



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 21560/2021

- | |
|---|
| (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED |
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In the matter between:

THE ROAD ACCIDENT FUND

APPLICANT

and

**ALL FIRMS OF ATTORNEYS LISTED IN
ANNEXURE "A1"**

FIRST RESPONDENT

THE LEGAL PRACTICE COUNCIL

SECOND RESPONDENT

THE SHERIFF, PRETORIA CENTRAL

THIRD RESPONDENT

THE SHERIFF, PRETORIA EAST

FOURTH RESPONDENT

THE SHERIFF, CENTURION EAST

FIFTH RESPONDENT

THE SHERIFF, JOHANNESBURG CENTRAL

SIXTH RESPONDENT

THE SHERIFF, JOHANNESBURG NORTH

SEVENTH RESPONDENT

ABSA BANK LIMITED

EIGHTH RESPONDENT

JUDGMENT

BASSON J

THE PARTIES

[1] The applicant is the Road Accident Fund (the RAF), a Schedule 3A public entity established in terms of section 2(1) of the Road Accident Fund Act¹ (the RAF Act). The first respondent is all firms of attorneys listed in Annexure A1 to the application (as subsequently revised). Initially 102 attorneys' firms were listed as respondents. I will amplify on the reasons why this list dwindled down to 14 attorney firms later in this judgment. Only four attorneys' firms opposed this application namely Phefadu AP Attorneys; Shabangu & Beachamp Attorneys; Erasmus-Scheepers Attorneys and Frans Rabie Attorneys. The dispute with Frans Rabie Attorneys was settled shortly before the hearing of the application. Only 14 attorneys' firms therefore remain on the list of attorneys, none of whom, except for the three attorneys' firms mentioned, have opposed this application.

[2] The firms listed as respondents are firms that, according to the RAF's records, have received duplicate payments from the RAF and have failed or refused to make repayment of the duplicate payments to the RAF. Some of those firms have also threatened to execute writs against the RAF's assets immediately after 30 April 2021.

¹ 56 of 1996 (as amended).

Others have failed or refused to reply to the RAF's letters of demand. The second respondent is the Legal Practice Council (the LPC). The LPC filed a notice of intention to participate in the proceedings in accordance with its statutory duties and functions in order to assist and facilitate the court in granting an appropriate order. As will be pointed out hereinbelow, the ultimate order by this court has been crafted taking into account the submissions made on behalf of the LPC. The remainder of the respondents cited as the 3rd to 8th respondents have not opposed the application.

MARCH APPLICATION BEFORE THE FULL BENCH OF THIS DIVISION

[3] In March 2021, the RAF approached a full bench of this court for extraordinary relief as a step to stabilise the precarious financial position it found itself in an attempt to prevent a constitutional crisis brought about by the severe financial difficulties it found itself in that have been exacerbated by the Covid-19 pandemic.

[4] In essence the RAF sought a lifeline suspending all writs of execution and attachments based on court orders already granted against it or settlements already reached with claimants which entitled the claimants to payment of compensation for damages resulting from bodily injury or death caused by road accidents that are regulated by the RAF Act.

[5] On 9 April 2021, the full bench handed down its judgment (*Road Accident Fund v Legal Practice Council and Others* ² – “the judgment of the full bench”) in which it held that all writs of execution and attachments against RAF assets based on court orders already granted or settlements already reached in terms of the RAF Act were suspended until 30 April 2021.³ This was done to, *inter alia*, allow the RAF time to implement systems to make payment equitably. Relevant to this judgment are the following paragraphs of this order:

“(a)...

² [2021] 2 All SA 886 (GP).

³ Paragraph 45(b) of the order.

(b) All writs of execution and attachments against the applicant based on court orders already granted or settlements already reached in terms of the Road Accident Fund Act, 56 of 1996 (the RAF Act) are suspended until 30 April 2021.

(c) The applicant is to pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement reached, on or before 30 April 2021, provided that the applicant has been notified by any attorneys who represent claimants that have such claims that are older than 180 days of the existence of such claims in accordance with paragraph 3 of this court's order made on 16 March 2021.

(d) All writs of execution and warrants of attachment against the applicant based on court orders already granted or settlements already reached in terms of the RAF Act, which are not older than 180 days as from the date of the court order or date of the settlement reached, are suspended from 1 May 2021 until 12 September 2021....”

