



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	YES
Circulate to Magistrates:	NO

Case No: **2473/2019**

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

MAHLAKODISANA CORNELIUS MOKOENA

1st Respondent

THE SHERIFF, PRETORIA EAST

2nd Respondent

In re:

MAHLAKODISANA CORNELIUS MOKOENA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: JP DAFFUE J

HEARD ON: 21 APRIL 2022

ORDER GRANTED ON: 21 APRIL 2022

These reasons were handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 12 July 2022.

REASONS

I INTRODUCTION

- [1] On 21 April 2022 I heard an application which was set down on the opposed roll by the first respondent. Having been informed by Mrs C Bornman who appeared on behalf of the Road Accident Fund ("RAF"), the applicant in the

application, that she did not hold any instructions at all, I excused her from further attendance for the reasons mentioned later herein. Having heard legal argument by Adv TC Maphelela on behalf of the first respondent, Mr MC Mokoena, the following orders were issued:

- "1. The application is dismissed with costs, such costs to be paid on an attorney and client scale.
2. Reasons to follow in due course."

These are my reasons. Insofar as I did not receive the benefit of argument on behalf of the RAF, I shall curtail my judgment.

II THE PARTIES

- [2] The applicant is the RAF, a juristic person established in terms of s 2(1) of the Road Accident Fund Act ("the RAF Act").¹
- [3] The first respondent is MC Mokoena a major male person, represented by Adv Maphelela, instructed by SB Seshibe Attorneys, c/o Matsepes Inc in Bloemfontein.
- [4] The second respondent is the Sheriff, Pretoria East, appointed in terms of s 2 of the Sheriff's Act.² The Sheriff did not oppose the application and played no role in the proceedings.

III THE RELIEF CLAIMED

- [5] The RAF claimed the following relief in its notice of motion:
 - "1. Suspending the operation and execution of the Warrant of Execution issued by this Honourable Court on 06 September 2021, pending the finalization of the rescission application to be instituted by the Applicant;
 2. The Applicant be directed to institute the rescission application within 10 days of this order.
 3. The Second Respondent is interdicted and restrained from proceeding with any further steps in execution against the Applicant.

¹ 56 of 1996

² 90 of 1987

4. The Respondents to pay the costs of this application, only in the event of opposition.”

IV THE DEFENCES RAISED

[6] The first respondent raised the following defences:

- 6.1 the RAF had an alternative remedy, bearing in mind the meeting that took place between representatives of the parties on 25 November 2021 and the undertaking that the matter would be discussed with RAF's Regional Manager where after they would revert to the first respondent's attorney before 2 December 2021 which they failed to do, but instead issued the present application whilst all along the RAF knew for months that they had to apply for rescission of judgment if they believed that they could make out a proper case for such relief;³
- 6.2 the RAF was fully aware of the trial dates, but failed to attend the hearing; and thereafter became aware of the judgment and order issued on 27 November 2020 as well as the amended court order of 4 February 2021, but used delaying tactics to avoid payment;⁴
- 6.3 the RAF is guilty of contempt of court for failing to pay in line with the judgment in *RAF v Legal Practice Council & others*⁵ whilst it did not seek condonation;⁶
- 6.4 the RAF, being fully aware of the trial dates, failed to attend and defend the matter without providing any reasons for its failure; furthermore, the RAF contradicted itself in that it appears from the founding affidavit that it is not only dissatisfied with the *quantum* awarded, but that it rejected the claim on the basis that the first respondent was the sole cause of the collision.⁷

³ Answering affidavit: para 4, pp 51 - 53

⁴ *Ibid*: para 5, pp 53/4

⁵ 2021 (6) SA 230 (GP)

⁶ *Ibid*: para 6, p 54 and further

⁷ *Ibid*: paras 7 – 21, pp 56 – 60 & numerous correspondence: “TC11” – “TC37”, pp 108 - 155

V THE HISTORY OF THE LITIGATION

[7] The following is a history of the litigation between the parties:

