

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2023/088679

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO



Date: 18 October 2023

In the matter between:

THE ROAD ACCIDENT FUND

Applicant

and

NTSHOSA PHINEAS MADIBA

First Respondent

NTSHOSA PHINEAS MADIBA INCORPORATED

Second Respondent

THE SHERIFF, PRETORIA EAST

Third Respondent

THE LEGAL PRACTICE COUNCIL

Fourth Respondent

JUDGMENT

DE VOS AJ

- [1] The applicant, the Road Accident Fund (“the RAF”) seeks urgent interim relief to stay the operation of all the writs issued at the instance of the first and second respondents. The first respondent is Mr Madiba, who practices as an attorney under the style and name of the second respondent. Mr Madiba is the director of the second respondent. The first and second respondents will be referred to interchangeably as Mr Madiba and Mr Madiba’s firm. Mr Madiba and his firm represent plaintiffs who wish to claim damages from the RAF. The writs are to execute on court orders obtained by Mr Madiba and his firm, on behalf of their clients, against the RAF.
- [2] The RAF also seeks to interdict the third respondent (“the Sheriff”) from removing the RAF’s movable property or selling the RAF’s property pursuant to any writ of execution issued, or which may be issued in future, at the instance of Mr Madiba or his firm against the RAF.
- [3] The RAF explains that the present application is another instalment in a saga which has ensued between the RAF and Mr Madiba since at least 2020. In sum, the RAF alleges that Mr Madiba is involved in the forgery of claimants’ signatures, the representation of claimants without those claimants’ knowledge and the altering of accident reports in order to lodge claims with the RAF.
- [4] The RAF’s motivation for its approach to this Court is twofold. The first is that the RAF administers public funds, which must not be spent fruitlessly and wastefully. The second is that the RAF seeks to protect its main function, which is fundamentally to pay compensation to victims of road accidents. This means that in the language of the RAF: “the money must actually reach those victims”.
- [5] The RAF wants to make sure its funds go to the victims and are not abused by a practitioner facing serious allegations of misconduct. The RAF is concerned this will not be the case if Mr Madiba is permitted to execute on the writs. The RAF’s concerns regarding Mr Madiba is bolstered by different sources of evidence. This includes an affidavit by an attorney who states his signature was falsely attached to three doctored settlement agreements in litigation against Mr Madiba. One of the false settlement agreements was for an amount just shy of R 5 million. The fourth respondent, the Legal Practice Council (“the LPC”) has resolved to launch an

application to strike Mr Madiba from the roll of attorneys and the RAF has laid fifteen complaints with the South African Police Service against Mr Madiba. The RAF's internal investigation unit, tasked with investigating corruption, has provided a report of an investigation of Mr Madiba. The outcome of the report is that Mr Madiba and his firm represented at least seven clients at a time when he was not enrolled as an attorney and his firm was not registered with the LPC. The RAF has presented this Court with five separate orders to stay the execution of writs issued at Mr Madiba's instance and evidence of six rescission applications launched against orders obtained by Mr Madiba.

- [6] The RAF seeks the relief on an interim basis pending the outcome of Part B. In Part B, the RAF asks that the LPC be directed to launch an application to appoint a curator *ad litem* and a curator *bonis*¹ to administer claims of persons represented by Mr Madiba and his firm against the RAF, pending the outcome of the LPC's suspension application launched against Mr Madiba. Alternatively, the Court is requested to direct the LPC to launch an application to suspend or strike Mr Madiba.
- [7] Whilst the case is properly brought in terms of the law of interdict and under Rule 45A of the Uniform Rules of Court, the case must be considered with an acknowledgement that the work of the RAF has a constitutional impetus. This has been recognised by our courts. The Constitutional Court in *Law Society of South Africa and Others v Minister for Transport and Another*² held that the RAF forms "part of the social security net for all road users and their depend[a]nts". In addition, the Full Bench of this Court held in *RAF v LPC*³ that compensation by the RAF is a

¹ The RAF contends section 89 of the Legal Practice Act 28 of 2014, provides the LPC with this power:

"89 Court may prohibit operation of trust account

The High Court may, on application made by the Council or the Board, and on good cause shown, prohibit any legal practitioner referred to in section 84 (1) from operating in any way on his or her trust account, and may appoint a curator bonis to control and administer that trust account, with any rights, powers and functions in relation thereto as the Court may deem fit."

² 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25; para 17.

³ *Road Accident Fund v Legal Practice Council and Others* (58145/2020) [2021] ZAGPPHC 173; [2021] 2 All SA 886 (GP); 2021 (6) SA 230 (GP) (9 April 2021).

vehicle which the state uses to meet its constitutional duty in terms of s 12(1)(c) read with s 7(2) of the Constitution of the Republic of South Africa, 1996, to protect road users against the risk of infringement of the right to freedom and security of their persons.⁴

- [8] The matter came before the Court on the urgent roll on Thursday 28 September 2023. The Court's roll was full and the matter could only be argued after hours. Mr Madiba's counsel disputed urgency and raised four points in *limine* – each of which I will consider carefully. The case also engages the Court's obligations with regard to its officers and its duty to protect its own procedure. The matter has the distinguishing feature that the RAF is acting to protect its opponents in Court – the claimants – from their representative. The set of facts required calm reflection. The Court required time to consider and craft an appropriate order. The Court reserved judgment and granted an interim holding order on Sunday, 1 October 2023, to protect the *status quo* pending the writing of this judgment and the order provided for in this judgment.⁵ The Court now provides its reasons and a final order, as

⁴ Para 29.

⁵ The terms of the order were:

1. This matter is enrolled as an urgent application in terms of rule 6(12) of the Uniform Rules of Court.
2. The judgment, reasons and order(s) (including in relation to the question of joinder of the first and second respondents' purported clients) are hereby reserved.
3. Pending the judgment and reasons of the Court in this matter, it is ordered that the orders set out below shall operate with immediate effect upon the granting of this court order:
4. The first and second respondents are interdicted from executing (and issuing instructions to the Sheriff to do so) all present and future writs of execution against the applicant, including (but not limited to) the following matters:
 - 4.1 Virnolia Ramogohlo Pasha v RAF under case number: 1700/2020;
 - 4.2 Prudence Tshiamo Ketsi v RAF under case number 83684/2018;
 - 4.3 Kgaogelo Mercy Sehlako v RAF under case number 1697/2020;
 - 4.4 Naked Thomas Moitsi v RAF under case number: 5079/2019;
 - 4.5 Gloria Moloko Matlala v RAF under case number: 4759/2019;
 - 4.6 Johanna Raisebe Kgodumo case number: 2672/2019; and
 - 4.7 Simpyane Phineas Kgole v RAF under case number 4658/2019.
5. The third respondent is interdicted and restrained from removing the applicant's movable property or selling the applicant's movable property pursuant to any writ of execution issued, or which may be issued in future, at the instance of the first and second respondents against the applicant.

foreshadowed in its order of 1 October 2023, in relation to Part A of this matter.

- [9] The context within which the matter must be considered appears from the pleaded case. I will spend some time providing these details before addressing the requirements for the relief sought by the RAF.

The pleaded case

- [10] The RAF brings the application in terms of section 38(a) of the Constitution, in its own interest as custodian of public funds and in the proper exercise of its statutory functions. The RAF also brings the application under section 38(d) of the Constitution in the public's interest. The RAF contends that the public interest is engaged in the matter as the application seeks to guard against the abuse of funds obtained from the fuel levy intended for the social protection of victims of motor accidents.