[6] The remainder of the order provides for issues such as steps to be taken to register and capture court orders or written settlement agreements on the RAF's payment list and for the RAF to continue with its process of making payment of the oldest claims first by date of court order or date of written settlement agreement *a priore tempore*.⁴

[7] The upshot of this order therefore is that all executions against the RAF assets were suspended until 30 April 2021. Beyond 30 April 2021 the RAF therefore has no further protection against execution in respect of orders older than 180 days.

[8] The RAF refers to the fact that in the period dating 1 to 29 April 2021, it paid out 19,395 claims worth R 4 575 427 892.97 to firms of attorneys who had conducted themselves honestly and in terms of the RAF's rules and precepts. On the date of the launch of this application, the RAF had processed a further 5 763 claims worth R 380 584 586.50. The total of payments made by the RAF to claimants during April 2021 totalled an amount of R 4 956 012 579.47. In the preceding period from 1 to 31 March 2021 a total of 51,043 claims to the value of R 8 006 528 668.39 were paid out.

⁴ Paragraph 45(f) of the court order.

THE PRESENT APPLICATION

[9] This application is a sequel to the application launched by the RAF against various firms of attorneys who were executing daily against the RAF's assets including its bank accounts which conduct had virtually brought the RAF's business to a standstill and which culminated in the judgment of the full bench.

[10] The RAF once again approaches this court on an urgent basis for a *rule nisi* to be issued calling upon all firms of attorneys listed in Annexure "A1" and any other interested parties to show cause, if any, to this court on 6 July 2021 at 10H00 why this court should not make a final order that any writ of execution based upon a court order that compels the RAF to make payment to a trust account of any of the respondents listed in "Annexure "A1" or any attachment pursuant thereto is suspended in terms of section 173 of the Constitution,⁵ alternatively Rule 45A of the Uniform Rules of Court and set aside pending:

- (i) Repayment by such of the respondents listed in Annexure "A1" of all duplicate payments to the RAF and the reconciliation of the RAF's records and processes; alternatively
- (ii) The finalization of an application to be brought by the Applicant within 45 days of the date of this Honorable Court's order in which application the Applicant will seek just and equitable relief.

That the order shall operate as an interim order, with immediate effect, pending the confirmation or discharge of the *rule nisi*.

[11] The RAF explains that this application is necessitated by virtue of the terms of the order of the full court which suspended all writs of execution and attachments against the applicant based on court orders already granted or settlements already reached in terms of the RAF Act (older than 180 days) but only until 30 April 2021.

⁵ Constitution of the Republic of South Africa, Act 108 of 1996.

[12] Since this court order the RAF suspended payment to various attorneys' firms (initially the 102 respondents listed on Annexure "A1" now only 13) due to duplicate payments that they received into trust and have not repaid or have repaid but the RAF is still busy with urgent reconciliation of such repayments. The RAF makes it clear in its papers that it had the funds to make payment of the relevant claims before 30 April 2021 in accordance with the order of the full court but could not do so because payment was suspended to some firms due to the unresolved issue of double payments.

[13] The purpose of this application is to seek urgent interim relief against the threat by the remaining attorneys' firms to execute against the RAF's assets immediately after 30 April 2021 in circumstances where payment to their trust accounts has been suspended due to the unresolved issue of double payments. The RAF submitted that this court can urgently intervene in terms of, *inter alia*, section 39(2) and 173 of the Constitution to prevent a constitutional crisis and to prevent potential contraventions of the Public Finance Management Act⁶ (PFMA). The RAF further submitted that the RAF is constitutionally obliged to put measures in place to safeguard its "available resources" against fruitless and wasteful expenditure and more specifically against contraventions of the PFMA.⁷

[14] Regarding its public duty, the RAF points out that it should ensure that the administration of the Road Accident Fund Fuel Levy is not spent fruitlessly, wastefully or disbursed where there is suspicion of impropriety especially in respect of the trust account of an attorney's firm and that the RAF is empowered and obliged to suspend

⁶ 1 of 1999.

⁷ See, *inter alia*, section 50 of the PFMA which provides for the fiduciary duties of accounting authorities:

'(1) The accounting authority for a public entity must –

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing

the financial affairs of the public entity;'

See also sections 51, 57, 81 and 83 of the PFMA where similar obligations are placed on the accounting authority of a public entity to guard against irregular, fruitless and wasteful expenditure.

payment in instances of suspicion of impropriety to an attorney's trust account. It is further submitted that any attempt to execute after 30 April 2021 against the RAF's assets before repayment of double payments and reconciliation constitutes an attempt to circumvent the RAF's systems to safeguard the RAF Fuel Levy against unconstitutional conduct.