- 7.1 the first respondent, having been injured on 14 December 2018, lodged a claim for compensation with the RAF on 23 January 2019;
- 7.2 upon rejection of the claim summons was issued under case number 2473/2019 on 3 June 2019 to which the RAF pleaded, contesting the merits as well as the *quantum* of the claim;
- 7.3 on 21 September 2020 a pre-trial conference was held when the parties represented by Adv Boonzaaier (for the first respondent) and Mr Albert Cilliers (for RAF) confirmed that all relevant expert reports had been served and filed whereupon the matter was declared trial-ready;⁸
- 7.4 on 23 September 2020 a notice of set down for hearing on 27, 28 & 30 October 2020 was emailed to Mr Albert Cilliers and three other email addresses of the RAF⁹ as the mandate of Maduba Attorneys, the RAF's former attorneys, had been terminated;
- 7.5 on 27 October 2020 judgment was reserved and on 27 November 2020 judgment was apparently handed down - the written judgment is neither contained in the court file, nor published in Saflii – but the last page thereof depicting paragraph 31 is affixed to the file cover;
- 7.6 I accept that the evidence of the first respondent as plaintiff was tendered in respect of the merits of his claim and as a result the trial court held the RAF fully (100%) liable for any damages to be proven or agreed upon;

⁸ The minute prepared by me is attached as annexure TC6, pp 99 & 100

⁹ Annexures "TC1" – "TC3", pp 91 - 94

- 7.7 the trial court initially awarded amounts of R1 013 333.00 for loss of income and R600 000.00 for general damages and directed the RAF to furnish the usual undertaking in terms of s 17(4)(a) of the RAF Act and to pay costs, inclusive of the fees of expert witnesses;
- 7.8 *ex facie* the court file the trial judge amended the order on 7 December 2020 in terms of Rule 42(1)(b) as a “patent error” had occurred and consequently, another order dated 27 November 2020 was issued (without stipulating that it was an amended order) in terms whereof R2 744 532.00 was awarded for loss of income and R600 000.00 for general damages;¹⁰
- 7.9 communication between the parties followed and two further orders were issued dated 4 February 2021, apparently after discussions with the trial judge; the first order merely referring to an amendment of paragraph 1 of the previous order to substitute the amount awarded for loss of income with the amount of R4 574 222.00;¹¹
- 7.10 the second order dated 4 February 2021 – not indicating that it is an amended order - is a more detailed order and caters for the payment of loss of income in the amount of R4 574 220.00 and general damages in the amount of R600 00.00 together with all further orders initially issued on 27 November 2020;¹²
- 7.11 on 17 May 2021 the trial judge made a note in the file, indicating that the parties approached her and requested the orders of 27 November 2020 and 4 February 2021 to “be consolidated as RAF wishes to pay Plaintiff, but only if the court orders are consolidated.”
- 7.12 numerous emails and other communication followed since then between the parties and eventually a roundtable discussion took place on 25

¹⁰ Annexure “TC13”, pp 111/2

¹¹ Annexure “TC14”, p 113

¹² Annexure “RAF2” attached to the RAF’s founding affidavit, p 31

November 2021 during which meeting the first respondent's legal representative was requested to abandon the judgment and accept an apportionment on the merits which request was declined;¹³

- 7.13 the RAF launched the present application soon after the meeting and in terms of the notice of motion the application was to be heard on 20 January 2022, obviously on the assumption that it would not be opposed, but if the notice of motion is read in context, it is clear that time was allowed for opposition and filing of an answering affidavit beyond the aforesaid date;¹⁴
- 7.14 on 21 December 2021 a notice of opposition was sent to the RAF per email, but a hard copy of this document was only filed with the court on 19 January 2022 together with the answering affidavit;
- 7.15 the matter was not supposed to be enrolled, but the general office, being unaware of the notice of opposition sent by email to the RAF, placed it on the unopposed roll;
- 7.16 when the RAF discovered this, it filed a notice of withdrawal of the application without tendering costs, which turned out to be incorrect as it had no such intention at that stage, (a notice to remove the matter from the unopposed roll was supposed to be delivered);
- 7.17 the RAF recognised that it had filed an incorrect notice and consequently, a notice of removal of the roll was sent by email without a hard copy being filed with the court;
- 7.18 the matter, which was hereafter set down by the first respondent for hearing on 24 March 2022, was allocated to the trial judge who removed it from the roll at the request of the RAF, no order as to costs, as there

