IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 17518/2020

In the matter between:

FOURIEFISMER INCORPORATED	1st Applicant
LINDSAYKELLER ATTORNEYS	2nd Applicant
PRETORIA ATTORNEYS' ASSOCIATION	3rd Applicant
MAPONYA INCORPORATED	Intervening Party

And

ROAD ACCIDENT FUND	1st Respondent
THE CHAIRPERSON OF THE BOARD OF THE ROAD ACCIDENT FUND	2nd Respondent
THE CHIEF EXECUTIVE OFFICER OF THE ROAD ACCIDENT FUND	3rd Respondent
THE MINISTER OF TRANSPORT	4th Respondent

CASE NO: 1587612/2020

In the matter between:

MABUNDA INCORPORATED and others	1st to 42nd Respondents

And

ROAD ACCIDENT FUND	Respondent

CASE NO: 18239/2020

In the matter between:

DIALE MOGASHOA INCORPORATED Applicant

And

ROAD ACCIDENT FUND Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL [RAF AND CEO]

BE PLEASED TO TAKE NOTICE that the respondents in the above applications apply for leave to appeal to the Supreme Court of Appeal ("*the SCA*") of South Africa alternatively the Full Bench of this Division against the judgment and orders of her Ladyship Madam Justice Hughes delivered on 1 June 2020.

BE PLEASED TO TAKE NOTICE FURTHER that the findings of fact and rulings of law appealed against are the following:

1. The Learned Judge has erred and misdirected herself in law. The SCA has found in *Nambiti* and *SAAB Grintek* that the cancelation of a tender constitutes an executive decision. The Learned Judge disagreed with these dictas and continued to find that such a decision constitutes an administrative decision.

1.1 First, the Learned Judge does not say on what basis in law can a single Judge of a lower Court differ so markedly with the decisions, not one but two of a higher court (the SCA) when even the Constitutional Court refused an invitation to revisit the SCA's decision in *Nambiti*. Her findings offend the *stare decisis* doctrine.

1.2 Second, even if the Learned Judge may somehow have been entitled to differ from the aforementioned SCA decisions, she has not given any judicial analysis of the two decisions to explain why they are so wrong that they must be departed from.

2. The Learned Judge erred in law and on the facts. The Delegations made by the Board in November 2015 and in accordance with section 11(1)(h) of the Road Accident Fund Act, 56 of 1996 ("*the Act*") and section 56(1) of the Public Finance Management Act, 1 of 1999 ("*the PFMA*") empowered the Bid Adjudication Committee ("*the BAC*") to cancel tenders issued by the Road Accident Fund ("*the Fund*"). The Learned Judge found at paragraph 58 of her judgment that "*logically, this delegation could not be applicable to this Board*".

2.1 First, the SCA and the Constitutional Court have repeatedly held that administrative decisions remain valid until set aside and may have valid legal consequences. The Delegations have never been challenged and set aside by any court before and none of the parties had challenged them before this Court. They are binding in law and yet the Learned Judge, relying on "*logic*", finds that they "*could never been applicable for this specific Board and for this specific panel*".

This is a complete surprise as it was never raised by the Learned Judge during argument, to enable the RAF's counsel to respond thereto.

2.2 Second, the Learned Judge finds that "*nowhere in the answering affidavit of all the respondents*" does she "*have facts confirming this submission that has been arbitrarily made by the Board*". This, in reference to the allegation that the Board had delegated the power to cancel tenders to the BAC. But this is dealt with in paragraphs 117 to 119 of the RAF's answering affidavit filed under Part A, in paragraphs 12, 52 and 53 of its heads of argument in the FSF application and was expressly addressed by its counsel during oral argument. The Learned Judge evidently ignored this evidence and submissions by the RAF.

2.3 Third, the Learned Judge consequently erred in law in finding that the tender cancellation notices dated 26 and 28 February 2020 respectively were invalid because they were not issued by the Board, when she ought to have found that the Delegations so authorized the BAC in terms of the RAF's Delegation and functions framework.

2.4 Fourth, the finding by the Learned Judge means the current Delegations are unlawful. The consequence of this finding is that management may have to now get approval of the Board in each operational decision they make otherwise their decisions are susceptible to attack for lack of authority. Such a situation is impractical bearing in mind that the Board members are not employees of the RAF and are consequently not available on a daily basis to run the daily

operations of the RAF. It is for this reason that Board's of SOEs such as the Fund approve delegations, to ease the daily administrative functions.