[15] The RAF acknowledges the plight of claimants that will have to wait for the claims to be met but submits that it owes such claimants and the public a duty not to pay monies to trust accounts or law firms that continue to owe the RAF or while the process of reconciliation is ongoing. One of the problems highlighted by the RAF with the duplicate payments is that it has become apparent that many firms have used duplicate funds received from the RAF for purposes other than as designated. Also, the RAF cannot in many instances determine which claims have actually been paid, if any, with those double payments.

[16] By now the financial woes of RAF are well-known and need not be restated. But, in order to give some context to the present application, I find it suffice to briefly refer to some aspects highlighted by Mr. Collins Phutjane Letsoalo, the Chief Executive Officer of the RAF (CEO), in the founding affidavit deposed to on behalf of the RAF. He explains that the RAF has discovered over the years that billions of rands of public funds were paid as double payments to firms of attorneys' trust account. In November 2020 alone, the total of such duplicate payment was in the region of R1.2 billion. Since then, the RAF has successfully recovered significant amounts of duplicate payments from firms of attorneys.

[17] The RAF explains that once its records show that a firm of attorneys received duplicate payments from the RAF, the RAF would inform that firm of attorneys that the decision has been taken to suspend payment to the trust account pending the repayment of the duplicate amounts and a reconciliation thereafter. Where a firm disputes that it had received duplicate payments, the RAF would provide that firm with proof of the duplicate payments that were made to its trust account. Usually, such proof would be in the form of proof of payments or bank statements. If a firm of attorneys still disputes that they received duplicate payments, the RAF would then

suggest as an urgent option that the dispute be referred to alternative dispute resolution to be determined by an independent auditor. Should the independent auditor find that the duplicate payments were received by the firm of attorneys, then the firm of attorneys is expected to pay the costs of the alternative dispute resolution. However, where there is no dispute that a firm of attorneys received duplicate payments into its trust account, then there is no dispute to be referred to alternative dispute resolution and the firm of attorneys would then have no right to withhold repayment to the RAF.

[18] There are approximately 300 firms on the RAF's database of attorneys involved in RAF matters. I have already referred to the fact that 102 firms have been identified as having received duplicate payments and their names appear on Annexure "A1" to this application as respondents. Since the launch of this application, by far most of these 102 firms have responded to the demand of the RAF and accepted their duty to repay duplicate payments. Once they have repaid any duplicate amounts paid into their trust account and after the RAF has done the necessary reconciliation, their names are then removed from the list. Of the 102 attorney firms initially implicated in the duplicate payment scheme, only 13 remain.

[19] The RAF assured the court that where a firm of attorneys repaid duplicate payments to the RAF and once reconciliation of the RAF's records has occurred, the suspension of payment is lifted. Their place on the list is restored and payment from oldest to newest claims *a priore tempore* is resumed.

[20] I should also mention in passing that where a firm of attorneys has refused to make repayment of duplicate payments, such conduct is invalid, unlawful and unconstitutional. The codes of conduct of officers of this court expect such practitioner immediately to repay any duplicate payments. Furthermore, every legal practitioner is required to report to the LPC any dishonest or irregular conduct on the part of the trust account in relation to the handling of or accounting of trust money on the part of the trust account (Rule 54.36). Moreover, trust account legal practitioners are responsible

for ensuring that the provisions of the Legal Practice Act⁸ and of those rules relating to trust accounts are complied with (Rule 54.19).

[21] The RAF referred the court to various letters that have been dispatched to attorneys suspected of having received duplicated payments as discussed below.

THE LETTER OF 18 APRIL 2021

[22] On 18 April 2021 a letter entitled “DUPLICATE PAYMENTS AND CRIMINAL INVESTIGATIONS” was dispatched to the implicated firms. In this letter the firm is advised that it has received double payments from the RAF into its trust account and is currently being investigated for possible criminal conduct. Subsequent to having receiving double payments, the firm has failed or refused to make repayment of the double payments to the RAF. A formal complaint has also been made against such firm to the LPC. The RAF refers to the court order of the full bench in terms of which the RAF is ordered to pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act which are older than 180 days from the date of the court order or the date of the settlement reached on or before 30 April 2021.