¹³ Answering affidavit, paras 34 & 35, p 64

¹⁴ Notice of motion, pp 4 -6

was no appearance on behalf of the first respondent when the matter was called;¹⁵

- 7.19 the RAF did not file a replying affidavit and although heads of argument were filed on behalf of the first respondent, no heads of argument were forthcoming from the RAF;
- 7.20 the first respondent, being dissatisfied with this state of affairs, set the matter down for hearing on 21 April 2022 on which date it was heard by me;
- 7.21 I, being unaware of the mistake pertaining to the withdrawal of the application instead of removal from the roll, pointed out at the onset to first respondent's counsel, Mr Maphelela, that I could not adjudicate the application as there was in fact no live application before the court, it having been withdrawn before the notice of opposition was filed and thus causing the matter to fall outside the ambit of Rule 41;
- 7.22 I let the matter stand down and requested Mr Maphelela to contact a representative of the RAF to ascertain the correct facts as well as the RAF's stance to the litigation;
- 7.23 Mrs Bornman arrived at court and confirmed that she held no instructions from the RAF to argue the application, but recorded that the RAF had decided not to proceed with the application as it intended to pay the first respondent what was due to him in accordance with the correct order; she pointed out that the RAF was in possession of two different orders for 27 November 2020 and two further different orders for 4 February 2021, and based on this confusion, the RAF did not know how to deal with the matter;

¹⁵ As confirmed by Mrs Bornman in court

7.24 Mr Maphellela confirmed that the registrar issued a writ of execution in accordance with the second order of 4 February 2021, to wit the document attached to the founding affidavit mentioned above;

7.25 bearing in mind what I have stated above, it is surprising that the RAF did not rely in its application on the confusion created by four different orders, but took a totally different stance as I shall explain hereunder.

VI THE RATIONALE FOR THE RELIEF SOUGHT

[8] The RAF relied on two statutory provisions for the relief sought, to wit rule 45A of the Uniform Rules of Court and s 173 of the Constitution.¹⁶ Rule 45A reads as follows:

“The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.”

Section 173 of the Constitution reads as follows:

“The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.”

[9] A writ of execution was served by the Sheriff, cited as the second respondent, on the RAF at its principal place of business in Pretoria. He received instructions thereafter from the first respondent’s attorney to remove the attached assets in order to proceed with an auction thereof. The sheriff’s return of service and notice of attachment are not in the court file. I accept, as stated by the RAF’s deponent, Me Lydia Mulaudzi, an Acting Senior Manager: Claims, that computers, laptop computers, desks and chairs were attached and if these attached assets were to be removed and eventually sold, it would be impossible for the RAF to continue with its daily business in order to comply with its statutory obligations.¹⁷

¹⁶ Act 108 of 1996

¹⁷ Founding affidavit: para 8, p 14

[10] The RAF in essence sought an *interim* order pending institution and finalisation of an application for rescission of the aforesaid judgment. The rescission application has not been issued and no doubt, as conveyed by Mrs Bornman, it is now evident that the RAF has no intention to do so.

[11] Although the RAF intended to launch an application for rescission of the judgment and the orders granted herein, not a single material averment has been recorded to indicate that the application for rescission has any merit. I shall explain when the evidence is evaluated hereunder.

VII EVALUATION OF THE EVIDENCE AND SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENT

[12] As mentioned, the RAF at long last decided not to proceed with its application to have the writ of execution set aside pending the institution and finalisation of an application for rescission of judgment, but contrary thereto, it failed to withdraw the application. Consequently, I am bound to consider the application based on the founding and answering affidavits, together with the submissions made on behalf of the first respondent.