3. The Learned Judge erred in law. She evidently granted consequential relief in her order in terms of section 8(1) of the Promotion of Administrative Justice Act 3 of 2002 ("*PAJA*") and/or section 172(1)(b) of the Constitution, 1996 without reviewing and setting aside any decision either in terms of section 6(2) of PAJA or alternatively, declaring any conduct inconsistent with the Constitution invalid in terms of section 172(1)(a). The Learned Judge ought to have firstly declared reviewable conduct unlawful and set it aside before granting consequential relief in her order.

4. The Learned Judge has erred and has misdirected herself in law and in fact by finding at paragraphs 62 and 63 that it was only after issuing cancelation notices that the management sought "*the lawful approval from the Board, having already concluded the process*".

4.1. First, and as already stated elsewhere above the BAC had delegated powers to cancel and there was therefore no need for the Board's prior approval;

4.2. Second, the Learned Judge misconstrued the RAF's case. Its case is that the BAC had authority to cancel as delegated by the Board. However, section 11(1)(h) authorized the Board to reverse the BAC's decision if it so wished but it didn't. It instead confirmed this decision on 27 February 2020. The RAF reiterates however that the BAC always had those powers. It is therefore incorrect for the Learned Judge to find that management sought the Board's

approval *ex post facto* in what she incorrectly refers to as "*a comedy of errors*".

5. The Learned Judge has misdirected herself in fact and in law. The Learned Judge has correctly found at paragraph 11 that the original SLA, concluded during 2014 was to terminate by effluxion of time on 29 November 2019 but was extended by conclusion of the second addendum, thereby extending it to 31 May 2020. The Learned Judge has however found at paragraph 38 of her judgment that the second addendum is invalid and unlawful.

5.1. First, the Learned Judge delivered her judgment on 1 June 2020 after the expiry of the second addendum yet she finds at paragraph 4 of her order that RAF shall fulfill all of its obligations to such attorneys in terms of "*the existing Service Level Agreement*" when there is no such existing SLA;

5.2. Second, the nullification of the second addendum ineluctably means that the RAF and the panel attorneys have not had a contractual relationship since 29 November 2019 when the original SLA expired. Which "*existing SLA*" did the Learned Judge extend then?

5.3. Third, in finding the second addendum unlawful, the Learned Judge ignored RAF's contention that the panel attorneys did not at any stage seek to have it rectified or to have the offending clauses excised as provided for in clause 26 of the SLA.

5.4. Fourth, the finding by the Learned Judge that the second addendum amended 4 months' notice to 1 months' notice is not factually accurate. Properly interpreted, clause 14.1 of the second addendum means that the RAF could give even more than 4 months' notice but could not give less than one month. The words "*at least"* precedes the reference to 1 month. On the facts, the RAF gave the panel attorneys 3 months and 12 days. In any event, clause 14.1 could have been excised without rendering the second addendum invalid.

6. The Learned Judge erred in law by finding that during the conclusion of the second addendum, the RAF:

6.1. acted from a position of superiority and therefore exercised public power when this was not the case; and

6.2. derived its powers to extend the SLA from section 217 of the Constitution when in fact the RAF derived such powers from clause 7.3 of the SLA read with the PPPFA, the PFMA, Treasury Regulations and Instruction Notes. It is impermissible on account of the doctrine of subsidiarity to rely directly on a Constitutional provision when there is legislation passed to give effect to that provision.

7. The Learned Judge ought to have found that it was during the procurement of the services of the panel during 2014 that RAF derived its powers from the PPPFA, the PFMA read with section 217 of the Constitution. The Learned Judge ought to have

found that thereafter it acted in accordance with its private contractual powers particularly when extending the SLA.

8. The Learned Judge erred and misdirected herself in law in finding that the notices of handover of files dated 18 and 20 February 2020 were susceptible to review as they were not authorized by the Board. The Learned Judge ignored the facts that (a) the notices were not canceling the SLA but merely requesting the return of the files because of the looming lapse of the contract; (b) the notices were not taking away any of the panel attorneys existing rights and consequently did not constitute administrative decisions and (c) contract management is a function already delegated by the Board to management.

9. The Learned Judge erred in fact and in law by finding that the RAF "*cannot cancel the panel attorneys mandate and replace them with other attorneys funded by them, to perform the same function of the panel attorneys*".

8.1 First, the Learned Judge has in fact completely ignored the RAF's case. Its case has never been that it no longer needs attorneys. Its case has always been that it does not need services of panel attorneys as specified in the tender invitation. In this regard, the tender invitation was for 215 attorneys for a period of 5 years. The Learned Judge ought to have found that Regulation 13(1)(a) of the Preferential Procurement Regulations, 2017 made in terms of the Preferential Procurement Framework Act, 2000 has been satisfied by RAF without a shadow of a doubt.