[23] The firm to which this letter was addressed is advised that payment is currently suspended pending repayment of all double payments to the RAF. The firm is requested to state by 20 April 2021 whether it agrees to make repayment of all double payments to the RAF and if not, the full reasons for refusing to do so. The firm is also advised of the urgent alternative dispute resolution process that is in place. The firm is further advised that, should it choose to refuse to make repayment of all double payments, then such firm is requested to indicate by 20 April 2021 whether it intends to execute any warrants after 30 April 2021 against the RAF’s assets and to provide the details of those parties’ writs. Should the firm agree to make repayment to the RAF of all double payments and such repayment is made on or before 20 April 2021, then the claims older than 180 days will be paid before the end of April 2021. Lastly,

⁸ 28 of 2014.

the firm is advised that if such firm is intending to execute on any of the RAF's assets, then it is the RAF's intention to bring proceedings in terms of, *inter alia*, Rule 45A to suspend execution. To avoid cluttering the court with urgent applications, the RAF finally requests that the attorneys' firm gives the RAF warning of its intention to attach so that the RAF can negotiate with that particular attorneys' firm an orderly disposal of such application.

THE LETTER OF 27 APRIL 2021

[24] On 27 April 2021, a further letter was dispatched to those attorneys' firms suspected of having received duplicate payments but who have not responded to the letter of 18 April 2021. The said attorneys' firm is advised that unless it responds to that letter and states that it will not execute against the RAF's assets after 30 April 2021, the RAF intends bringing "an extremely urgent application for a *rule nisi* to ensure that it can continue to operate as an essential institution."

IS THE RELIEF SOUGHT IN CONFLICT WITH THE JUDGMENT OF THE FULL BENCH?

[25] Before I turn to the merits of the matter in more detail, it must be considered whether or not the judgment of the full court constitutes an obstacle against bringing the present application.

[26] Counsel on behalf of Erasmus-Scheepers Attorneys (now 14th on the list - Annexure "A1") submitted that it is in conflict with the judgment, particularly in light of the fact that the motive behind this application is to withhold payment to successful claimants on the basis that there is a "suspicion of impropriety" in the conduct of the attorneys listed in Annexure "A1". Moreover, it submitted that having regard to what the full bench held in paragraph 39 of the judgment, it is clear that payment to successful claimants should not be withheld by the RAF because of a dispute between the attorneys representing the claimants and the RAF.

[27] I do not read the judgment of the full bench to exclude any possible approach to the court to further suspend writs of execution and warrants of attachment. What is, in my view, clear from the judgment is that the RAF may, on a case by case basis,

approach the court if it has *valid grounds* to seek an order for a (further) suspension. The full bench held as follows:

“[39] I have referred to the objections raised by attorneys acting on behalf clients who are successful claimants against the RAF. I do not believe that payments should be withheld from successful claimants because of a dispute between the RAF and the attorneys acting for them, or pending the repayment of double payments by attorneys. Such exceptions may cause undue hardship on and be unfair to successful claimants. *In such instances, the RAF should approach the court, on a case-by-case basis, if it believes or is advised that it has valid grounds to obtain an order suspending writs of execution and warrants of attachment against it. The order which we propose to make, therefore, does not provide for any exceptions.* The RAF, as it undertook to do, must pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement, on or before 30 April 2021, provided it has been notified by any attorneys who represent claimants that have such claims that are older than 180 days of the existence of such claims in accordance with paragraph 3 of this court's order made on 16 March 2021.”⁹

[28] I will return to whether the RAF has made out a *prima facie* case for interim relief later in the judgment.

OTHER ISSUES RAISED

[29] Various other issues have been raised by the three parties before court. I intend to deal with them briefly. But before I do so, only two attorneys firms – Erasmus-Scheepers and Shabangu B Attorneys – have properly opposed this matter by filing an intention to oppose and followed by an opposing affidavit. In the case of Erasmus-Scheepers a counter-application has also been filed. The first name on the list in Annexure “A1” – Phefadu AP Attorneys – only filed a notice in terms of section 6(5)(d)(iii) of the Rules of its intention to raise various points of law. It did not file an answering affidavit disputing the allegations of double payments levelled against it. As

⁹ My emphasis.

such those factual allegations *vis à vis* Phefadu AP Attorneys stand uncontested. Also, the said notice was filed late.