The RAF's efforts to halt writs issued by Mr Madiba and his firm

- [11] The RAF has had to approach the Court on several occasions to halt the execution of writs. The RAF has presented the Court with six rescission applications, four court orders interdicting Mr Madiba from executing on writs and six applications to stay, launched in the past year. These includes the following six examples:
- a) One, the matter of Kgaogelo Mercy Sehlako// RAF (1697/2020). In this matter, the RAF issued a rescission application against the order granted in this matter and the rescission application is enrolled for a hearing on 8 May 2024. The order is for R 1.6 million.
 - b) Two, the matter of Nakedi Thomas Moitsi//RAF (5079/2019). On 26 July 2022, Bam J ordered a stay of execution in relation to a previous sale. The RAF issued a rescission application, which was enrolled for hearing on 29 August 2023 and was

6. The first and second respondents, jointly and severally, are directed to pay the costs of this application on an attorney and own client scale, including the costs of two counsel.

postponed on the day as it became opposed. It is yet to be heard. The order is for R 3.4 million.

- c) Three, the matter of Johanna Raisibe Kgodumo//RAF (2672/2019). The RAF has issued a rescission application and the application is enrolled for hearing on 22 May 2024. The amount involved is R 2.6 million.
- d) Four, the matter of Simpyane Phineas Kgole//RAF (4658/2019), in which an order interdicting a previous sale in execution, was granted by this Court on 26 July 2022. In addition, the RAF has issued a rescission application in this matter which is enrolled for hearing on 20 May 2024. The matter involves a judgment debt of R 6.4 million.
- e) Five, the matter of Gloria Moloko Matlala//RAF (4759/2019) in which the RAF instituted an application to stay the execution of the warrant of execution pending a rescission application.
- f) Six, the matter of Prudence Tshiamo Ketsi//RAF (83684/2018), in which Lenyai J granted an order interdicting the sale in execution scheduled for 25 July 2023.

[12] The RAF requests the Court to suspend the operation of all writs issued at Mr Madiba and his firms' instance, not only because of the pending rescission applications but also because of its general concerns regarding paying public funds over to Mr Madiba. The RAF has provided the Court with what it calls five red flags that underpin its concerns.

The red flags

[13] First, the RAF has pleaded that it is in possession of witness statements, under oath, from (a) claimants who were represented by the first and second respondents, (b) claimants that the first and second respondents purported to represent; and (c) employees of the RAF. The witness statements contain allegations that once the RAF had paid their claims through Mr Madiba's firm, some of Mr Madiba's clients did not receive the amounts they were supposed to receive. In addition, there is an allegation that Mr Madiba attempted to bribe an employee of the RAF and then, threatened when the employee would not to change a particular report of one of Mr Madiba's clients. Mr Madiba has referred to this complaint as the basis of a

defamation claim he has lodged against the RAF and attached the particulars of claim repeating this allegation.

- [14] Second, the RAF has laid 15 charges against Mr Madiba with the South African Police Service ("SAPS") for, among other things, forgery, and impersonation of an attorney. Those cases are still pending and remain under investigation.
- [15] Third, the LPC resolved, in July 2023, to bring proceedings against Mr Madiba to have his name struck off the roll of attorneys. The LPC has prepared such an application which, once it is deposed to, will be issued against the first respondent. The Court has a letter from the LPC's attorneys indicating that it is awaiting a signature to the founding affidavit and will then launch the proceedings. There is an imminent application from the LPC to suspend/strike Mr Madiba from the roll of attorneys.
- [16] Fourth, is the final report by the RAF's external investigations, "Report On Impersonation by Ntshosa Madiba". The investigation forms part of the RAF's measures to detect, prevent and report irregular claims, as well as cases where there is potential corruption and fraudulent and unlawful conduct – both on the part of the RAF's officials and external stakeholders (or both acting jointly). The report makes the factual finding that Mr Madiba signed powers of attorney/obtained mandates from clients in seven claims prior to being admitted as an attorney and prior to his firm being registered with the LPC. Mr Madiba's firm was registered on 6 August 2018, and he was admitted as an attorney on 24 July 2018. The Court has external confirmation of these dates from the LPC's records.⁶ The conclusion reached in the report is that:

⁶ The specifics of these are:

- a) Link number 4142059 with a special power of attorney signed by Mr Madiba on 12 May 2017.
- b) Link number 3631449 with Mr Madiba's mandate dated 22 May 2017.
- c) Link number 2987850 with Mr Madiba's mandate signed on 17 March 2017.
- d) Link number 4010567 with Mr Madiba's special power of attorney signed on 22 April 2017.
- e) Link number 4143925 with Mr Madiba's special power of attorney signed on 12 May 2017.
- f) Link number 4580246 with Mr Madiba's special power of attorney signed on 20 November 2017.
- g) Link number 4279780 with Mr Madiba's special power of attorney signed on 20 August 2017.

“Mr Madiba received mandates from the claimants before he was admitted as an attorney and lodged claims against the RAF and therefore impersonated an attorney (fraud by misrepresenting to RAF and client that he was admitted attorney) in contravention of the Legal Practice Act.”

- [17] The RAF’s fifth red flag is that the signature page of a valid offer in one letter was attached to three other offers, creating a false settlement offer. This red flag is set out in detail in a letter with attached affidavits from Hammann Moosa Inc. I will spend some time setting out the contents of this letter and its annexures.
- [18] The letter is authored by Mr C Strydom to Ms TJ Chikana, a Road Accident Fund Investigator. Mr Strydom writes that Hammann Moosa represented the RAF in litigation against Mr Madiba. In this litigation, the RAF (as the client) sent Hamman Moosa Inc. an offer of settlement in the matter of Lizzy Mapaila//RAF with case number 453/2017. The settlement offer in 453/2017 is therefore a valid settlement offer. Its last page contains the signature of an attorney of Hamman Moosa. The last page contains no terms of the settlement and only the signature of the attorney on the matter, Mr Radzuma.
- [19] However, the last page of this valid offer (containing Mr Radzuma’s signature) was used in three other matters. In other words, the last page of the valid offer for settlement in 453/2017 was attached to three other “settlement” offers from Hamman Moosa made to Mr Madiba’s clients. Hamman Moosa denies that it ever received a settlement instruction from the RAF in these three matters and never presented such a settlement offer to Mr Madiba. The three matters are set out in detail in the letter.
- [20] The first is dated September 2020, has case number 461/2017 and involves Ramaesele Daphney Khuto//RAF. Mr Strydom explains that -

“It is confirmed that during September 2020 we were approached by Marloe from the RAF regarding an offer and settlement made. The enquiry related to whether our firm received the offer of R 4 823 894.00 from the RAF and relayed same by way of an offer of settlement to the plaintiff’s Attorneys, Nthosa Madiba Attorneys. We perused the file and found that we did not receive any offer from the RAF and also did not send any offer to the plaintiff’s Attorneys and consequently responded to the

RAF with an affidavit by the attorney who attended to the matter at the time the so-called offer was made. It seems that the last page of the offer that we made on another matter were attached to the offer in this matter and served and filed.”

[21] The second relates to a query of April 2021 with case number 452/2017 and Raesetja Octavia Madubanya//RAF:

“During April 2021 we received a query from Tlou for another matter, with similar circumstances. We perused our file contents and found that we have no record of any offer received from the RAF, neither did we have any offer on the file which was relayed to the Plaintiff Attorney, Nthosa Madiba Attorneys.”

