



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NUMBERS:

1. 3394/20
2. 1167/21
3. 1952/20
4. 2205/20
5. 856/20
6. 84/21
7. 321/20
8. 3975/19
9. 311/20
10. 759/21

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

06 April & 09 May 2022

DATE

.....
SIGNATURE

In the matters between:

BABUSIYE LINKIE MAPAILE

APPLICANT IN CASE. 1

OBREY MATHEBULA

APPLICANT IN CASE. 2

NHLANHLA NGWENYA

APPLICANT IN CASE. 3

MIRRIAM THANDI NKOSI

APPLICANT IN CASE. 4

HENDRY CHRISTOPHER MBETHE

APPLICANT IN CASE. 5

JAN ELMON MOKOENA

APPLICANT IN CASE. 6

ROBBER CHAUKE

APPLICANT IN CASE. 7

JAKU HENDRY MABIZELA

APPLICANT IN CASE. 8

MANDLA MZIMBA

APPLICANT IN CASE. 9

MILDRED PULENI KHOZA

APPLICANT IN CASE. 10

and

ROAD ACCIDENT FUND

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 06 April 2022. The costs order judgment is handed down on 09 May 2022.

JUDGMENT

RATSHIBVUMO J

[1]The 10 applications above were consolidated for purposes of hearing and judgment as they are identical both in nature and purpose and they are aimed against the same Respondent. These are the applications to compel the Respondent to either accept or reject the RAF 4 Serious Injury Assessment Forms submitted by each one of the Applicants. The applications are brought in terms of the Promotion of Access to Justice Act, no. 3 of 2000 (PAJA).

[2]The completion of the RAF 4 form was done in compliance with the provisions of section 17 of The Road Accident Fund Act, no. 56 of 1996 (the Act) which provides,

(1) The Fund or agent shall be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for nonpecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

(1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party. [My emphasis].

[3] The provisions above should be read alongside the Regulation 3(3) of the Act, parts of which provide,

“3(3)(a) A third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

...

(c) The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations

...

(dA) The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment.

(e) The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations.

[4] As it appears well in paragraph 8 below, 90 days have already lapsed in some of these applications and the Respondent has not taken a decision yet. Where an aggrieved party is not happy with an administrative decision, PAJA provides that internal remedies should be exhausted before he/she could approach the court for judicial review.¹ This however does not appear to include failure to take a decision, although that is also seen as a decision. In the latter scenario, the aggrieved party would be justified to bring the failure to take a decision on judicial review in order to compel the administrative body to take a decision, provided there has been unreasonable delay in taking a decision.² In *Road Accident Fund v Duma*³ the Supreme Court of Appeal (the SCA) held the following,

To recapitulate; if the Fund rejects the RAF 4 form - with or without proper reasons - it means that the requirement that the Fund must be satisfied that the injury is serious has not been met. In that event, the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3(4). It follows that the rejection cannot be ignored merely because it was not raised within a reasonable time. This does not mean, as was suggested, for instance, in *Louw v Road Accident Fund* (*supra*) at paragraph 82, that the Fund can avoid and frustrate every claim against it indefinitely by simply not taking a decision either way. The solution is to be found in section 6(2)(g) read with section 6(3)(a) of PAJA. These sections provide that if an administrative authority unreasonably delays to take a decision in circumstances where there is no period prescribed for that decision, an application can be brought "for judicial review of the failure to take the decision". Though PAJA sees this

¹ See section 7(2) of PAJA. See also *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)* 2010 (4) SA 327 (CC) at paragraphs 35-37

² See *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E)

³ 2013 (6) SA 9 (SCA) at para 20

as a "ground of review" it is really no different from the time honoured common law remedy of *mandamus* (see eg *Cape Furniture Workers' Union v McGregor NO 1930 TPD 682 at 685-686*). [My emphasis].

[5] In light of the above, there is no doubt therefore that the applicants who have not heard anything from the Respondent, at least 90 days after sending the required form are entitled to the order compelling it to take a decision. The only concern I have is in respect of costs. The Fund is a public entity vested with the authority to receive and investigate the claims and in deserving cases, settles them. It is the public that through compulsory fuel levy, contributes to the purse which makes over R40 billion in a year.⁴ It is common knowledge that the RAF is operating in deficit and that it is strained to the extent that Fisher J recommended that it should be placed under liquidation.⁵

[6] It is for this reason that the courts frown at reckless litigation against the Fund that may result in it being mulcted with unnecessary costs. It is for this reason that the Practice Directives of this Division encourage the litigants to settle the claims against the Fund at least seven clear court days, to avoid unnecessary costs.⁶ Any settlements on the date of trial invites an inquiry as to whether it was the practitioner's fault and why he/she should not be ordered to pay costs on a punitive scale and/or out of own pocket, including forfeiture of appearance or day fee.⁷

[7] In my view, it would be unfair to expect the public to foot the bill on costs if it is proved that they were occasioned by the deliberate act or omission on the part of an identified or known individual. The papers filed in these applications suggest that there were Claims Handlers and/or Senior Claims

⁴ See *TM v Road Accident Fund* 2021 (2) SA 618 (GJ) at para 6.