Urgency

[30] The first is the issue of urgency. Shabangu B Attorneys submitted that there is no evidence whatsoever of any actual or threatened attempt by them to either attach or execute against any of the RAF's assets and submitted that the mere theoretical existence of such possible attachments or execution somewhere in future does not render the application urgent. This may be so in their case. But, if regard is had to the order of the full court, the RAF enjoys no protection against execution after 30 April 2021 in respect of orders older than 180 days.

[31] I have referred to the correspondence in which attorney firms on the list have been requested to indicate whether or not they intend to execute any warrants against the RAF's assets by 16H00 on 28 April 2021 failing which the RAF would assume that they intended to execute should they not state that they would not. In that event the RAF would then approach the court on an extremely urgent basis for a ruling. Nothing has been placed before the court to indicate that any of the other attorneys on the list have given such an undertaking.

[32] I am therefore of the view that the matter is urgent in order to prevent a flurry of executions in circumstances where an attorneys' firm is suspected of having received double payments.

POINTS OF LAW RAISED BY PHEFADU AP ATTORNEYS

Section 173 and Rule 45A of the Rules

[33] Phefadu AP Attorneys submitted with reference to section 173 of the Constitution and Rule 45A of the Rules that this court does not have the necessary jurisdiction to grant suspension relief. The submission that this court does not have the power to grant suspension relief is misplaced and has been dealt with by the full court as follows:

“[30] It is unnecessary for us to decide whether r 45A of the Uniform Rules of Court, which provides that '[t]he court may suspend the execution of any order for such period as it may deem fit', finds application in the present case, because a stay of execution falls within the purviews of a court's common law inherent power to regulate its procedures and also s 173 of the Constitution. Superior courts have an 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice': *Universal City Studios Incorporated and others v Network Video (Pty) Ltd* [1986] 2 All SA 192 (A). There, Corbett JA drew a distinction 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'. The present case clearly concerns procedural law, not substantive law.”

Non-joinder

[34] Phefadu AP Attorneys (as did Shabangu B Attorneys) also raised the issue of non-joinder. This point likewise has no merit. In this matter all those attorneys that are suspected of having received double payments have been notified. They represent the claimants affected by any order that this court may ultimately grant. In these circumstances the steps taken renders the joinder of each and every claimant to these proceedings for purposes of the issuing of a *rule nisi* adequate. The issue of non-joinder was also fully dealt with by the full court:

“[10] This matter, in my view, is one where the joinder of the many thousands of parties that could be affected by the order of this court, is unnecessary in the light of the steps taken by the RAF to notify as many parties of its application as possible. The steps taken are adequate. The number of affected parties is substantial, and the steps taken by the RAF to notify the sheer volume of parties that could be affected were sufficient to effect their joinder. Only the seventeenth to twenty third respondents responded and were joined to these proceedings. The failure to respond by those who were notified can be taken to equate to a waiver of the right to be joined.”

[35] See also in this regard *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd, Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd*¹⁰ where the court dealt with non-joinder where a substantial number of persons are affected and held that the issuing of a *rule nisi* may be sufficient in such circumstances.¹¹

PRIMA FACIE RIGHT

[36] The RAF submitted that it has no alternative but to temporarily suspend payment to trust accounts where there is a suspicion of impropriety particularly in the form of having received double payments. Any attempt to further execute after 30 April 2021 against the RAF's assets before repayment of the duplicate payments amounts to an attempt to circumvent the RAF systems to safeguard the RAF Fuel Levy against unconstitutional conduct. Except for Shabangu B Attorneys and Erasmus-Scheepers Attorneys, none of the other firms on the list has disputed the claim of double payment. I will return in more detail to whether a *prima facie* case for relief has been made out in respect of Shabangu B Attorneys and Erasmus-Scheepers Attorneys but, as will be pointed out, I am likewise of the view that a *prima facie* case for relief has also been made out in respect of them. In this regard I agree with the sentiments expressed by Fisher J in *Taylor v Road Accident Fund and a related matter*.¹²

“Conclusion

[131] While De Broglio might believe that it has served the interests of its clients and itself in achieving a settlement agreement for a grossly inflated amount in circumstances where it has avoided this court's jurisdiction, in fact it has placed them in jeopardy. To the extent that the settlements are unconstitutional they are unenforceable. And if payment is made pursuant thereto this would constitute irregular expenditure by the RAF and potentially make those approving such payments vulnerable to personal scrutiny by the courts. The RAF is a public entity, as contemplated in part A of sch 3 to the Public Finance Management Act (“PFMA”) and is therefore subject to the onerous prescripts relating to public expenditure set out in

¹⁰ 2007 (4) SA 467 (SCA).