[13] Initially, the RAF's deponent recorded that it intended to apply for rescission of the "quantum order".¹⁸ No material facts were placed before the court in order to consider whether there were any reasonable prospects of success in the intended application for rescission. Later on in the founding affidavit the deponent changed tack and challenged the judgment insofar as an order was granted against the RAF on the merits. In support of this allegation, reference was made to the accident report of the SAPS and the respective drivers' alleged statements, indicating that the first respondent lost control of his vehicle and inappropriately and negligently caused his vehicle to enter the insured driver's lane of traffic and as a result caused a collision. Consequently, the RAF rejected the claim as it could not attribute any negligence to the insured driver.¹⁹

¹⁸ Founding affidavit: para 5.2, p 11

¹⁹ *Ibid*: para 16, p 23/4

No confirmatory affidavits of the insured driver, SAPS officials, or eyewitnesses were attached to the founding affidavit, but more importantly, the RAF failed to explain why the relevant evidence was not tendered during the trial.

- [14] It is common cause that the RAF is in dire financial straits.²⁰ It is also flooded with numerous demands for payment following judgments in favour of thousands of claimants. *In casu*, the attorney for the first respondent attached to the papers a letter of demand on behalf of four of his clients. These claims range between as low as the first respondent's claim in the amount of R 5 174 220.00 to as high as R8 209 750.00.²¹ Bearing in mind my experience as a judge in this division as well as co-author of *Corbett & Honey: The Quantum of Damages in Bodily and Fatal Injury Cases*, I can safely say that awards in motor vehicle claims in accordance with the RAF Act have skyrocketed in recent years. Whereas in the past awards in excess of one million rand were exceptional, nowadays awards more often than not are in excess of a million rand. Having recognised the effect of inflation, it is not the purpose of this judgment to analyse the dominant reasons and/or to make any submissions in this regard, save to say that unless a total overhaul of the RAF Act and the management of claims under the Act are dealt with rather sooner than later, the system will soon collapse completely.²² I mentioned the increase in the average claim, but the increase in the number of claims is apparently beyond all expectations. Furthermore, a booming industry has developed: in the majority of cases in which I have been involved over the years, and especially more recently, five, six and as many as eight specialists are being instructed to file expert reports on *quantum* in any given case.

- [15] If the application was indeed withdrawn on 17 January 2022, the first respondent would not be entitled to the costs of the answering affidavit, the further attendances, the drafting of heads of argument and the attendance in the opposed motion court on 21 April 2022. Now that it has been established that the RAF never intended to withdraw the application at that stage, it is not

²⁰ *Ibid*: para 10, pp 15/16

²¹ Answering affidavit: annexure "TC33", pp 142 - 145

²² RAF's deponent hints in that direction: Founding affidavit, paras 6.1, 10, 11, 12, 18 & 19

necessary to consider ordering costs in favour of the first respondent until such time only.

[16] I am really perturbed with the manner in which the RAF approached the present litigation. If it had clear evidence in respect of the merits to counter the plaintiff's version, it was duty-bound to ensure that the merits were properly defended. It is unbelievable and totally unacceptable that it failed to present material evidence to the trial court. If it was really uncertain as to what amount or amounts were payable to the first respondent after it neglected to properly defend the claim, it would have been easy for it and the first respondent to approach the trial judge in order to get clarity. Having said this, I have to accept that the parties indeed approached the trial judge in chambers on 17 May 2021 for a so-called "consolidation" of the court orders. If the initial orders issued on 27 November 2020 are read with the order which the RAF attached to the founding affidavit – "RAF2" – there cannot be any doubt which of the two orders dated 4 February 2021 is correct. Court orders, as long as they stand, cannot be ignored. I refer in this regard to a recent judgment of the Supreme Court of Appeal that also dealt with the interpretation of court orders, relying on several other well-known judgments.²³ Clearly, the award of general damages in the amount of R600 000.00 never changed. The RAF was obliged to issue an undertaking in terms of s 17(4)(a) and the RAF had to pay the costs of the action, including the costs of the experts mentioned in the initial orders. The only issue, which unfortunately caused uncertainty, is the amendment of the award pertaining to loss of income on more than one occasion, from as low as just over R1 million to R4 574 220.00.