8.2 Second, the RAF made it plain that (a) it will use the services of the state attorneys' offices, (b) issue a fresh tender for 20 panel of attorneys and (c) employ Regulation 16A.6.6 of the Treasury Regulations should it need services of more firms of attorneys but what it no longer needs, is 215 attorneys for 5 years.

10. The Learned Judge erred and misdirected herself in finding that because the RAF has been insolvent since 1981, it can no longer use lack of funds as justification to change its costly model by canceling a tender for 215 attorneys for 5 years.

9.1 First, the Learned Judge has ignored the fact that the legal costs have skyrocketed to much greater heights never seen since 1981. It is therefore inappropriate to make a comparison with the past years;

9.2 Second, it is reckless for the Fund to continue amassing billions of Rands in debt simply because it has always been insolvent;

9.3 Third, the Learned Judge has ignored the contention by the Fund that due to its deteriorating financial state, there is now a real danger of the Fund being forced to invoke section 21(2) of the Act because of its continued inability to pay any compensation.

11. The Learned Judge erred and misdirected herself in fact and in law by introducing facts in her judgment that were never part of the papers. the Learned Judge found at paragraph 81 that fraud and corruption at the RAF does not only fall at the feet of the

attorneys "*but involves … the ambulance emergency sector and the South African Police force*". The Learned Judge finds that the "*net covering corruption at the RAF is very wide*".

10.1 First, while the Learned Judge might have become aware of these facts from elsewhere, they were not part of the papers and the parties did not comment thereto.

10.2 Second, while the Learned Judge finds that there may indeed be panel attorneys who may be involved in fraudulent and corrupt activities, the Learned Judge proceeds to find in paragraph 3 of her order that all attorneys who were on the panel at the launching of the FourieFismer application shall continue to serve on the panel, without making any distinction.

10.3 Third, the Learned Judge's finding that RAF cannot "*penalize*" all attorneys who may not be involved in fraud and corruption ignores the fact that RAF's case is that the panel attorneys not involved in malfeasance are free to participate in a fresh tender that it intends issuing.

10.4 Fourth, the cancelation of the tender is not to penalize the panel attorneys. It is to change the RAF's current model.

12. The Learned Judge erred in law by forcing the RAF to enter into a contract it says it no longer needs, with unspecified terms, particularly since the contract that had governed the parties previously had lapsed.

13. The Learned Judge erred in failing to take into account the alleged fraud and corruption in the determination of a just and equitable remedy. She attached no weight to the fact that the management had already registered criminal investigations with the SAPS in December 2019 already. She in fact finds at paragraph 68 that the CEO makes no mention "*about what has become of the identified irregularities*" when he repeatedly states in his affidavits that criminal cases have been opened with the SAPS and he gives case numbers.

14. The Learned Judge erred in finding that the tender cancellation notice dated 26 February 2020 is invalid simply because it was not accompanied by reasons. The Learned Judge ought to have found that a decision can be published without reasons, particularly if it is executive in nature. Reasons can then be requested later. It is only when a request to give reasons is refused that the decision itself may be impugned.

15. The Learned Judge erred in fact and in law in finding that the decision to dispense with panel attorneys as advertised in the tender was not rationally connected to its purpose, i.e. changing the current costly model that is also fraught with fraud and corruption.

16. The Learned Judge erred in fact and in law by finding at paragraph 34 of the judgment that panel attorneys are "*standing instead of the RAF performing a social duty for the state"*.

    16.1. First, the Learned Judge has ignored the fact that the panel attorneys are only contracted to the RAF to provide specialized litigation services.

16.2. Second, the Learned Judge has ignored the fact that the RAF can settle claims on their own without the need for panel attorneys. Panel attorneys are only required once a claim is litigated.

16.3. Third, the RAF has no direct control of the panel attorneys and/or alternatively, the RAF continues in its obligations under the RAF Act in that it continues to itself pay for claims to beneficiaries, medical and legal costs.

16.4. Fourth, the Learned Judge ignored the fact that the Panel does not perform a public function on behalf of the RAF.

17. The Learned Judge found in paragraph 5 of her order that the consequential relief she granted shall operate for a period of six months. The Learned Judge does not state what the RAF should do during this period of six months. (a) Must the RAF interpret her order to mean that it must now adjudicate and award the cancelled tender or must it issue a fresh tender still for 215 attorneys and for a 5-year period? (b) Because RAF had already stated that it would be issuing a fresh tender for a reduced panel of attorneys of 20 for a period of 5 years, is it the effect of her Ladyship's order that the RAF must no longer proceed with that tender? (c) Is the RAF permitted to give a notice for the return of its files during this 6-months period and if so when?