¹¹ *Ibid ad* paras 30 and 31. This judgment was also quoted with approval by the full bench *ad* para 9.

¹² 2021 (2) SA 618 (GJ).

the PFMA. Thus, without further collusion by the RAF in relation to payment, the settlements are, in effect, worthless.”

REASONABLE APPREHENSION OF HARM

[37] I am in agreement that should the order not be granted, the RAF will lose the progress it has made since the implementation of systems to safeguard the RAF Fuel Levy against, *inter alia*, wasteful expenses brought about by the billions of Rand that have been paid over to the trust accounts of various firms of attorneys in the form of double payments. Should the process of attachment be allowed to continue in circumstances where there exists suspicion of impropriety especially in respect of a trust account, the administration of the RAF in attending to and paying out claims to claimants, will be severely hampered. I am thus persuaded that the RAF will suffer irreparable harm should the interim order not be granted.

BALANCE OF CONVENIENCE

[38] I have considered the plight of those clients of the firms of attorneys listed in Annexure “A1”. It is indeed unfortunate that the individual claimants again have to bear the brunt of serious failings not only on the part of the RAF but on the part of their attorneys. This is indeed unfortunate. On the other hand, this court cannot lose sight of the importance of resolving existing disputes regarding double payments whereafter the payment to claimants will be restored.

[39] One also cannot lose sight of the fact that the RAF has a constitutional obligation to safeguard the RAF Fuel Levy and to ensure that claimants have indeed benefitted from payments that have been made into the trust account of their attorneys.

[40] Lastly, the court can also not, in my view, ignore the fact that the launching of this application yielded significant success in that the RAF has recovered significant amounts of duplicate payments from firms of attorneys. That it took an application such as this to catapult numerous attorneys’ firms into repaying amounts they were not entitled to in the first place, is also unfortunate.

[41] The fact that time limits are set to resolve the outstanding dispute does, to some extent, ameliorate the harm that a claimant may suffer.

NO ALTERNATIVE RELIEF

[42] I am in agreement that the RAF has no other alternative remedy but to seek urgent interim relief in circumstances where the measure of protection that was afforded by the full court no longer exists.

THE 12TH NAME ON ANNEXURE “A1”: SHABANGU B ATTORNEYS

[43] Shabangu B Attorneys accept that they have received double payments but do not disclose how much they have received in duplicate payments. They do, however, undertake in their papers that they will repay duplicate payments but that they intend to make deductions from the double payments and then only thereafter repay the balance thereof.

[44] The RAF is adamant that no deductions can be made from the duplicate payments paid into the trust account and that this firm is obliged to make repayment. Shabangu B Attorneys also places the blame for the double payments squarely on the shoulders of the RAF but conveniently fails to accept the obligation of the firm *vis - à - vis* its trust fund to repay any double payments paid into its trust account. The following extract from Shabangu B Attorneys’ affidavit is instructive:

“From this paragraph it is patently obvious that any double payments that may have been made to my legal practice was made exclusively at the hands of Applicant and was the Applicant’s own fault.”

“I do admit that my legal practice has from time to time received erroneous and duplicate payments from the Applicant which have been addressed.”

“I concur the duplicate payments could indeed have occurred under the circumstances outlined at sub-paragraph 1.4 but, once identified, the issue could have easily resolved administratively by engagement between the Applicant’s relevant officials and effected legal practices”

“The Applicant must indeed avoid wasteful and fruitless expenditure but within the realms of the law.”

[45] I am likewise of the view that the RAF has, in respect of Shabangu B Attorneys, established a *prima facie* right to the relief sought, that there is a reasonable apprehension of harm, that there is no suitable alternative remedy, and that the balance of convenience favours the granting of the relief. Shabangu B Attorneys should repay all duplicate payments to the RAF forthwith, without deductions, whereafter reconciliation will follow and the suspension will be lifted. Once the suspension has been lifted, payment will resume *a priore tempore*.