[17] This judgment should not be understood to lay down a general principle that no party may approach the court on an urgent basis for the suspension or setting aside of a writ of execution pending institution and finalisation of an application for rescission of judgment. No doubt, many instances may occur which necessitate such a procedure. One example shall suffice: a defendant on an overseas' trip of six weeks may return to this country, only to find the Sheriff,

²³ Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd 2017 (5) SA 508 (SCA) para 10 & further

having unlocked his home, in the process of removing furniture and one of his vehicles. If the summons was served by leaving a copy in the post-box at home in the temporary absence of the defendant, where after judgment by default was obtained and a writ of execution issued, such defendant would surely be entitled to obtain an urgent interdict to prevent the Sheriff from proceeding pending the institution and finalisation of an application for rescission of judgment on condition that the four requisites of interlocutory interdicts are met.

[18] I quoted rule 45A above. It does not allow a court to suspend orders without reason. Relief in terms of this rule is not there for the taking. A court has, apart from the provisions of the rule, an inherent discretion in terms of the common law to order a stay of execution, but such discretion shall be exercised judicially. In principle, a stay will be granted to prevent an injustice. An application for the rescission of a court order does not automatically suspend its execution. The remedy lies in rule 45A. A stay of execution will be granted where the underlying *causa* of the judgment debt is being disputed or no longer exists,²⁴ or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution.²⁵ A court should be careful to act on ideas such as the interests of justice, equity or public policy to prevent execution upon a valid and uncontested judgment.

[19] Although there is a difference of opinion in this regard, I am of the view that in the determination of the factors to be taken into account in the exercise of a discretion under rule 45A, a court may in appropriate circumstances borrow from the requirements for the granting of an interlocutory interdict, namely that the applicant must show (a) that the right which is the subject of the main action and which he seeks to protect by reason of the *interim* relief is clear or, if not clear, is *prima facie* established though open to some doubt; (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the *interim* relief is not granted and he ultimately succeeds in the establishing of his right; (c) that the balance of

²⁴ Road Accident Fund v Strydom 2001 (1) SA 292 (C) at 300B

²⁵ Brummer v Gorfil Brothers (Pty) Ltd 1999 (3) SA 389 (SCA) at 418E - G

convenience favours the granting of *interim* relief; and (d) that the applicant has no other satisfactory remedy.

[20] In *Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd*²⁶ the court, relying on *dicta* in *Gois t/a Shakespeare's Pub v Van Zyl & others*, stated the following:

"It is clear that what was intended in this case was that, where the *causa* for the execution is a judgment, and the judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for the exercise of a favourable discretion by a court."

In *Stoffberg NO v Capital Harvest (Pty) Ltd*²⁷ Binns-Ward J, after an analysis of the case law and the general principles for the granting of a stay of execution, not only criticized the judgment of Davies J in *Firm Mortgage Solutions supra*, but concluded as follows:

"[26] The broad and unrestricting wording of rule 45A suggests that it was intended to be a restatement of the courts' common law discretionary power. The particular power is an instance of the courts' authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. "Real and substantial justice" is a concept that defies precise definition, rather like "good cause" or "substantial reason". It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension it might be persuaded to allow should be granted."

[21] Already, as we have become accustomed over the years, the RAF settles matters on the basis that the judgment debt shall not be payable before the expiry of 180 days. No reasons have been advanced in this application why this period should be extended any further. I cannot think of any reason at all, save for the observations made above in respect of the RAF's precarious financial situation. If the RAF was a commercial company, sufficient grounds would have existed for it to be liquidated.²⁸

²⁶ 2014 (1) SA 168 (WCC) p 170 F - G

²⁷ WCC case no 2130/2021 dated 2 March 2021 (unreported)

