuing out these notices the RAF was exercising a private power and not a public power. Clause 14.1 of the extended SLA reads as follow:

'At least one (1) month before the expiry of this 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 unfinalized files in its possession for the hand over process and logistics thereof. The Notice of Handover will stipulate the handover procedure to be follow. The Fund reserves the right in its sole discretion, to waive the obligation to hand over files to the Fund.'

[20] *Seale v Van Rooyen and Others* 2008 (4) SA 43 (SCA) at para 13.

[41] I have already dealt with the status of the second addendum, which in my view has an effect on the extended SLA being invalid and unlawful and I have dealt with the exercise of private and public power. My views above remain the same.

[42] Before I address the notifications, itself I ought to make mention of how the SLA had an effect on each notice. The SLA initially made provision for notification four months prior to its expiration, whilst the extended SLA makes provision for only one month's notification before its expiration. Notably the initial SLA provided specific time frames within the four-month period to ready the files in an organised manner for handover.

[43] The extended SLA on the other hand deleted those time frames and a provision was instead inserted, that the panel attorneys would be advised of the handover schedule in their notification. This literally meant that within that very month before the SLA came to a head, the process of handover would commence, exactly two days after the initial notice was issued. This is so because the RAF in the notification requests a list of all open files within two days of the notice.

[44] Essentially, the first notification issued, in my view, amounted to no notification or proper notification being afforded to the panel attorney as a result of the extended SLA. It goes without saying that the expectation to perform in terms of this initial notification would be impossible for some attorneys. After clarification, reconsideration and extensions of the schedule are sort by the panel attorneys, the RAF then issued a second notification.

[45] On a contractual level, *Diale* raised the defence of impossibility to perform. This is an important defence as it did indeed affect some of the panel of attorneys hence I deal with it here. I am guided by LAWSA *Vol 5(1)* First Re-issue para 160 which states:
'The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract. [D 45 1 137 5 and see *Frye's (Pty) Ltd v Ries* 1957 3 SA 575 (A)]'

[46] It is worth restating a trite principle, to test whether an impossibility defence has in fact been established. It is imperative that one does so on a case by case basis. Carefully looking at that case individually on its own merits. One would thus look at the 'nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, be applied'.[21]

[47] Taking the aforesaid into account and applying it to this case, I am not persuaded that the defence of impossibility succeeds. Though most panel attorneys have complained that it is impossible to comply with the schedules, others have agreed to comply, of course subject to receiving a guarantee for their fees and disbursements. This is the guarantee sought by *Maponya* as its alternative relief.

[48] Turning to the conduct of the Board as regards the issuing of the two notification of handover to the panel attorneys. During the course of the Board seeking legal assistance it made certain disclosures to its legal representatives. It admitted that it was not informed nor was it consulted by the COO prior to addressing these handover notices to the panel attorneys.[22] How then did the COO have the authority and mandate to issue the handover notifications? As we are well aware it is only the Board, subject to the powers of the Minister, who has the power of authority and control over the RAF's management, financial position and operation.[23] The powers of the Minister referred to are those in section 9(1), where the Minister on recommendation of the Board may enter into agreements with private and public institutions. In addition, in terms of section 10(3), the Minister may remove a member of the Board for sufficient reason. Notably the Minister has no power when making managerial decisions, it is only the Board who may do so. Thus, if the Board was not consulted in a managerial decision such as the issuing of the notices prior to them being issued, the COO did not

[21] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at para 28.
[22] At para 14 page 005-158 of a Memorandum by Adv. LG Nkosi-Thomas SC of 28 February 2020 to the Board.
[23] Section 11 of the RAF Act 56 of 1996.

have the necessary authority nor mandated to issue the notifications to the panel attorneys.