⁵ *Auret N.O obo Kieser v Road Accident Fund* (14206/2014) [2020] ZAWCHC 192 (28 April 2020) at para 62 and *TM v Road Accident Fund* (*supra*) at para 133.

⁶ See Directives 13 & 14 of this Division.

⁷ See Directive no. 14.5 of this Division.

Handlers who were sent the communications via emails and that none of them responded. I do not see why Claims Handlers and/or Senior Claims Handlers should not be subjected to a similar inquiry that the legal practitioners are constantly subjected to if there was dereliction of duties on their part. It would therefore be fair in my view to afford each and every Claims Handler and/or Senior Claims Handler involved in these applications, an opportunity to state their version or their involvement in the files and explain in particular, why they were not able to take decisions expected from them within 90 days as provided in the regulations. That way, they would be able to explain why they should not be ordered to pay the costs or a portion thereof, personally.

[8]Following is the summary regarding the dates on which letters to the Respondent were dispatched, the details of the claims handlers and other relevant information as contained in the files:

	Applicant	Case no.	Claims Handler & Senior Claims Handler	Link no.	Date of dispatch of letter per email	Date of dispatch of letter per registered post
1.	BL Mapaile	3394/ 2020	Nsovo Bambisa & Tsholofelo Ramatlapeng	4991743	03 Nov 2021 mfar@raf.co.za	04 Nov 2021
2.	O Mathebula	1167/ 2021	Nhlamulo E Mabasa & Erika le Roux	5055712	08 Nov 2021 mfar@raf.co.za	09 Nov 2021
3.	NS Ngwenya	1952/ 2020	Dithomo Mothiba &	4984097	29 Oct 2021 dithomom@raf.co.za	02 Nov 2021

			Lizette Wannenbureg			
4.	MT Nkosi	2205/ 2020	Rito Makhubele & Natasha Coetzer	4928945	01 Oct 2021 settlementhub@ raf.co.za	01 Oct 2021
5.	HC Mbethe	856/ 2020	Malvin Khoseni & Tsholofelo Ramatlapeng	4895805	05 Oct 2021 mfar@raf.co.za	05 Oct 2021
6.	JE Mokoena	84/ 2021	Paseka Kubayi & Hemmilton Moremi	5019185	05 Nov 2021 hemmiltonm@raf.co.za	09 Nov 2021
7.	R Chauke	321/ 2020	Keith Wakeford & Erika le Roux	4834398	15 Sep 2021 erikal@raf.co.za	17 Sep 2021
8.	JH Mabizela	3975/ 2019	Sandisiwe Mgobo & Tsholofelo Ramatlapeng	4759811	26 Nov 2019 sandisiwemg@raf.co.za	26 Nov 2019
9.	M Mzimba	311/ 2020	Malvin Khoseni & Tsholofelo Ramatlapeng	4855662	16 Nov 2021 malvink@raf.co.za tsholofelor@raf.co.za	17 Nov 2021
10.	MP Khoza	759/ 2021	Busisiwe Ntsele & Willem Pretorius	5031703	11 Nov 2021 busisiwen@raf.co.za	12 Nov 2021

[9] According to the regulations, the forms have to be served on the Respondent by hand or by registered mail/post.⁸ The regulations make no provision for service by e-mail. In all these applications, service was done by email and by registered mail/post. In calculating the days that lapsed from the dates on which the forms were served on the Respondent by registered mail, the court is guided on the definition of a “day” from the same regulations. The regulations define a day as any day other than a Saturday, Sunday or public holiday.⁹ It would appear that the Applicant’s legal representative may not have been alive to this definition in that in the first case, he caused a letter to be written to the Respondent on 14 February 2022 in which a reference is made to the email sent on 03 November 2021. In the letter, the legal representative informs the Respondent that 90 days expired on 03 February 2022.¹⁰ This clearly indicates that the author of the letter mistakenly believed that a month has 30 days which can only be so when weekends and holidays are not excluded.