18. A mistake on the facts will only give rise to a reasonable apprehension of bias if it is so unreasonable on the record that it is inexplicable except on the basis of bias. The RAF now has a reasonable apprehension of bias on the side of the Learned Judge possibly

due to her previous Directorship or employment at one of the panel attorneys, namely Hughes-Madondo Incorporated. There are a number of material findings of fact by the Learned Judge that are so unreasonable and/or so out of kilter with the evidence that they are explicable only on the grounds of bias against RAF and in favour of the panel attorneys.

18.1. First, the Learned Judge finds in paragraphs 57 and 58 that "*nowhere in the answering affidavits of all the respondents*" does she find the submission confirming that the tender was cancelled by the BAC in accordance with delegations by the Board. This finding is inexplicable for the reasons that follow:

18.1.1. these facts are made in answering affidavit of the ACEO filed under Part A in the Mabunda application under the heading "*The tender cancellation was made by the BAC in accordance with its delegated powers*" at page 248 and 249 of the original pagination. Paragraphs 117 and 118 thereof specifically refers to these Delegations, when they were published and in terms of which authority;

18.1.2. the point about Delegations is also dealt with in paragraphs 39 of the RAF's heads filed under Part A in the Mabunda application, paragraphs 12, 52 and 53 of RAF's heads in the Fouriefismer application; and

18.1.3. not only was this point dealt with in affidavits and in the heads but, the RAF's counsel in oral argument specifically referred the Judge to these Delegations when making the point that none of the applicants have attacked them and that they therefore remain valid.

18.1.4. This was never raised by any of the parties and was not a live issue in the papers. What then informed the Learned Judge to reach her finding on this aspect.

18.2. Second, the finding by the Learned Judge that because the RAF still needs the services of attorneys, it was not entitled to cancel the tender is inexplicable for the following reasons:

18.2.1. It was never RAF's case that it no longer needs the services of attorneys at all. In oral argument, RAF's counsel repeatedly pointed out to the Learned Judge that what the RAF no longer needs is the services as "*specified in the tender invitation*". His argument was that it is the services of 215 attorneys for a period of 5 years which had been "*specified in the invitation*" that the RAF no longer needed. RAF's case as it appears, *inter alia* from paragraph 77 and 78 of its heads in the Fouriefismer application, is that it will appoint a number of attorneys under the auspices of the state attorneys and use Regulation 16A.6.6 of the Treasury Regulation to get more attorneys should it need them.

18.2.2. Had the Learned Judge, correctly and fairly evaluated the RAF's case on these facts, it would have led her to the conclusion that the RAF has satisfied Regulation 13(1)(a) of the Preferential Procurement Regulations, 2017 which specifically permits cancellation of a tender on the basis that due to changed circumstances, there is no longer a need for the goods or services specified in the invitation.

18.3. Third, the Learned Judge finds at paragraph 52 and 53 that the tender was adjudicated and therefore the "*decisions*", including the tender cancellation constitutes administrative action in terms of PAJA. This finding is inexplicable and out of kilter with the evidence.

18.3.1. The main thesis of the case advanced by the applicants has always been that the decision to dispense with panel attorneys and cancellation of the tender ought to have been taken by the Board but was instead taken by the ACEO and management. Fouriefismer applicants deal with this in paragraph 53 to 76 of their heads. Mabunda applicants deal with it in paragraph 17 to 26 of their heads, Diale Mogashoa deals with it at paragraphs 4.1 to 4.31 and Maponya at paragraphs 50 to 63 of their heads. It is for this reason that the RAF's case has always been that the decision to cancel the tender was taken by the BAC and is an executive decision;

18.3.2. The Learned Judge does not elaborate on what she refers to when she says the ACEO "*makes mention of the intricate aspects of the bids*". The RAF can only speculate that she was referring to the evidence in paragraph 96 to 102 of the answering affidavit of the Fouriefismer application when the ACEO explained what appeared in the Board minutes of 22 October 2019. This evidence however does not support her conclusion either. The evidence is that because of the weaknesses in the composition of the BSC and the BEC, it was an impossible task to expect the proper evaluation of the 815 tenders and because of these, "*the risk of the tender being challenged after the award was very high".* Nowhere is it stated that the tender had been adjudicated.

KINDLY TAKE NOTICE that the RAF and the ACEO reserve their rights to amend their grounds of application for leave to appeal.

DATED AT **PRETORIA** ON THIS THE **3RD** OF JUNE 2020



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