[49] Having become aware of the unauthorised notification to the panel attorneys that were dispatched on 18 and 20 February 2020, the Board consulted with counsel and thereafter held a meeting on 27 February 2020 to discuss amongst others, these notifications. At that meeting the Board records that it accepted the rational for the termination notices served on the panel attorneys. However, management was requested to prepare a detailed handover plan, which could be substantiated and implemented. Ironically, this was after the fact, and as such, it cannot be said that the Board authorised or mandated the COO to issue such notifications. In fact, even after being appraised of the rationale behind the notification the Board still requested a handover plan to be substantiated. The Board states that its request for a detailed handover plan was indicative of it supporting the decision of management. This is after the fact I might add. In my view, this certainly does not denote that the Board had granted its approval that the notification had been sent, even after the fact. Neither could one argue that the Board's authority had been delegated to the COO to issue the notification.

[50] In their answering affidavit and in argument the RAF did not deny the fact that the Board was not informed, but argued instead that when they issued the notifications they were exercising their private contractual powers, in terms of clause 14 of the SLA. This being the case the RAF is spared from any review proceedings. I find it prudent at this stage to restate what constitutes an administrative action, which is susceptible to review. The Constitutional Court held in *Motau*[24] :

'There must be (a) a decision of an administrative nature;(b) by an organ or State or natural juristic person;(c) exercising a public power or performing a public function;(d) in terms of any legislation or an empowering provision;(e) that adversely affects rights;(f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.'

[24] *Minister of Defence and Military Veterans v Motau and Others* 2014(5) SA 69 at para 33.

The Supreme Court of Appeal held in *Grey's*[25] :

'Administrative action means any decision of an administrative nature made…under an empowering provision [and] taken …by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect…'

[51] The RAF as it had dictated the terms of the SLA in this case clause 14, it was clearly acting from a position of power, standing instead of the State. [26] As such the RAF was burdened with its public duty of fairness and transparency in exercising the powers it derived from the contract.[27] In my view, the decision to issue the notices is susceptible to review. As the Board was not aware of the issuing of these notifications, their dissemination to the panel attorneys was unauthorised and as such are not valid.

Are the decisions an administrative act or an executive act?

[52] The RAF contends that the decisions taken are executive decisions and thus not susceptible to review. In this matter the tender was adjudicated, as is indicated by the ACEO in his answering affidavit, where he makes mention of the intricate aspects of the bids. The RAF place reliance on *Nambiti*[28] which held that if 'a decision to procure services does not have a direct, external effect no rights are infringed…'.

[53] On application of the criteria amplified in *Motau* above to this case, as regards what constitutes an administrative action, it is my view, that the decisions taken qualify as administrative actions. Why do I say so? Firstly, the nature of the decisions is clearly administrative; the decision is taken by an organ of the State; in this instance the RAF is exercising its public power in complying with its social responsibility to the public; the decisions are subject to section 217 of the Constitution; the decisions affect the rights of the general public of South Africa in terms of section 12(1)(b) and 7(2) of the

[25] *Grey's Marine Hout Bay (Pty)Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 21.
[26] Section 3 of the RAF Act 56 of 1996.
[27] *Logbro* at para 11
[28] *Tshwane City and Others v Nambiti Technologies (PTY) Ltd* 2016 (2) SA 494 (SCA).

Constitution. Hence, I say the decisions qualify as administrative actions and the principles of Promotion of Administrative Justice Act (PAJA) are applicable.

The cancellation of the tender RAF/2018/00054 and dispensing of the panel attorneys

[54] The cancellation of the tender had the effect of dispensing with the services of the panel attorneys. The decision to cancel the tender was taken by the BAC. Both the RAF and the Board concede that this is so. The Minister also supports the decision that RAF took to cancel the tender. Though the Board did not take the decision to cancel the tender it accepted management's decision to do so. All are on-board with the decision, but for, the affected parties, being the panel attorneys.

[55] Least it is not clear enough by now, it is only the Board in terms of section 11 of the RAF Act that exercises its authority and control over the RAF, financially, operationally and the management thereof. However, according to the Board as per their heads of argument they contend that in terms of section 10 they do not have overall financial, operational and managerial control over the RAF. However, in further heads the Board now states '…The Board does have overall authority over the financial, operational and management of the fund in terms of section 10 of the RAF Act…'.[29] Confusion on the part of the Board is evident as it has overall authority in terms of section 11.