[10] If one is guided by the definition of a day referred to above, it becomes apparent that as of the date the application in the first case was launched, 90 days had not yet lapsed. In this case, an affidavit in support of the application was written on 17 February 2022 some 73 days after the registered mail was dispatched to the Respondent, on 04 November 2021. For that reason, the application in matter no. 1 cannot succeed. For the same reason, matters no. 2, 3, 6, 9 and 10 also stand to fail. The applications have to be successful in respect of the remaining matters being cases no. 4, 5, 7 and 8.

⁸ See Reg 3 *supra*.

⁹ See Reg 1 of the regulations.

¹⁰ See Annexure E1 on p. 66 of the paginated bundle in case 3394/2020.

Order

[11] In light of the above, the following order is made:

[11.1] In matters 2205/20, 856/20, 321/20, 3975/19, the Respondent is ordered to take a decision in terms of Reg 3(3)(c) and 3(3)(d) of the Regulations promulgated in terms of Act no. 56 of 1996, within 30 days from the date of this order.

[11.2] The application is dismissed in respect of cases 3394/20, 1167/21, 1952/20, 84/21, 311/20 and 759/21 with no cost order.

[11.3] The Claims Handlers and the Senior Claims Handlers in matters 2205/20 (Rito Makhubele & Natasha Coetzer), 856/20 (Malvin Khoseni & Tsholofelo Ramatlapeng), 321/20 (Keith Wakeford & Erika le Roux), 3975/19 (Sandisiwe Mgobo & Tsholofelo Ramatlapeng) are ordered to file affidavits with the Registrar of this Division (via email: imasilela@judiciary.org.za) by no later than 27 April 2022, explaining themselves as detailed in paragraph 7 of this judgment.

[11.4] Costs in matters 2205/20, 856/20, 321/20, 3975/19 are reserved pending the inquiry to be conducted on 05 May 2022.

[11.5] The proceedings are postponed until 05 May 2022 at 09h00 for inquiry, on which day the Claims Handlers and Senior Claims Handlers in matters 2205/20, 856/20, 321/20, 3975/19 are ordered to be present on virtual platform the link of which shall be provided by the Registrar, failing which they risk having the punitive cost order envisaged in paragraph 7 of this judgment being made against them in their absence. The Claims Handlers and Senior Claims Handlers are entitled to be legally represented for purposes of the inquiry if they wish.

[11.6] A copy of this order should also be served on the Chief Executive Officer of the Road Accident Fund.

[12] *Postea* (05 May 2022). Inquiry on costs:

In compliance with paragraph 11.3 of the order above, various affidavits were filed by the respective Claims Handlers who also availed themselves on virtual platform for purpose of costs inquiry. The Claims Handlers and the Road Accident Fund further appointed Mpoyana Ledwaba Inc as their attorneys for purpose of the inquiry. Adv. Majozi was briefed to represent them.

[13] Matter no. 4: Nkosi v RAF. The Applicant's legal representatives had identified Rito Makhubele and Natasha Coetzer as the Claims Handlers involved in this case. The two Claims Handlers however disputed being involved in this case saying it was never allocated to them. Ms Makhubela alleged in her affidavit that she was copied in email correspondence from the Applicant's attorneys, but at the time, she was on maternity leave and the matter was not allocated to her.

[14] Ms. Coetzer testified that the Link Number used by the Applicant's attorney was wrong. The correct link was 4928948, not 4928945. Once she was served with judgment on merits in this case, she made efforts to trace this file and established the correct Link Number. To do this was a long process. Once this was done, she allocated the file to a Claims Handler who accepted the claim on behalf of the Respondent. An offer was thereafter made which was accepted by the Applicant. The matter has since been settled.

[15] Matter no. 5: Mbethe v RAF. The Applicant's legal representatives had identified Malvin Khoseni & Tsholofelo Ramatlapeng as the Claims Handlers involved. These were however not the correct Claims Handlers involved in this case. Ms. Ramatlapeng testified that this case was allocated to Ms. A

Netshisaulu in October 2021. In her affidavit, Ms. Netshisaulu alleges that when the file was allocated to her, it did not have the RAF 4 form. It was only after the judgment in this matter that she was sent the RAF 4 form by the Applicant's attorneys which enabled her to accept the claim on behalf of the Respondent and make a settlement offer to the Applicant. The matter has since been settled.