[22] After these two matters were reported to Hamman Moosa, it proceeded with an internal investigation and searched its database for all matters wherein Nthosa Madiba Attorneys was acting as attorneys for the plaintiff. During this investigation, Hamman Moosa Inc. discovered a third matter with case number 3229/2016 in the matter of Zandile Nomhle Skhosana//RAF:

“We perused our file contents and found that there was an acceptance of an offer on our file served by [Nthosa Madiba Attorneys] but have had no record of an offer received from the RAF or any offer that was relayed to these attorneys via our offices. We proceeded to request our correspondent attorney to check on the court file and obtain a copy of the offer of settlement, if same was on the file. Our correspondent attorney provided us with a copy of the offer uplifted from the court file and we found that the offer of settlement was the same as per [the two other matters] above. The last page of the offer on [453/2017] was attached to the offer of matter [3229] and then filed at court”.

[23] The conclusion reached is that:

“The only legitimate offer was received from the RAF and made by our firm to Nthosa Madiba Attorneys was on matter [453/2017]. Take note that the offers [in the other three matters] were not done by our firm.”

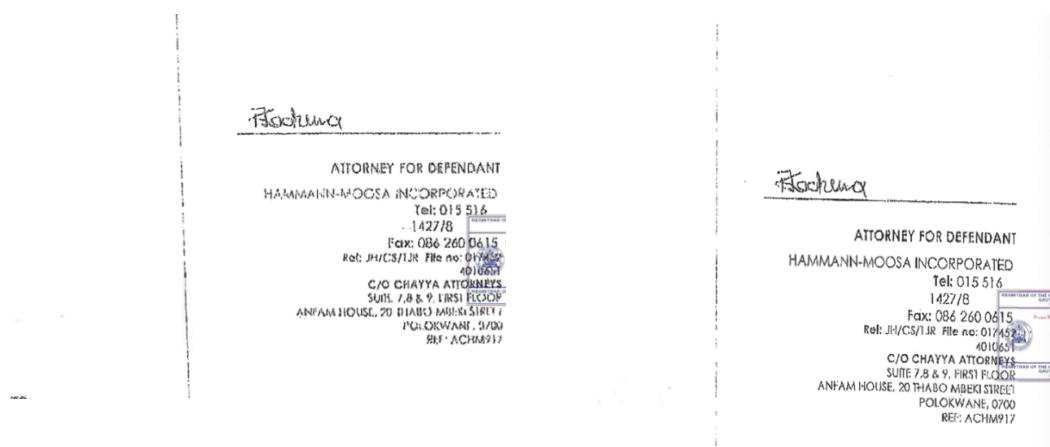
[24] Attached to the letter is an affidavit from the candidate attorney, who had been working on the matter:

"I confirm that no offer was made to the plaintiff's attorneys and I truly believe that the offer of settlement dated 18 March 2020 has been forged."

[25] The affidavit states that Nthosa Madiba Attorneys was the plaintiff's attorney in two matters, case number 453/2017 and 461/2017. The affidavit reads further:

"It seems the last page of the offer of settlement for case no: 453/2017 which was signed by Mr Radzuma, was attached on the forged offer for case no: 461/2017."

[26] The deponent then attaches the offers of settlement in both matters. It is clear that the last page, with the signatures ostensibly from the RAF's attorneys, is identical. The photo below on the left is the signature page in the original valid offer 453/2017, and the one on the right is attached to the offer of 461/2017.



[27] They are clearly identical and even have the same file and reference numbers. The only difference is the stamp which appears on the documents. The page on the right, alarmingly, was attached to a false settlement agreement in matter 461/2017 for an amount of R 4 823 894.00.

[28] The letter from Hamman Moosa also has an attachment in the form of a second affidavit deposited by the attorney whose signature appears on the valid offer - with case number 453/2017. The attorney, Mr Radzuma, states that –

"The said offer was sent via email. I wish to indicate that on this matter, the offer sent was a valid offer from the RAF.

During the course of last year (2020) I was made aware of a fraudulent offer. ... I then realised that the offer was forged and that the person who formed the offer had attached the second page from the matter of Lizzy Mapaila. I wish to indicate that

the second page on the matter of Lizzy Mapaila is exactly the same as the second page on the matter of Ramasele Dapheny Khuto....

I wish to indicate that I did not make an offer on the matter of Ramaesele Daphney Khuto. I verily believe that the offer was forged. Again during the course of a year (2020), I was also made aware of the notice of acceptance of settlement on the matter of Raesetja Octovia Madubanya. I was surprised to see the acceptance of the offer on the matter of Rasetja since we did not prepare an offer on this matter.

I wish to indicate further that whatever that was done amounted to forgery or alteration of documents.”

[29] Mr Radzuma states, under oath, that he did not sign the three subsequent “settlement offers” and that his signature was attached – without his knowledge - to the three subsequent settlement agreements presented to Court by Mr Madiba’s firm.

[30] The RAF points to these red flags and asks the Court to halt the execution of the writs until the LPC either removes him from the roll, or the Court directs that the LPC launch an application to place Mr Madiba under curatorship.

Mr Madiba’s response

[31] Mr Madiba’s answering affidavit states that the “entire founding affidavit is riddled with falsehoods, defamatory statements, vexatious material, scandalous material, irrelevant considerations which [are] ultimately designed to impute improper conduct on my part without any good faith basis for the allegations made by the RAF”.

[32] Mr Madiba complains that the case made out against him lacks a factual foundation and that the RAF has not provided this Court with evidence that the seven writs at play in this matter suffer a defect and that the RAF has sought to paint him, unjustifiably so, as an unscrupulous lawyer. Mr Madiba pleads that the LPC has not called him in for a disciplinary hearing and that the SAPS have not questioned him in relation to the charges. In argument, this position was presented in stronger terms: the submission was that this Court must not interfere with the investigations and jurisdiction of the LPC and the SAPS.

- [33] I carefully read and re-read Mr Madiba's answering affidavit and the annexures attached. Mr Madiba does not provide any allegation that addresses the concerns raised by the five red flags and the RAF's concerns that these writs, or any others in Mr Madiba's possession, are riddled with the same irregularities raised by the five red flags.
- [34] Mr Madiba fails, in his 70-page affidavit, to deal with the five red flags and the facts that underpin these red flags. Mr Madiba does not address the contents of the letter from Hammann Moosa or the FID's investigation. In fact, in responding to the allegation that he accepted instructions in 2016 and 2017 – prior to his enrolment as an attorney, Mr Madiba refers to the fact that he had accepted work as an advocate sometime in 2012. This is not the relevant period and leaves the sting of the allegations unanswered.
- [35] Mr Madiba's legal representatives argued that "valid offers of settlement were made to the respondents as far back as early January 2022." If these orders were underpinned by offers of settlement, it would have been easy for Mr Madiba to attach the settlement offers from the RAF to his papers. He, however, did not do so and did not more than present as a conclusion the allegation that the orders were underpinned by settlement agreements.
- [36] In addition to complaining that the RAF has a "vendetta" against him, Mr Madiba challenged the urgency of the matter and raised four points in *limine*. The points are authority, non-joinder, jurisdiction and non-compliance with Rule 35(12).
- [37] I will deal with the issue of urgency at the end of this judgment and show the careful consideration given to Mr Madiba's points in *limine* under dedicated headings. The central controversy in this matter, however, is whether the requirements for a stay and an interdict have been met.

Requirements for a stay and an interdict

- [38] Our Courts have, generally accepted the requirements for an interim interdict to guide the application of the Court's discretion under Rule 45A. ²⁸ As the RAF has sought a stay and an interim interdict, substantially, the Court has to determine whether the RAF has met the requirements for an interim interdict.