[56] According to the answering affidavit of the Chairperson of the Board it was the BAC which cancelled the tender RAF/2018/00054. BAC cancelled the tender on 25 February 2020 'due to unaffordability of services as advertised in the tender, as well as changed circumstances'. The ACEO on 26 and 28 February 2020 issued termination notices of the tender to all the bidders. On 25 February 2020 *FourieFismer* sends correspondence to the Board and on the very same day the Board responded that it would revert as regards their concerns raised of the handing over. In the Boards heads of argument, they state that it was only on 27 February 2020 that the ACEO and management reported to them (the Board) on the decision to dispense with the panel attorneys.

[29] Para 22 of 2nd Respondent's Heads of 5 May at 008-821.

[57] The RAF submits that 'the decision to cancel the tender was delegated to the BAC and that management made submissions to the BAC to cancel the tender. The BAC took the decision to cancel the tender on 25 February 2020. The Board, in its heads of argument, for the very first time, alludes to the fact that BAC had been delegated by the Board. Likewise, in terms of sections 12(1)(b) &12(2) of the RAF Act, the decision maker of the handover notifications. They argue that in terms of the RAF Act section 11(1)(h) 'the Board is not the only body authorised to make the decision to dispense with the panel attorneys'.

[58] Let me deal with decision having been taken by the BAC and not the Board. The Board advises that the decision made by BAC was under the auspices of delegated power in 2015. Logically, this delegation could not be applicable to this Board as it was only inaugurated on 5 December 2019. Incidentally, nowhere in the answering affidavits of all the respondents do I have facts confirming this submission that has been arbitrarily made by the Board. Even if it were the case, this is a new Board and from the manner in which things have unfolded with this specific decision to cancel the tender, the Board was advised of same after the fact, as the termination letter had already been transmitted to the panel attorneys. As stated above, this function lies with the Board alone, yes it is not restricted from delegating but if it ought to be in control of the RAF's affairs, logic dictates that the Board ought to be *au fait* with the circumstances and the decisions to be taken, before these are taken and not after. Thus, I am not persuaded and reliance cannot be placed on this delegation of 2015. This delegation could have never been for this specific Board and for this specific panel.

[59] Cumulatively the Boards assertions are:

(a) The Board was not consulted nor were they advised that the COO had issued the notifications for handover of the files to the panel attorneys. The Board only approved these notifications on 27 February 2020 after they had already been transmitted;

(b) The Board states that from the resolution it's clear that they supported the decision of management made by BAC, which apparently was delegate power

to do so in terms of delegation issued in 2015. Bear in mind that this Board was only inaugurated on 5 December 2019 and this decision to cancel the tender was taken on 25 February 2020.

[60] The Board has set out what is required of it in terms of Protocol of Corporate Governance in the Public Sector para 5.1.1, which I set out below:

'…the board must act on a fully informed basis, in good faith, with diligence, skill and care and in the best interest of the entity, whilst taking account of the interest of the shareholders and stakeholders, including employees, creditors, customers, suppliers, and local communities. To this end the board must monitor closely the process of disclosure and communication and exercise objective judgment on the affairs of the entity, independent of management.'[30]

[61] In this case, the Board failed to make decisions or take decisions. This amounts to administrative action that is susceptible to review. The conduct of the Board leaves much to be desired, especially as they are responsible and accountable for the public purse of RAF, which we are all aware is being exhausted from all quarters. The responsibility of the Board is to play a pro-active role, but this Board was rather docile and submissive in all the decisions discussed and taken. The poorest of the poor, be they pedestrian and motor vehicle drivers, have not been protected at all by the current Board. This debacle emanates from the Boards failure to comply with its mandate. Simply put it allowed the ACEO to rule the roost to the detriment of the claimants who are supposed to benefit therefrom. It is now clearly evident that there would be further delays in the implementation of the Strategic Plan 2020-2025 and the Annual Performance Plan 2020/2021 which according to the RAF was supposed to alleviate the financial burden of the RAF and speed things along for the claimant's.