THE 14TH NAME ON ANNEXURE “A1”: ERASMUS-SCHEEPERS ATTORNEYS

[46] Erasmus-Scheepers Attorneys filed a comprehensive answering affidavit together with a counter-application in which it claims that it has already duly accounted to the RAF in respect of three matters referred to as the “Chetty” matter; the “Wuster” matter and the “Demana” matter. Despite having done so, the RAF and its attorneys ignored the accounting furnished to it. It also submitted that the RAF did not establish a case to suspend and/or set aside attachment of assets of each of the successful clients.

[47] Erasmus-Scheepers Attorneys do not dispute having received duplicate payments and have in fact repaid half of the duplicate payments to the RAF. They, however, assert that they have the right to apply set-off against duplicate payments. The RAF disputes this and submits that where an attorneys’ firm receives double payments into its trust account, such public funds cannot be utilised in any way and must be repaid immediately. The RAF insists that Erasmus-Scheepers should repay the balance to the RAF forthwith after which the RAF will reconcile its accounts. Once repayment has occurred and the reconciliation completed, payment to their trust account *a priore tempore* will be restored. That this is the nub of the dispute between the parties also appears from Erasmus-Scheepers’ affidavit:

“[19] To my mind the nub of the dispute, between the Applicant and ES Attorneys (and its ref clients concerned) is whether or not set-off has lawfully occurred. If the Honourable Court is against my submissions on this score:

19.1 ES Attorneys asks that the matter stands down for an hour, whereupon it will furnish the Honourable Presiding Judge proof of payment, into the Applicant's so-called "Debtors Account" number ... of the R 80 257.38 common cause disputed amount....

19.2 upon such payment the Applicant will have no further excuse not to, within 48 hours (as opposed to when and if it wants) to reconcile its records accordingly, inform Treasury thereof, and remove any reference to ES Attorneys from any of its internal lists and processes which may prevent or hamper future payments of the claims of its RAF clients into the trust account of ES Attorneys."

[48] I am persuaded that in respect of Erasmus-Scheepers Attorneys the RAF has likewise established a *prima facie* right to the relief sought, that there is a reasonable apprehension of harm, that there is no suitable alternative remedy, and that the balance of convenience favours the granting of the relief.

[49] Regarding the counter-application, Erasmus-Scheepers Attorneys sought an order that the RAF must first and in writing inform them of alleged double payments whereafter Erasmus-Scheepers will have 14 court days within which to respond thereto. If the RAF is still not satisfied the dispute must be adjudicated by a court or by an alternative dispute resolution forum to be agreed upon by the parties before the RAF may take any internal steps which prevent further payment of the claims of the third party claims of Erasmus-Scheepers. In the alternative, should this court not be inclined to come to the assistance of Erasmus-Scheepers, the balance of R 80 257.38 will be repaid by Erasmus-Scheepers into trust pending the conclusion of the main application.

[50] I have already largely dealt with the RAF's response to Erasmus-Scheepers. In brief, the counter-application has no merit. The dispute between the parties is clear and by its own papers, Erasmus-Scheepers acknowledges what the disputed amount is. As already pointed out, once the amount has been repaid and the urgent reconciliation has been completed, Erasmus-Scheepers' position on the payment list will be restored. The RAF cannot reconcile its records until repayment has been made into the RAF's account. Also, Erasmus-Scheepers could have – as other firms of

attorneys have – repaid the balance under protest in order for the reconciliation process to take place. In the event the counter-application is dismissed.

THE LEGAL PRACTICE COUNCIL

[51] The LPC’s participation is limited to the alternative relief initially sought by the RAF and only to the extent that reference is made to the appointment of a *curator bonis* by the LPC. In this regard the LPC submitted that the alternative relief should not include an order that the RAF may request the LPC to appoint a *curator bonis* to control and administer the trust accounts of such firms of attorneys who appear on the list (Annexure “A1”) who refuse or neglect to repay any duplicate payments which are proven to have been made to them.

[52] The RAF has conceded the point and the draft order submitted to the court has been amended accordingly.