Prima facie right

[39] The RAF has a *prima facie* right to protect, as a custodian, public funds from being misappropriated. The RAF is not only a bearer of a right in this regard but also has a public obligation to protect funds from being spent fruitlessly, irregularly or wastefully. The RAF's obligation includes a duty to exercise utmost care to ensure reasonable protection of its assets and to act in the best interests of the RAF, take effective and appropriate measures to prevent irregular expenditure, safeguard the RAF's assets and determine material risks which the entity may be exposed to.

[40] The RAF also has a duty to fulfil its constitutional obligations. In *Law Society of South Africa and Others v Minister for Transport and Another*⁷ Moseneke DCJ said that:

“urgent steps must be taken to make the Fund sustainable so that it can fulfil its constitutional obligations to provide social security and access to healthcare services”; and that it is a 'legitimate government purpose to make the Fund financially viable and its compensation scheme equitable’. The RAF has a general and constitutional duty and right to protect claims from abuse.

⁷ *Supra*. In *Gois t/a Shakespeare's Pub v Van Zyl and others* 2011 (1) SA 148 (CC) ,our courts have leaned on the requirements for an interim interdict to determine whether it is fit to grant a stay:

“(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

(b) The Court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right but attempting to avert injustice.

(c) The Court must be satisfied that:

(i) the applicant has well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject matter of an ongoing dispute between the parties.

(e) The Court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute.”

[41] Mr Madiba has not denied, with any particularity, the factual basis on which the RAF relies for its *prima facie* right. Mr Madiba contended that the RAF is seeking to halt the execution of orders in which it has adduced no evidence of impropriety. Mr Madiba contends that the RAF cannot paint these writs with the same paint as those in the FID report and the Hamman Moosa letter. Of course, to paint all instances with the same brush is at odds with our legal system, which requires that a cause of action and a case be made out in order to obtain specific relief. However, the RAF has done more than make generalised allegations against Mr Madiba. The RAF has indicated it seeks to rescind these orders, and it has concerns regarding the payment of these writs pending an application by the LPC, premised on serious allegations of impropriety.

[42] The RAF has established it has a *prima facie* right.

Reasonable apprehension of irreparable harm

[43] The irreparable harm to be suffered by the RAF is that its movable assets are those that the RAF relies on to carry out its day-to-day statutory duties. If those assets are sold in execution, the RAF will not be able to administer or perform its functions, which serve a critical aspect of those members of the community who are unfortunate enough to be involved in road accidents in the country. The assets are likely to be sold for an insignificant value, and the RAF will have to pay the shortfall. The RAF will have to incur additional expenses of purchasing new assets to replace those sold in execution.

[44] The RAF also asks the Court to weigh its historical and ongoing financial woes. Central to correcting this situation is the RAF's implementation of measures to detect and prevent payment of claims which do not fall within the ambit of the RAF Act and to curb the abuse of the fund and its limited resources.

[45] In addition, the RAF has a reasonable apprehension that Mr Madiba should not be entrusted with the administration of the compensation to be paid to those persons whom Mr Madiba claims to represent in matters against the RAF. The RAF also has a reasonable apprehension that the orders sought to be executed by Mr Madiba,

generally against the RAF, were not validly obtained and that Mr Madiba will not pay the claimants the amounts due to those claimants from the RAF.

[46] The RAF is concerned about the real risk that if the RAF pays the funds to Mr Madiba, those funds may be misappropriated. If so, there is no guarantee of a reimbursement. The RAF has a reasonable apprehension of harm if the stay is not granted.

[47] It weighs with the Court that Mr Madiba has taken no steps to allay this apprehension of harm. Mr Madiba has made allegations concerning bad blood between him and the RAF but has not sought to address or displace any of the RAF's allegations. Mr Madiba has pleaded a bare denial in relation to the facts pleaded by the RAF.

[48] Mr Madiba has disputed the authenticity of the letter from the LPC indicating it has resolved to launch an application to strike Mr Madiba. Yet, he has not provided the Court with any information that the allegations on which the RAF leans is false. Mr Madiba has stated that he has not been called in for a disciplinary hearing by the LPC or been questioned by SAPS, but has not presented any proof that is of comfort to the Court.

[49] I asked Mr Madiba's counsel where these serious allegations have been dealt with. The response was that Mr Madiba was awaiting the outcome of a Rule 35(12) notice in relation to one aspect of the evidence and that the substantive response to the allegations were the following paragraphs in the answering affidavit -

“20. Firstly, it is demonstrable that the RAF is seeking to suspend the execution of orders listed in the notice of motion and it does this purely on manufactured evidence, scandalous statements not attached to the founding papers, speculations and inadmissible evidence even in motion proceedings.

21. Secondly it doesn't appear that the Road Accident Fund refuses to pay these claimants except to say that I should not be the attorney who is receiving this payment on behalf of clients I have represented, and once again it predicates this request on defamatory statements, scandalous material and absolutely nothing of substance.

22. Finally the Road Accident Fund suggest that I should be interdicted from selling the assets of the Road Accident Fund to satisfy the court orders my client obtained validly without any question.”

[50] These paragraphs do not respond substantially to the allegations made against Mr Madiba.

[51] Mr Madiba has contended that it is unlikely that the seven writs referred to specifically by the RAF will, if executed, hamper the RAF's functions. This is premised on a misunderstanding of the RAF's claim. The RAF seeks to prevent Mr Madiba from executing on all writs, inclusive of the seven identified by the RAF. Mr Madiba has opposed the RAF's allegations that its functions will be hampered based on the misunderstanding that it seeks to only stop the seven writs in Mr Madiba's possession – rather than all the writs he may wish to execute on against the RAF. In any event, Mr Madiba's opposition on this basis only goes to one of the aspects of the harm the RAF has pleaded, and leaves unchallenged the RAF's apprehension that harm will befall the public and possibly Mr Madiba's clients themselves.

[52] The RAF has shown, largely on an uncontested basis, a reasonable apprehension of harm in the event the relief is not granted.

Balance of convenience

[53] The RAF contends that the balance of convenience favours the RAF, as the inconvenience it and the public stand to suffer is the possible payment of illegitimate claims with no redress at a later stage.

[54] The Court must consider the inconvenience to Mr Madiba. It weighs with the Court that the effect of the relief sought by the RAF means that there is an interference with Mr Madiba's ability to earn a living and apply his trade. Mr Madiba has the constitutional right to trade and to earn a living – as a component of his right to dignity.⁸ This must be balanced against the RAF's inconvenience of possibly paying out funds without a legal basis to do so and without any assurance that those funds will reach the claimants.

⁸ *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003).

[55] I find that the balance of convenience favours the RAF.

Alternative remedy

[56] There is no alternative remedy available to the RAF to prevent the execution of the writs. The RAF had invited Mr Madiba to agree to an undertaking to withdraw the writs and warrants of execution and to undertake not to issue further process pending the outcome of part B. No such undertaking was forthcoming. There is no remedy to undo an illegitimate payment made to Mr Madiba. It is unlikely, in light of the amounts involved, that the RAF will be able to claim these monies back. In addition, there is no alternative remedy for the RAF's immediate issue which is its loss of its assets it requires to function.

[57] The Court concludes that the RAF has met the requirements for an interim interdict. The impact of this finding is that the RAF has made out its case for a stay and for an interim interdict. The extent of this interdict will be considered later in this judgment.