[16] Matter no. 7: Chauke v RAF. The Applicant's legal representatives had identified Keith Wakeford and Erika le Roux as the Claims Handlers. It again turned out that these parties were in no way involved in this matter. The correct Claims Handler was Mr. L Mukwena. From the affidavit prepared by Mr. Mukwena testified that he only learned that the matter was allocated to him in February 2022 when an email from the Applicant's attorneys was forwarded to him by Mr. K Wakeford. The matter was however allocated to him in October 2021 without any communication to him about that allocation. As a Claims Handler, he and his colleagues have to deal with between 200 and 250 files at any given moment which sometimes proves to be too much.

[17] He further testified that when he checked the file in February 2022, it was empty. On 21 February he wrote an email to the Applicant's attorneys asking them to furnish him with all the lodgement documents. Unfortunately, there was no response to this request. The Applicant's attorneys must have known already by then that Mr. Mukwena was the Claims Handler in this case as the email from Mr. K Wakeford dated 18 February 2022, in which he was informed that the matter was allocated to him, was also copied to them.

[18] On 13 April 2022, he again received an email from Mr. Wakeford in which the Applicant's attorneys had sent to him (Mr. Wakeford) the lodgement documents. He testified that once these were forwarded to him, and on 19

April 2022, he accepted the claim on behalf of the Respondent and sent a settlement offer to the Applicant's attorneys. This matter has since been settled in full.

[19] Matter no. 8: Mabizela v RAF. The Applicant's legal representatives had identified Sandisiwe Mgobo & Tsholofelo Ramatlapeng as the Claims Handlers. These were again wrong parties as Mr. L Mbonane was the one to whom the case was allocated. It is not clear as to what Mr. Mbonane did with the case, but he has since been transferred to East London branch of the RAF. No affidavit was filed by him as he was not identified in the judgment and no one from the RAF thought he should be invited to do so as he has been transferred to another branch. This matter was settled in full in April 2022 and the Claims Handler who attended to its settlement is Mr. Seopela who has since left the RAF.

[20] From the submissions above, it became clear that the fingers of the Claims Handlers were pointed at the Applicants' legal representatives for various reasons: Picking up Claims Handlers "at a whim" and sending emails to them without ascertaining first if they were indeed the correct Claims Handlers for such files. Sending files without all the required lodgement documents. Failure to respond to emails from the RAF and rushing to commence motion proceedings ignoring the escalation avenue provided to them by the Respondent in terms of which non-compliance can be escalated to certain senior officers within the RAF.

[21] The Applicants' attorneys responded through an affidavit deposed to by Ms. E Van Heerden, a correspondent attorney for the Applicants. In it she denies most of the accusations levelled against them. The source of the names of the Claims Handlers was a spreadsheet that was sent to her by Cindy Ntsiyene, an employee of the Respondent, on 02 October 2020. The spreadsheet was meant

to inform various legal representatives as to the identities of the Claims Handlers to whom files were allocated following the termination of the panel of attorneys' mandate by the RAF.

[22] Ms. Van Heerden further asserts that in matter no. 4 above, Ms. Coetzer could have undertaken the efforts she finally put in place after the judgment, much earlier in order to establish the correct link number if she wanted to, but she chose not to do so. She admitted that in matter no. 7, there was an email sent from the Claims Handler to which a candidate attorney from her office did not respond. She explained that such was an administrative error on his part. An affidavit by him confirming this position was also filed.

[23] It is common cause that the Applicants' legal representatives relied on a spreadsheet that had been sent to them about a year earlier to identify the Claims Handlers involved in their claims. This was done without ascertaining again if the said officers were still involved in the particular claims. It turned out that the Claims Handlers in all these cases had changes. The spreadsheet cannot be the only source of information for the Applicants as at least one of the Claims Handler's name (Mr. Wakenford) was not in it. Mr. Wakenford was not even working for the RAF at the time the spreadsheet was developed and sent to the Applicants' attorneys. It appears he was regarded as a Claims Handler simply because at one stage, he attended to the file and communicated to the attorneys over it. But attending to a file does not make one a Claims Handler. More was needed to be done by the attorneys to establish the identity of a Claims Handler.

[24] Failure to establish the identity of Claims Handler may be indicative of haste in which the claim and the application was launched, paying little attention to exactitude. The same can be said of the claim in which the link number was wrong (see matter no. 4). I am not persuaded that Ms. Coetzer should

have established the correct number earlier as argued. It is not her responsibility to correct the errors of the Applicants. She also made it clear that it took her a long process to find out the correct number. Although counsel for the Respondent started his submission favouring the award of costs in favour of the Applicants, the unmasking of these errors led him to alter his submissions, arguing rather that the Applicants should be denied the costs.