[62] Turning to address the issue of the notification of the cancellation of the tender. It is common cause that the first notification of 26 February 2020 did not provide the panel attorneys with a reason for the cancellation of the tender. The RAF admits as much, that they failed to disclose the reason for the termination. There goes transparency in terms of section 217. Then the second notification of 28 February 2020

[30] Para 10 of the Chairperson of the Boards Head of argument dated 5 May 2020 at page 008-253.

was issued. In this termination notification the CFO, yet again not the Board, now sets out the reasons for the cancellation. The reasons advanced were that the RAF no longer required the services sought to be procured as specified in the invitation. In addition, they 'rendered the funds no longer available to cover the total envisaged expenditure'.

[63] This is a comedy of errors. The notification was not issued by the Board. The Board was yet again made aware of the notices which culminated in the validation of the decisions being after the fact. Management already took and executed the decisions. After the fact yet again, they seek the lawful approval from the Board, having already concluded the process. In the face of the Board's request that management supplement, so as to confirm the decision. Nothing comes of this, as the decision has been taken and is in the pipeline to be processed or processed already by management. No respect for the authority of the Board or its accountability to the South African public.

[64] Both notices to cancel the tender are in my view invalid. The first does not display the reasons for the termination. It is trite that an affected party must be appraised of the reasons for the termination of his/her/its contract. This is likewise as between public organs and private institutions. On this level alone the first notification of cancellation does not comply with contractual prescripts relied upon by the RAF. It cannot be said that a proper notification of cancellation was issued as it was not issued by the Board.

[65] Thus, the notifications and the cancellation of the tender stands to be reviewed and set aside as they are not valid and hence unlawful.

[66] The second notification then indicates that the financial position is no longer as it was to entertain the tender and, the circumstances of the RAF have changed. The RAF raises section 13(1) (a) and (b) of the Regulations of the Preferential Procurement Regulations 2017(PPPFA Regulations)[31]. The onus is on the RAF to show that indeed

[31] **Regulation 13(1)** provides:

this is the case. Refer to *National Lotteries Board and Others v South African Education and Environment Project*, duly confirmed by the Constitutional Court[32], where it was stated:

'The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the dispute decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards- even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex-post facto rationalisation of a bad decision.'[33]

[67] The cancelation letter of 28 February 2020 is very specific as regards the reasons that the tender was cancelled. It reads as follows:

'This serves as a formal notification that to tender number RAF/2018/00054 has been cancelled in line with the provisions of Regulation 13(1)(a) and (b) of the Preferential Procurement Regulations, 2017 issued by the Minister of Finance in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000, in that:

(a) The RAF's dire financial situation has necessitated a review of its operational model, which resulted in a conclusion that there is no need to have the panel of attorneys. Consequently, the Raf no longer requires 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…'

[68] However, in the ACEO's answering affidavit he alludes to an additional fact for the cancellation. This being that he had identified irregularities in the management of the tender by the Supply Chain Management(SCM). This he states led to the extension

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13. Cancellation of Tender

(1) An organ of state may, before the award of a tender, cancel a tender invitation if-
(a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;
(b) funds are no longer available to cover the total envisaged expenditure;
(c) no acceptable tender is received; or
(d) There is a material irregularity in the tender process.

[32] *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC) at para 39.

[33] *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 at para 27.

of the tender to 31 May 2020. He states that he explained this to the Board on 22 October 2019. Notably no mention is made about what has become of the identified irregularities which he states are still in existence.

[69] Importantly, he pointed out that management had as far back as December 2019 taken a decision to allow the tender to lapse and 'if there was a need for a new panel, a fresh tender would be issued…'. The latter submission flies in the face of all the reasons the RAF has advanced for the cancellation of the tender. How can one still intend to issue a fresh tender when it is alleged that there are no funds for the intended purpose of the purported cancelled tender.

[70] In addition, on the one hand the RAF states that they do not require the services of the panel attorneys and at the same time they reserve the notion of constituting a new panel of attorneys, who by the way will provide the same services the panel attorneys are currently avoiding and who are supposedly no longer required. The RAF finds itself in the exact position that the Supreme Court Appeal warns of in *National Lotteries Board and Others v South African Education and Environment Project.* The reasons advanced are, in my view, not proper or adequate at all and thus are susceptible to review.