[58] Due to the serious allegations involved in this matter and the Court's intention to give a full set of reasons, the Court will consider the alternative approach to Rule 45 A, which is to consider the rule through the common law lens of injustice and inherent jurisdiction.

Injustice and inherent jurisdiction

[59] In *Van Rensburg NO and Another v Naidoo NO, Naidoo NO v Van Rensburg NO*⁹ the Court held as follows:

"Apart from the provisions of Uniform Rule 45A a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, not for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.

A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying causa of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a

⁹ [2010] ZASCA 68, [2010] 4 ALL SA 398 (SCA), 2011 (4) SA 149 (SCA).

general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action.”¹⁰

[60] *RAF v LPC*, affirmed that Superior Courts have an “inherent reservoir of power to regulate [their] procedures in the interests of the proper administration of justice.”¹¹ A distinction has been drawn between a court creating substantive law as opposed to procedural law:

“Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.”¹²

[61] In *RAF v LPC* – dealing with a stay of execution, the Court held that the core of the dispute before it “clearly concerns procedural law, not substantive law.”¹³ Of course, this power must be exercised judicially; in fact, it must not be done as a matter of course; it must be exercised sparingly and strong grounds would have to be advanced.¹⁴

[62] In *RAF v LPC*, the Court concluded –

¹⁰ *Id* at para 52.

¹¹ *Universal City Studios Incorporated and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) ([1986] 2 All SA 192; [1986] ZASCA 3).

¹² *RAF v LPC* para 30.

¹³ *RAF v LPC* para 30.

¹⁴ In *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 462H – 463B, Botha J said the following:

“I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms, and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.”

“The invocation of this court's common law inherent power to regulate procedure and of its inherent power in terms of s 173 to regulate its process, therefore, must be determined on the peculiar facts of this case.”¹⁵

[63] As the Court found exceptional circumstances existed, it was satisfied it could exercise this power.

[64] I have considered whether the facts of this case meet the threshold of exceptional circumstances. I consider the depth of evidence the RAF has provided against Mr Madiba as well as the fact that the most damning allegations originate from a third party supported by objective evidence. This evidence cried out for a response, yet none was forthcoming. Of course, these factors cannot be divorced from the very public attempt by the RAF to turn its ship around and the important role the Courts play in halting writs where there are serious allegations of impropriety. This Court need not make a finding on fraud and does not do so; that will be the work of another Court. However, it must consider the serious allegations that have been made at this stage.

[65] For all these reasons, the Court concludes that the RAF has shown exceptional circumstances. If the execution is not stayed, it is likely to have devastating consequences for the RAF as well as the people who rely on the efficient and proper administration of the fund and potentially the claimants in this matter. The Court accepts that real and substantial justice requires the court to halt the execution of the writs. If this is not done, there will be injustice.

[66] There is some debate¹⁶ whether importing the principles of an interim interdict is

¹⁵ *LPC* above, para 35.

¹⁶ See, for example, *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) the Court held that Rule 45A of the Uniform Rules of Court, in terms of which a Court ‘may suspend the execution of any order for such period as it may deem fit’, affords the Court a discretion of the widest kind and imposes no procedural or other limitations on the power it confers. Among the grounds upon which a Court may exercise its discretion are that the *causa* of a judgment is being impugned or that execution of the judgment is being sought for improper reasons. The Court’s discretion under Rule 45A cannot, however, be limited by postulating that it can only be exercised in such circumstances. (At 301B - C/D.) The Courts will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or where injustice would otherwise be done. (At 304H - H/I.):

appropriate or, rather, whether it is a discretion in the broadest sense that is being exercised under Rule 45A.¹⁷ I do not have to resolve this debate, as the RAF has made a case under either approach. In this case, the RAF's factual foundation is so strong and the interests it seeks deeply public that it meets both approaches.

[67] Before considering the appropriate remedy, I set out the basis on which I do not uphold Mr Madiba's points in *limine* – save for the issue of joinder.

Mr Madiba's points in *limine*

Rule 7

[68] Mr Madiba disputed the deponent of the RAF's authority to depose to the affidavit on behalf of the RAF. Mr Madiba raised this objection in the form of a Rule 7 notice. The RAF, in its replying affidavit, provided a resolution from the RAF authorising its deponent, Mr Koko, to bring the application. For good measure, the RAF also provided proof of confirmation that Malatji & Co were appointed to act on behalf of

"The analogy of interim interdict does not appear to be entirely appropriate in the circumstances of this matter. For one thing, the applicant is not asserting a right in the strict sense but a discretionary indulgence based on the apprehension of injustice.

It seems to me in a matter such as the present that at the heart of the inquiry relative to the exercise of the Court's discretion is whether it has been shown by the applicant that there is a well-grounded apprehension of execution of the order taking place at the instance of the respondent and of injustice being done to the applicant by way of irreparable harm being caused to the applicant if execution were not suspended."

¹⁷ See *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another* and *A Similar Matter* 2022 (1) SA 162 (GJ) which held that Rule 45A of the Uniform Rules of Court, in terms of which a Court 'may suspend the execution of any order for such period as it may deem fit', affords the Court a discretion of the widest kind and imposes no procedural or other limitations on the power it confers. Among the grounds upon which a Court may exercise its discretion are that the *causa* of a judgment is being impugned or that execution of the judgment is being sought for improper reasons. The Court's discretion under Rule 45A cannot, however, be limited by postulating that it can only be exercised in such circumstances. (At 301B - C/D.) The Courts will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or where injustice would otherwise be done. (At 304H - H/I.) In exceptional circumstances a residual equitable discretion to stay execution could be exercised to prevent an injustice, even where a litigant had an enforceable judgment and was entitled to payment.

the RAF. The point was then not persisted in Mr Madiba's written argument or during oral argument.

Joinder

[69] Mr Madiba raises a point of material non-joinder. Mr Madiba contends that the respondents cited in this application have been cited in their capacity as legal representatives of the judgment creditors. However, ultimately, the relief sought prejudices the judgment creditors who have been waiting for the RAF to compensate them.

[70] The RAF submitted, with some nuance, that the relief being sought is ultimately intended to ensure that these claimants get paid what is due to them. The RAF also indicates that the relief sought is only interim and that it will ensure the papers and order are served on Mr Madiba's clients which would permit them to anticipate the relief under Part A. In addition, if the RAF is unsuccessful in the rescission applications, the claimants will be able to seek payment from the RAF. The RAF also contends that the relief being sought is against the enforcement of the writs at the instance of Mr Madiba and not at the instance of the judgment creditors.

[71] The Court must determine whether Mr Madiba's clients have a direct and substantial interest in these proceedings.

[72] Mr Madiba's counsel cannot be faulted for the submission that no Court can make findings adverse to any person's interest without that person first being afforded an opportunity to be joined to the proceedings. Similarly, where a Court order cannot be sustained or put into effect without adversely affecting the rights of a third party, it is required that such third party be joined as an interested party.¹⁸ The Constitutional Court has held that a "direct and substantial interest" denotes "a right adversely affected or likely to be affected" in the subject matter of the litigation.¹⁹

¹⁸ *Morgan v Salisbury Municipality* 1935 AD 167, 171; *Collin v Toffie* 1944 AD 456; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 659, 660; *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) 774F-H; *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape* 2000 (4) SA 681 (C) 688- 690

¹⁹ *South African Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC) para 9.