²⁸ Sub-sections 344(f) & (h) of the Companies Act, 61 of 1973

- [22] Section 173 of the Constitution cannot come to the RAF's assistance *in casu*, although the High Court has been granted the inherent power to stay execution if it is in the interests of justice. Although the High Court invoked the section and its inherent common-law power in *Road Accident Fund v Legal Practice Council*,²⁹ and not rule 45A to stay execution, the Constitutional Court held in *Mukaddam v Pioneer Foods (Pty) Ltd*³⁰ that the inherent jurisdiction of the High Court under s 173 to regulate its own process cannot override provisions of the Uniform Rules of Court directly making provision for relief.
- [23] The RAF knew about the judgment soon after 27 November 2020 as well as the "consolidated" order dated 4 February 2021 (which I accept was finally amended on 17 May 2021 for the reasons mentioned above), but it waited months – at worst for it eleven months and at best seven months – before it instituted the application and then delayed the finalisation thereof for another five months only to throw in the proverbial towel midstream. I do not sit as a court of appeal in respect of the judgment, either in respect of the merits or the *quantum* of the first respondent's claim and save for stating that the *quantum* appears to be high, bearing in mind the circumstances of the case and after having perused the expert reports, and in particular the report of Munro Actuaries calculating loss of income based on three scenarios in the amounts of R1 051 475.00, R1 965 550.00 and R4 574 220.00 respectively, it remains a fact that the RAF did not utilise the correct process in order to first of all properly defend the matter and secondly, to immediately apply for rescission of judgment if there was really a ground to rely on for such application to be successful. Much to the exasperation of the first respondent, the RAF did not deal with the matter as could be expected, but all of a sudden and out of the blue launched the present proceedings. The approach of the RAF is regarded by the first respondent as unethical. I cannot disagree.

²⁹ 2021 (6) SA 230 (GP) paras 30 - 35

³⁰ 2013 (5) SA 89 (CC) paras 31 & 32

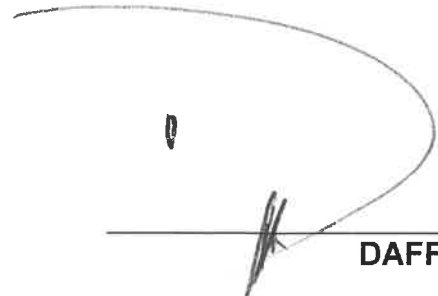
[24] Mr Maphelela submitted that the court should consider to award punitive costs *de bonis propriis* against the RAF's deponent, Me Lydia Mulaudzi. Obviously, if the court were to consider making such an order, Me Mulaudzi should have been called upon to present reasons why such an order should not be made against her in her personal capacity. Mr Maphelela also acknowledged that such order might not be in the interest of his client as it was uncertain if this person was financially in a position to pay any order granted against her. He submitted that the RAF is crying foul all the time about the wasting of public funds, but in many instances, it is the RAF and its officials that cause unnecessary wasted costs. This application is a typical example. Officials of organs of state shall take responsibility for the manner in which they allow their organisations to deal with private citizens in particular who are often poor people and the most appropriate way to ensure this is to order costs *de bonis propriis* against them. *In casu*, I decided to finalise the matter without causing further delay and costs.

[25] My approach to adjudication of the application would have been totally different if the RAF simultaneously applied for rescission of judgment based on a proper factual foundation, or at least presented facts in the present application to show some prospects of success in setting aside the judgment. The common cause facts point in one direction only: in failing to turn up for the trial, the RAF was in wilful default. It is unthinkable that any court would be inclined to grant the relief sought in the notice of motion.

VIII CONCLUSION

[26] I have dealt with the history of the litigation in much detail and also referred extensively to the reasons why I granted the orders as set out in paragraph 1 above. Hopefully, these reasons will assist colleagues in determining whether or not relief should be granted to applicants who approach the court, often *ex parte* while alleging extreme urgency, to have writs of execution set aside or suspended pending institution and finalisation of applications for rescission of judgment. More often than not, a stay of execution is merely a delaying tactic

by a litigant that has no real intention to defend the plaintiff's claim in the main action, even if rescission of judgment is eventually granted in his/her/its favour.



DAFFUE J

On behalf of the Applicant:
Instructed by:

Mrs C Bornman
RAF c/o State Attorney
BLOEMFONTEIN

On behalf of the 1st Respondent: Adv TC Maphela
Instructed by: Matsephe Inc
BLOEMFONTEIN