[71] The additional reason advanced is clearly '*ex post facto* rationalisation of a bad decision'. It contradicts the former reasons advanced and nullifies them. *Maponya's* counsel argued that there can be no changed circumstance as a result of the RAF's financial situation. This is so, they say, because the fund has been in this financial situation of insolvency since 1981. I agree with this contention.

[72] There is also the matter of not requiring the services of panel attorneys. Though the RAF wants to do away with these services, they still want to employ new attorneys to assist under the auspices of the State Attorney's office and/ or outsource the very work that the panel attorneys are doing to their corporate attorneys. There is no logic in this scheme.

[73] No proper or adequate reasons have been advanced. This is clearly a case of rationalising a decision gone wrong.

Rationality of the RAF's decisions

[74] I address this issue from the premise that my findings above are wrong, then my findings set out below on the rationality of the decisions should prevail. I have dealt with the decisions in detail above and I do not propose to repeat them.

[75] *Motau* eloquently points out that which constitutes a rationality review. Khampepe J states that:

'the principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given. It is established that the test for rationality is objective and distinct from that of reasonableness.' [34]

Simply put there has to be a 'sufficient connection between the means chosen and the objective sought to be achieved'.

[76] The RAF places reliance on the fact that the decisions taken were executive decisions. As such, they can only be declared invalid if there is no rational connection between the decision taken and the purpose for which it was intended. They further contend that the decisions (to cancel the tender and relinquish the panel attorneys) were predominately taken to save the RAF legal costs.

[77] They propose to do so by settling the majority of their matters already at court. If they fail, the matters will be transferred to mediation. The last resort would be to appoint new attorneys at the State Attorneys offices or the Solicitor General's offices to provide them with the services they would require from attorneys. Seemingly, according to the RAF the Minister of Justice and the Solicitor General have already agreed to this.[35]

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[34] *Motau* at para 69.
[35] Para 77 of the RAF's Heads at page 008-195.

[78] Consequently, they concede that they will require the service of attorneys from time to time. First price, is to seek the services from the office of the State attorney, which they propose to fund and capacitate, as they will employ new attorneys. If necessary, they may invoke regulation 16A.6.6 and utilise their corporate attorneys to perform the functions of the panel attorneys.

[79] I need to point out that the RAF is not precluded nor has it ever been precluded from settling claims directly with the claimant's or plaintiff's attorney. This is before summons is issued within 120 days from the lodgement of the claim. No attorneys are necessary during this period. Thus, there is no costs incurred towards the panel attorneys. Once summons is issued and if settlement endeavours have failed there are two options, either defend the action or face default judgment. It is at this stage that the panel attorneys are instructed, as and when required by the RAF. The decision lies with the RAF and they are not forced to instruct attorneys as per the SLA. Due to the litigious nature of these cases the necessity of an attorney for representation purposes does not go away, whether it is the State Attorney's offices, the corporate attorneys, the Solicitor General's offices or the panel attorneys.

[80] The conundrum that the RAF finds itself in is that they cannot cancel the panel attorneys mandate and replace them with other attorneys funded by them, to perform the same function of the panel attorneys. This contradicts the reason advanced that the service of attorneys is no longer required as they wish to save legal costs. The RAF will still be paying for attorneys, which they are currently doing with the panel attorneys.

[81] Auxiliary, to the above, they contend that issues of fraud and corruption mitigated their decisions. This contention was advanced *ex post facto.* The problem they face is that they have conceded that the fraud and corruption is not with all the attorneys. It therefore cannot be justified and rational that all the attorneys are penalized. As demonstrated by the various cases referred in the papers before me. The fraud and corruption does not only fall at the feet of the attorneys, but involves RAF staff, the medical profession, the ambulance emergency sector and the South

African Police force. To mention but a few. The net covering the fraud and corruption issue at the RAF is very wide.

[82] For the reasons set out above the RAF has failed to demonstrate the rationality of the decisions it has taken.

Just and equitable

[83] In approaching this issue I am guided by the *dicta* in *Economic Freedom Fighters and Others v The Speaker of the National Assembly and Another* sets out below:

'[210] However, this Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable. In *Hoërskool Ermelo* the Court said about a just and equitable remedy: "The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words, the order must be fair and just within the context of a particular dispute."