- [73] The suspension of the operation of a writ will affect, at a minimum, the timeous payment of the claimants as judgment creditors. The order suspending the operation of the writs cannot be given effect without affecting the rights of the claimants. The Court upholds Mr Madiba's point that the claimants have a direct and substantial interest in the matter.
- [74] The Court must consider what relief flows from this finding. Mr Madiba's counsel submitted that the issue of non-joinder ought to result in the dismissal of the application. The Court engaged counsel on authority for this position and whether it would not be more appropriate to join them in the proceedings or grant a rule nisi that provides them with an opportunity to take part in the proceedings.
- [75] The case law indicates that in matters where non-joinder is established, the Court retains discretion as to its consequence. Courts often adjourn the proceedings until such time as the interested parties have been joined.²⁰ Or courts have stood matters down to ascertain if the non-party would consent to be bound by the order.²¹
- [76] Mr Madiba's position that the application must be dismissed on the basis of non-joinder is not supported by the case law. The Court will, under the heading dealing with the appropriate remedy, provide for the interests of the claimants.

Jurisdiction

- [77] Mr Madiba contends that this Court has no jurisdiction to hear or adjudicate on this matter, as the court orders that underpin the writs were issued by the High Court in Polokwane. Therefore, contends Mr Madiba, it is that Division that enjoys exclusive jurisdiction.

²⁰ *Khumalo v Wilkins* 1972 (4) SA 470 (N); *Laerskool Gaffie Maree and Another v Member of the Executive Council for Education, Training, Arts and Culture, North Gate, and Others* 2003 (5) SA 367; *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd* (Basfour 130) (Pty) Ltd, (third party) 2002 (5) SA 101 (W); *Pretorius v Slabbert* 2000 (4) SA 935 (SCA); *Harding v Basson and Another* 1995 (4) SA 499 (C); *Amalgamated Engineering Union v Minister of Landbou* 1949 (3) SA 637 (AD).

²¹ *Amalgamated Engineering Union v Minister of Landbou* 1949 (3) SA 637 (AD) at 663.

- [78] Mr Madiba's counsel drew the Court's attention to *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* ("Thobejane")²² for authority that section 173 of the Constitution, does not create a free-for-all to approach the High Court with whatever disputes may fall within its territorial jurisdiction without regard to what must be established for the Court to grant the relief sought.
- [79] *Thobejane* dealt with the issue of whether a High Court may properly refuse to hear a matter over which it has jurisdiction where another court has concurrent jurisdiction in either of two circumstances: when a High Court and a Magistrates' Court both have jurisdiction in respect of the same proceedings and when the main seat of a Division of a High Court and a local seat both have jurisdiction in respect of the same proceedings. The case is not analogous.
- [80] Closer to the facts of this case is the Full Bench decision in *RAF v LPC*²³, where the Court considered the issue of jurisdiction. The issue of the Court's jurisdiction arose in similar circumstances as the writs - which were the subject of the litigation - were issued in various divisions, yet the suspension application was sought in this Court. I draw extensively from the approach and reasoning of this decision to consider Mr Madiba's complaint regarding jurisdiction.
- [81] The Full Bench held that it is empowered by the *causae continentia* principle (the doctrine of cohesion of a cause of action). Where one Court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The Court cited the reasoning applied in *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*²⁴, where the location of the object of contractual performance (a bridge between two provinces) within the jurisdiction of one Court gave that court jurisdiction over the whole cause of action. The *causae continentia* principle avoids a multiplicity of proceedings and the

²² (38/2019; 47/2019; 999/2019) [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (25 June 2021).

²³ 2021 (6) SA 230 (GP).

²⁴ 1962 (4) SA 326 (A).

possibility of conflicting judgments on the same cause and allows for a more convenient disposition of its cases.

[82] The *causea continentia* rule is now enshrined in section 21(2) of the Superior Courts Act 10 of 2013. In *RAF v LPC*, the Court held it did not matter whether the *causea continentia* rule applied as section 21(2) applied and that –

“This Court has jurisdiction to entertain this application in respect of the respondents and thousands of interested parties residing in its area of jurisdiction, which is not at issue, but also in respect of the second, and eighth to twelfth respondents and the thousands of other interested parties residing within the areas of jurisdiction of other divisions. Also, regarding the question of convenience, this application avoids a multiplicity of applications, along with the additional costs and the risk of discordant findings.”²⁵

[83] I conclude, based on the reasoning in *RAF v LPC*, that this Court, similarly has jurisdiction, albeit under section 21(2) of the Superior Courts Act or in terms of the *causae continentia* principle.

[84] There is another basis on which the Court concludes it has jurisdiction to hear this matter. The Court notes that this is not the first time Mr Madiba has sought to raise the issue of jurisdiction in response to the RAF seeking to stay the execution of writs sought at his instance. In *Road Accident Fund v Nthosa Madiba Incorporated and Others*²⁶, decided in April 2022 (“*Madiba 2022*”), the Court dismissed the jurisdiction challenge.

[85] The Court in *Madiba 2022* applied *Zokufa v Compusca Credit Bureau*²⁷, where Alkema J held that “a court will have jurisdiction to grant an interdict if the jurisdictional connecting facts supporting the requirements for the interdict are present within its area of jurisdiction”. The Court also relied on *Mtshali v Mtambo and Another*²⁸, where the Court held:

²⁵ *Id* at para 17.

²⁶ (22264/2022) [2022] ZAGPPHC 314 (26 April 2022).

²⁷ 2011 (1) SA 272 (CMA paras [30] and [61-62]).

“There is obvious ample justification for the rule that an interdict founds jurisdiction and that no exception to the Court's jurisdiction can be taken in such proceedings. The interdict procedure is an extraordinary remedy devised for matters which do not admit of delay -*periculum in mora* and in which the power of the Court should be summarily interposed to prevent and, if necessary, to discontinue, the perpetration of unlawful acts forthwith and for good or pending action. The administration of justice would be seriously hampered, if not frustrated, if a Court does [not] have such power within its own area of jurisdiction.

... therefore, ... lack of jurisdiction cannot be interposed as an objection in proceedings for an interdict in which the recognised requirements for an interdict are satisfied by the facts within the territorial jurisdiction of the Court.”

[86] Based on this reasoning, the Court in *Madiba 2022* held that the Court had jurisdiction as the writs of execution are sought to be enforced in this Court's area of jurisdiction. The reasoning of the Court in *Madiba 2022* applies equally here.

[87] At its core, the test for jurisdiction is twofold: “A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit, but also for giving effect to its judgment”.²⁹ The RAF and Mr Madiba's principal place of business is in the jurisdiction of this Court. The writs are to be executed within the jurisdiction of this Court. On a pragmatic approach to the matter, this Court has jurisdiction.

[88] The Court concludes, based on the reasoning of the Full Bench, the approach in *Madiba 2022* and that the writs are to be executed in this Court's jurisdiction, that this Court does have jurisdiction to hear this matter.

Rule 35(12)

[89] The RAF has pleaded that it has in its possession witness statements that contain serious allegations regarding Mr Madiba. These relate to the first red flag set out above. These allegations are that Mr Madiba is involved in the forgery of claimants'

²⁸ [1962] 2 All SA 457 (GW).

²⁹ *Steytler NO v Fitzgerald* 1911 AD 295 at 346.

signatures, the representation of claimants without those claimants' knowledge, and the altering of accident reports in order to lodge claims with the RAF.

[90] The RAF has pleaded that there have been instances in the past where Mr Madiba has intimidated witnesses. As a result of these instances of intimidation, the RAF has not attached the witness statements to these affidavits. For this reason, also, the RAF has not provided confirmatory affidavits.