ORDER

[53] In the event the following order is made:

1. A *rule nisi* is issued calling upon all firms of attorneys listed in Annexure “A1” and any other interested parties to show cause, if any, to this court on 6 July 2021 at 10H00, why the following order should not be made final:

- 1.1 Any writ of execution based upon a court order that compels the Applicant to make payment to a trust account of any of the First Respondents listed in Annexure “A1” or any attachment pursuant thereto is suspended in terms of Section 173 of the Constitution, alternatively Rule 45A of the Uniform Rules of Court and set aside pending:

- 1.1.1 Repayment by such of the First Respondents listed in Annexure “A1” of all duplicate payments to the

Applicant and the reconciliation of the Applicant's records and processes; alternatively

- 1.1.2 The finalization of an application to be brought by the Applicant within 45 days of the date of this Honorable Court's order in which application the Applicant will seek just and equitable relief.
2. That the order sought under paragraphs 1 to 1.1.2 shall operate as an interim order, with immediate effect, pending the confirmation or discharge of the *rule nisi*.
 3. That the Applicant be granted leave to publish this order by publication in two national newspapers.
 4. That the Applicant's costs of this application are to be paid by Erasmus-Els Incorporated t/a Erasmus-Scheepers Attorneys, Shabangu B Attorneys and Associates and AP Phefadu Incorporated, jointly, and severally, the one paying the other to be absolved, including the costs of two counsel, one of whom is a senior counsel.

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically generated and therefor unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 June 2021.

APPEARANCES

For the Applicant:
(Road Accident Fund)

ADV. CEDRIC PUCKRIN SC
ADV. REIMER SCHOEMAN
ADV. PALESA NYAPHOLI-MOTSIE
MALATJI & CO ATTORNEYS

Instructed by:

For the 1st Respondent:
(Phefadu AP Attorneys)

ADV. MATLHABA MANALA
ADV. DONALD SEKWAKWENG
AP PHEFADU ATTORNEYS

Instructed by:

For the 1st Respondent:
(Shabangu & Beachamp Attorneys)

ADV. BP GEACH SC
ADV. FHH KERHAHN
ADV. DB TSHABALALA
SHABANGU B ATTORNEYS &
ASSOCIATES

Instructed by:

For the 1st Respondent:
(Erasmus-Scheepers Attorneys)

ADV. RUSSEL BEATON SC
ADV. JACQUES EASTES
ADV. DB TSHABALALA
ERASMUS-SCHEEPERS
ATTORNEYS

Instructed by:

For the 2nd Respondent:
(Legal Practice Council)

MR LIAM GROOME (ATTORNEYS)

Instructed by:

ROOTH & WESSELS INC

Date of hearing:

3 June 2021 (virtual hearing)

Date of judgment:

9 June 2021

ANNEXURE “A1”

1. Phefadu AP Attorneys with its business address at Suite 407-408, Savelkoul's Building, Cnr Paul Kruger & Pretorius Street.
2. CN Phukubje Attorneys with its business address at 83 Albertina Sisulu Street Corner Von Brandis Street Bradlows Building, Works @ Market 4th Floor Offices 405-407.
3. Gura Tlaletsi & Partners with its business address at 38 Carrington Street Mafikeng Industrial Mafikeng, North West.
4. KG Mashigo Attorneys with its business address at 58 Marshall Street Marshall Street Marshalltown Johannesburg.
5. Makokga Sebei Inc with its business address at Tudor Chambers Office No 0240 229 Helen Joseph Street Pretoria.
6. Malose Matsaung Attorneys with its business address at 238 Paul Kruger Street, Standard Bank Chambers, Pretoria Central, Pretoria.
7. Maluleka Tlhasi Inc with its business address at 754 Stanza Bopape Street, Eastcliff, Pretoria.
8. Mammile A M Attorneys with its business address at Mammile Law Chambers, 130 Highveld Road, Kempton Park.
9. Mzamo Attorneys with its business address at Suite 2, 3rd Floor, West Wing Suites, 132 Fox Street, Johannesburg.
10. N.T Ntshole Attorneys with its business address at Suite 325, Bank Towers, 190 Thabo Sehume Street, Pretoria, 0001.
11. PM Mositsa Inc with its business address at Lapa Building, 380 Bosman Street, Pretoria.
12. Shabangu & Beauchamp (Pretoria) with its business address at Shop 15, Bothongo Plaza West, Francis Baard Street, Pretoria Central, Pretoria, 0001.
13. Modibedi Sebele Phethoe Attorneys with its business address at 44 Rooihuiskraal Road, The Reeds Centurion.
14. Erasmus ELS Inc t/a Erasmus Scheepers with its business address at 172 Bronkhorst Street Nieuw Muckleneuk Pretoria.