[211] The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution. In *Hoërskool Ermelo* Moseneke DCJ declared: "A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is

valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."[36] [My emphasis]

[84] In the circumstances of this case, I find it necessary to apply section 172(1)(b) of the Constitution. The RAF requires a period to reconsider its position for the sake of the general public of South Africa. Nothing precludes the RAF from implementing its proposed strategic plan in a manner that accords with legality. The facts of this case permit this court to resort to imposing an order not sort by the parties, in order to ensure just and equitability in the circumstances that prevail.

[85] This is an exceptional case and a constitutional crisis looms. This could have grave effect for claimants and thus it must be averted to protect their rights. The RAF is the only institution responsible to compensate victims of motor vehicle related accidents and the RAF has a social responsibility to continue doing so in a legally accepted manner. Unfortunately, the court has to intervene to protect the general public of South Africa as their rights in terms of the Constitution are being threatened[37]. The court cannot sit back supine whilst the RAF is finding its feet at the behest of eroding the Constitutional rights of public at large. The status *quo* has to prevail to allow all parties to reach an amical just and equitable solution to protect the rights of the South African public.

[86] It is therefore necessary to retain the status *quo* for at least six (6) months with the panel attorneys present contractual relationship. This will enable the RAF to reconsider its position and retain the social responsibility net in place protecting the public.

Costs

[87] All the parties, in my view, were a party to the adjournment of the 21 April 2020 and added to this was the Covid-19 pandemic with the lockdown in place. In the three

[36] *Economic Freedom Fighters and Others v The Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 210-211.
[37] *Black Sash Trust v Minister of Social Development and Others* 2017 (3) SA 335 (CC).

reviews the respondents are to pay the reasonable taxed costs of the applicants on a party and party scale. Such costs to include two counsel where so employed.

Order

[88] Consequently, the following order is made:

1. The forms, service and time period prescribed by the Uniform Rules of Court are dispensed with and the applications are heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. The Intervening Party is joined as the Fourth Applicant in the *FourieFismer* review application.

3. The panel attorneys on the RAF's panel as at the date of the launch of the *FourieFismer* review application shall continue to serve on the RAF panel of attorneys.

4. The RAF shall fulfil all of its obligations to such attorneys in terms of the existing Service Level Agreement.

5. This order shall operate for a period of six (6) months from this order.

6. The Respondents are ordered to pay the costs of the review applications on a party and party scale, jointly and severally.

7. Such costs are to include the costs of two counsel for each legal team where so employed.

Electronically signed
W Hughes
Judge of the Gauteng
High Court, Pretoria

APPEARANCES:

For the 1st Applicant: Adv. Labuschagne Sc
Adv. Mabuza

For the 2nd Applicant: Adv. Budlender
Adv. Mitchell

For Mabunda Inc: Adv. Mukhari Sc
Adv. Lithole

For Maponya Inc: Adv. Ferreira
Adv. Harding

For Diale Mogashoa: Adv. Tsatsawane
Adv. Tisani

For the 1st Amicus: Adv. Solomon Sc
Adv. Williams

For the 2nd Amicus: Adv. Norman Sc
Adv. Magano

For the 1st Respondents: Adv. Moroka Sc
Adv. Mojapelo

For the Minister: Adv. Mphaga Sc
Adv. Magagane

For the RAF: Adv. Motepe Sc
Adv. Vimbi
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For the Applicants: Adv. Mukhari Sc
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For the 91st Respondent: Adv. Labuschagne Sc
Adv. Mabuza

For the 57th & 108th Respondent: Adv. Willis
Adv. Khwela

For the 15th & 156th Respondents: Adv. Bester
Adv. Sethaba

For the 7th & 141th Respondents: Adv. Adam

For the 65th & 132nd Respondents: Adv. Notshe Sc

For the 44th,46th ,48th ,68th ,73rd ,77th,84th,85th , 117th ,136th ,147th,150th: Adv. Jacobs

For the RAF: Adv. Motepe Sc
Adv. Vimbi
Adv. Manganye