[91] The RAF did tender to make these affidavits and statements available to the Court. In fact, the RAF indicates that it would have been ideal to enter into a confidentiality regime where the affidavits and statements could be shared with Mr Madiba's representatives under an agreement not to share them with Mr Madiba. However, as Mr Madiba's firm is representing itself in these proceedings, that regime was not available to the RAF. The RAF also tendered to have an official from the Forensic Investigation Division (FID) in Court to provide any evidence to the Court was necessary. The RAF contends that to the extent necessary, this issue can be dealt with under Part B of the matter.

[92] Mr Madiba pleaded a bare denial to these allegations and presented no alternative solution to the RAF's concerns. Mr Madiba filed a Rule 35(12) asking for the RAF to make available the documents referred to in the affidavit for inspection. Specifically, the documents referred to are the edited accident reports; the documents pertaining to the forged signatures; all statements made to the FID; statements made to the SAPS when the alleged cases were open, and statements made to the Legal Practice Council.

[93] During oral argument, the RAF's failure to respond to Rule 35(12) was raised as a point in *limine*. Mr Madiba's position, in a more strident tone, was that the Court could not hear the matter until the RAF had complied with the Rule 35(12) notice.

[94] The Court considers this point. Rule 35(12)(b) provides what should happen where a litigant does not comply with a Rule 35(12) notice. The rule provides:

“(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such

proceeding provided that any other party may use such document or tape recording.”

- [95] The RAF does not seek to rely on or use the document i.e. the actual witness statements. The RAF is, however, presenting the contents of such documents as hearsay evidence. Of course, the rule against hearsay evidence is not absolute, and it may be admitted in terms of section 1(c) of the Law of Evidence Amendment Act 45 of 1988. In particular, hearsay evidence may be admitted where it would be in the interest of justice to do so. One of the relevant factors in making such a determination is the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends. In this case, the reason why the hearsay evidence is sought to be admitted is because of allegations of intimidation and the fear of interfering with ongoing investigations by SAPS and the LPC. In addition, the rule regarding hearsay evidence is not applied as strictly in urgent matters as in matters that are heard in the ordinary course.
- [96] In any event, even if this evidence were to be disregarded entirely, it would only affect what has been referred to as the first red flag above. There remain four further red flags relied on by the RAF, as well as the fact that it has instituted six rescission applications that are currently pending and that it has successfully obtained a least five stays of execution against Mr Madiba.
- [97] In circumstances where there are serious allegations supported by objective evidence in the form of a FID report and a letter from the external third party Hamman Moosa, the Court is disinclined to refuse to hear an urgent matter because one party has not replied to a Rule 35(12) on the basis that it fears its witnesses may be intimidated.
- [98] The Court dismisses Mr Madiba’s argument that the RAF’s failure to comply with the Rule 35(12) notice prevents this Court from hearing the matter.
- [99] As the Court has considered and rejected Mr Madiba’s technical defences, it sets out its findings on urgency.

Urgency

[100] The Sheriff advised the RAF's attorneys on Monday, 4 September 2023, that she had been instructed by Mr Madiba to remove the RAF's assets on the afternoon of 4 September 2023 to make good on the writs issued at the instance of Mr Madiba. The RAF launched the application on 4 September 2023 and afforded the respondents eight days to respond to the application. The matter was set down to be heard in the urgent court week of 19 September 2023. However, Mr Madiba filed his answering affidavit late, necessitating the removal of the matter from the urgent roll of 19 September 2023 and re-enrolling it for the week of 25 September 2023 after the RAF's replying affidavit was filed.

[101] The RAF's explanation for the urgent application is the imminent sale of its assets. Mr Madiba has not disputed this allegation.

[102] Mr Madiba contends that the RAF created its own urgency, as it has known about the judgments underpinning these writs for a considerable amount of time and has not acted until the Sheriff's indication of 4 September 2023. Mr Madiba's position is not supported by the facts. The RAF has launched and obtained applications to stay two of the writs and to rescission the judgments in five of the matters. The RAF has, therefore, challenged the validity of the majority of the judgments even prior to the notice of the sale in execution. However, the need to suspend the operation of the writs only became necessary in response to the Sheriff's indication that it would execute the writs.

[103] The RAF also has to satisfy the Court that it will not be able to obtain substantial redress in due course. The RAF is concerned that the victims may not receive the compensation they are entitled to. In addition, if the allegations against Mr Madiba are proven to be true or the relief granted in Part B – then it is unlikely the RAF will be able to obtain substantial redress in due course.

Appropriate relief

[104] The Court has found that the requirements for a stay and an interim interdict have been met. Our Courts have, on two occasions, suspended writs issued against the RAF by invoking section 173 of the Constitution. In *RAF v Sheriff Pretoria East*³⁰

Baqwa J held that the Court is empowered in terms of section 173 of the Constitution if it is in the interest of justice to do so.³¹ I have been informed that the judgment is currently under appeal, but the aspect I rely on has been approved by the Full Bench in *RAF v LPC*. In *RAF v LPC*, the issue was whether writs and attachments could be suspended. After considering all the evidence, the Court found that the requirements for an interdict had been satisfied, and it ordered the stay of the writ of attachment. The Court also held that section 173 of the Constitution permitted the stay of execution where real and substantial justice requires such a stay.

[105] The RAF places express reliance on *RAF v Sheriff of the East* for authority that the existence of a judgment does not necessarily compel the RAF to pay monies where there are *prima facie* irregularities. To hold otherwise would promote illegality, of which the judiciary cannot be part. It is also not in dispute that RAF is an organ of the state, established in terms of section 2 of the Act and that it has to adhere to the principles governing public administration under the Constitution, which requires in section 195(1) that "[e]fficient, economical and effective use of resources must be promoted."

[106] Of course, the context of these matters were different to the proceedings before this Court. This Court will not grant such a drastic remedy but will draw on this case law for authority that such relief is not unprecedented.

[107] The Court, however, has three matters which it must consider when tailoring the relief.

[108] The first is the issue of non-joinder. The Court, in this case, is in the curious position where the claimants' interests are allegedly not protected by their legal representative. On the contrary, their opposition, the RAF contends that the relief being sought will redound to their favour. The Court however does not have the information of these other claimants before it. The Court does not know how many

³⁰ *Road Accident Fund v Sheriff of the High Court, Pretoria East and Others* (028726/2022) [2023] ZAGPPHC 746 (28 August 2023).

³¹ *Id* at para 70.

other writs Mr Madiba has in his possession or what the claimants say of this position.

[109] The relief sought by the RAF is in effect a halt to Mr Madiba's ability to execute on the writs in his possession. The RAF asks this Court to do so by staying the execution of the writs. However, this would affect the claimants' rights to execute on writs which may or may not have been validly obtained. These claimants have not had a say in these proceedings. The Court would be slow to grant a final order against them in circumstances where they have not been notified or heard in relation to this matter. The Court's concern is that, amongst Mr Madiba's clients may be individuals who are in need of payments from the RAF to provide for their medical needs. The Court has to imagine this possibility, as Mr Madiba has not made any such allegations.

[110] However, the RAF tells this Court that amongst Mr Madiba's clients there are minors. The Court plays a special role in such circumstances. In order to cater for such events, the Court will provide in its order that any client of Mr Madiba affected by this order can approach the Court on notice.

[111] In addition, the Court will not suspend the operation of the writs in their entirety indefinitely, but only Mr Madiba's ability to execute on them. In this way, if there is a valid court order, the claimants can approach a different attorney to assist them. In this way, the Court will limit Mr Madiba's ability to execute on the orders and grant an interdict that prohibits Mr Madiba and his firm from executing on these writs.