[25] Counsel for the Applicants argued that this would be unfair as the Respondent did not show that the escalation process was communicated to them. Failure to respond to request for lodgement documents was a once off error for which the attorneys should not be punished. It was only one email that they did not respond to.

[26] I agree that a diligent legal representative would have done more than just rely on a year-old document, to establish the identity of the Claims Handlers. I also agree that in not escalating the predicaments of the Claims Handlers not responding to the correspondence, the legal representatives displayed a rushed approach that creates an impression that the application that followed may not have been aimed only at compliance, but the costs that come with the order.

[27] What the Applicants' legal representative refers to as an administrative error resulted from paying no particularity to the matter. This blunder is however diminished by the fact that the documents that gave rise to the application were sent by registered post as required by the regulation. The correct claim or link number was quoted in the registered mail sent to the Respondent. Escalation of non-compliance by Claims Handler could be a less expensive approach, but it does not bar the attorneys from approaching the court for relief once the ninety days' period expires. Moreover, there is no proof that

the avenue of escalating non-compliance was communicated to the Applicants' legal representatives. This I say mindful of the natural expectations that a diligent attorney should be able to escalate any non-compliance before rushing to court so as to exhaust internal remedies.

[28] Having said that, I do not find any justification in not responding and thereby not providing the Claims Handler with the documents he asked for in matter no. 7. This was the only one email sent by the Respondent that was not responded to, but the Respondent did not have to send many emails to elicit a response. While errors like these happen, the attorneys have to justify why they would still be entitled to costs. Once the documents were made available, it took the Respondent nine days to make an offer. From the date the email was dispatched requesting the documents, more than nine days lapsed from the day the request was made and not responded to, to the date of the application. A response to this email would have rendered the application unnecessary as it would have been acted upon and possibly settled as it was when documents were availed. I am therefore of a view that the Applicant in this case is not entitled to costs.

[29] The Applicants are entitled to costs in respect of the rest of the case. There is however no justification in ordering the Claims Handlers to pay the costs from own pockets as they were able to demonstrate that the problem is within the Respondent's system than with them (the Claims Handlers). *In casu*, wrong Claims Handlers were also identified. For these reasons, it is recommended that the Respondent looks into the following measures that can help avoid unnecessary expenses on costs by the RAF.

- a) Choosing not to defend and/or oppose matters before courts could save legal costs but may also result in even more costs being paid especially

in matters that the RAF was supposed to be defending or opposing. The blanket practice of not defending and/or opposing matters should as such be reconsidered.

- b) When both parties are represented, it helps the courts to focus on their judicial responsibilities without appearing to descend into the arena.
- c) The RAF should investigate a number of files the Claims Handlers deal with at any given moment, and if necessary, the workload should be reduced, spread or shared so they (Claims Handlers) can focus and pay more attention on the matters allocated to them.
- d) Claims Handlers should be allowed to deal with their files for the duration from first allocation to their finality and avoid quick and unnecessary re-allocation to new Claims Handlers. Where a re-allocation is necessary, it should be clearly communicated to the legal representatives and the Claims Handlers themselves.
- e) Claims Handlers need to be informed in writing whenever files are allocated to them. The legal representatives should also be informed of the allocation at the same time.
- f) Upon allocation, all the documentation already in the file should be made available to a Claims Handler upon allocation.

[30] For the reasons above, the following order is made

[31.1] The Respondent is ordered to pay party and party costs in respect of matters no. 4, 5 & 8.

[31.2] No costs order is made in respect of matter no. 7.

**TV RATSHIBVUMO****JUDGE OF THE HIGH COURT**

FOR THE APPLICANTS	: ADV. KW VAN HEERDEN (merits)
	: ADV. MS JANSE VAN RENSBURG (costs)
INSTRUCTED BY	: FRANS SCHUTTE & MATTHEWS PHOSA INC C/O SDJ INC MBOMBELA
FOR THE RESPONDENT	: NO APPEARANCE (merits)
	: ADV M MAJOZI (costs)
INSTRUCTED BY	: MPOYANA LEDWABA INC C/O TP RADEBE ATTORNEYS MBOMBELA
DATE HEARD	: 04 MARCH 2022 (merits)
JUDGMENT ON MERITS DELIVERED	: 06 APRIL 2022
DATE HEARD	: 05 MAY 2022 (costs)
JUDGMENT ON COSTS DELIVERED	: 09 MAY 2022