[112] This will effectively provide the RAF with the relief it seeks – an order that limits Mr Madiba's involvement pending the LPC hearing or Part B of this matter - whilst permitting the claimants from seeking their relief through other attorneys. To prohibit the claimants from executing on the writs through assistance of another attorney would limit their section 34 rights and their right to an effective remedy. If amongst Mr Madiba's writs there are writs supported by legitimate orders, other attorneys can make good on those orders.

[113] In summary –

- a) nothing stops the judgment creditors from seeking to enforce their orders (save for those in respect of the first species of writs where rescission applications are pending); and
- b) any of those judgment creditors may anticipate the order or seek a reconsideration.

[114] Second, the impact on Mr Madiba's ability to earn a living. I acknowledge the relief granted will limit Mr Madiba's ability to practice as a lawyer. I however note that the common law, Rule 45A and section 173 of the Constitution permits this interference, and has been used historically to halt – temporarily – the execution of writs. The interference is limited both the extent and scope of this limitation. The interference is limited to only those writs against the RAF and only on an interim basis.

[115] Third, the Court has inherent jurisdiction, and in fact a duty, to make orders in relation to the conduct of its officers.³² The inherent jurisdiction has been recognised by the Legal Practice Act 24 of 2014, which provides in section 44 that –

“The provisions of this Act do not derogate in any way from the power of the 15 High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.”

[116] Inclusive in this power is to cause an enquiry to be made into the conduct of its practitioners. Under the common law the Court's powers were explained as follows in *Johannesburg Bar Council v Steyn*³³–

“The position is that a duty is vested in this Court to enquire, or to cause enquiry to be made, into the conduct of advocates who are officers of the Court and are entitled to practice before it, when facts are brought to its notice rendering an enquiry with the possibility of consequent disciplinary action, necessary in its opinion. The Court in performing its “duty in relation to the proper conduct of its officers” has historically sought assistance it deems most suitable in the discharge of this duty.”

[117] In *Wild v LPC*³⁴ a Full Bench held that –

³² *The South African Legal Practice Council v Teffo* (10991/21) [2022] ZAGPPHC 666 (16 September 2022) para 98.

³³ 1946 TPD 115 at 119.

“It therefore seems that the courts not only had a duty (and right) to enquire or to cause enquiry to be made into the conduct of advocates, but, as the courts had no machinery for the purpose of themselves conducting investigations, it was the prerogative of the courts to request a party (like the Attorney-General) who would be 'pre-eminently able to afford the court the maximum assistance' in the preparation of the case against an advocate as a respondent (*Steyn* supra [57] at 119 and 120). However, as the Attorney-General was not an official of the bar and he had no special knowledge of professional etiquette regarding members of the bar in private practice, the Society of Advocates of the division concerned, which was most intimately concerned with the practice of advocates, was later recognised as the proper body to initiate disciplinary proceedings and to bring applications to suspend or strike off the names of advocates. The role of the Society of Advocates was to render the necessary assistance to the court in performing its duty in relation to the proper conduct of its officers.”

[118] The Court held, in the context of the introduction of the Legal Practice Council Act, that the Court had retained its common law power to regulate its own process.³⁵ The RAF has sought the LPC's involvement in this matter. The Court notes the relief being sought in Part B relies heavily on the involvement of the LPC. The Court therefore will order the LPC to file a report on the developments in the LPC matter in these proceedings within 15 days of this order.

Costs

[119] This matter also raises the RAF's duty, as a custodian of public funds, to ensure that those funds are not wasted and that they are paid to the victims of road accidents. In addition, the RAF has a duty to protect its assets, which are threatened by the impending sale in execution at the instance of the first and second respondents, whose execution would result in the RAF's assets – crucial to its day-to-day functioning – being removed and sold. If that is done, on account of the havoc on its operations, the RAF will not be able to fulfil its statutory duties, and this will also prejudice other road accident victims seeking assistance from the RAF.

³⁴ *Wild v Legal Practice Council and Others* (31130/2019) [2023] ZAGPPHC 297 (24 April 2023) at 59.

³⁵ *Id* at paras 79 and 80.

[120] The RAF has acted in its own and the public interest. In addition, the RAF has been successful in the relief it seeks. Costs should follow the result. The RAF has requested the costs of two counsel. The matter is complicated and traversed previous court orders granted by three other judges, the outcome of a report and serious allegations. The use of two counsel is appropriate in these circumstances.

[121] The RAF has requested the Court considering granting punitive costs. The basis, is for this to show the court's displeasure in Mr Madiba's dealing with the matter. The request is considered in circumstances where rather than address serious allegations, Mr Madiba has raised several technical defences.

[122] In addition, Mr Madiba is an officer of the Court, and more is required from him. In *South African Legal Practice Council v Singh*³⁶ the Court held that principles relating to the conduct expected from legal practitioners are now trite and need only be referred to briefly. The Court expects from a legal practitioner *uberrima fides*, which is the highest possible degree of good faith in his or her dealings with clients. A legal practitioner, being a member of a respected and honourable profession, must display unquestionable integrity to society at large, to the profession and to the Court.³⁷ Mr Madiba has failed to meet this standard.

[123] Not only has Mr Madiba not substantively dealt with the allegations and has failed to meet its duties as a practitioner, Mr Madiba has challenged this Court's jurisdiction to hear this dispute. This challenge has been considered and dismissed by this Court in *Madiba 2022*. Mr Madiba did not bring this matter to the Court's attention, nor did it explain why the same point in *limine* was being raised again.

Order

³⁶ *South African Legal Practice Council v Singh* (26408/2021) [2021] ZAGPPHC 552 (18 August 2021) para 20.

³⁷ *Id* at 21.

[124] As a result, the following order is granted:

- a) This matter is enrolled as an urgent application in terms of rule 6(12) of the Uniform Rules of Court.
- b) Pending the outcome of Part B the first and second respondents are interdicted from executing (and issuing instructions to the Sheriff to do so) all present and future writs of execution against the applicant, including (but not limited to) the following matters:
 - i) Virnolia Ramogohlo Pasha v RAF under case number 1700/2020;
 - ii) Prudence Tshiamo Ketsi v RAF under case number 83684/2018;
 - iii) Kgaogelo Mercy Sehlako v RAF under case number 1697/2020;
 - iv) Nakedi Thomas Moitsi v RAF under case number 5079/2019;
 - v) Gloria Moloko Matlala v RAF under case number 4759/2019;
 - vi) Johanna Raisebe Kgodumo case number: 2672/2019; and
 - vii) Simpyane Phineas Kgole v RAF under case number 4658/2019
- c) Pending the outcome of Part B the third respondent is interdicted and restrained from removing the applicant's movable property or selling the applicant's movable property pursuant to any writ of execution issued, or which may be issued in future, at the instance of the first and second respondents against the applicant.
- d) The applicant is directed to serve this order and judgment on the fourth respondent.
- e) The fourth respondent is to file an affidavit/report within 15 days of this order setting out the development of the striking/suspension application.
- f) Any claimant against the applicant who is affected by this order may approach the Court on notice to vary or reconsider this order.
- g) The first and second respondents, jointly and severally, are directed to pay the costs of this application on an attorney and own client scale, including the costs of two counsel.



I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:

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KAR Thobakgale

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H Nkabinde

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Date of the hearing:

28 September 2023

Date of judgment:

18 October 2023