



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

Case No: 1065/2023

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

SHERIFF, CAPE TOWN WEST

First Respondent

KRUGER & CO

Second Respondent

FILLIS CHITANDARA

Third Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] The Third Respondent opposed this urgent application in terms of which the Applicant seeks *inter alia* that the writ of execution issued by the Second Respondent under case number 1065/2023, be stayed to operate as interim relief pending the

Supreme Court of Appeal's hearing of the *Mudawo and Others v Minister of Transport and Another* ("*Mudawo*")¹ matter in which the question of whether the social benefit scheme provided for in the Road Accident Fund Act² ("The Act") and which is administered by the Fund was not intended to benefit illegal foreigners. The Applicant further seeks an order be pended subject to a rescission application which is still to be launched.

Factual Background

[2] The Third Respondent entered South Africa on 8 December 2023 and her trip expired on 5 March 2024. Prior thereto, the Third Respondent entered South Africa on 15 July 2012 and her trip expired on 14 August 2012. These dates are confirmed by the Movement Control System ("MCS"). On 17 January 2021, the Third Respondent's minor child was involved in an accident. The Second Respondent filed the Third Respondent's lodgement documents relating to the injuries sustained by the Third Respondent's child on 8 December 2022. These documents also included a document named Formal Recognition of Refugee Status in the RSA. The Second Respondent lodged a copy of the Third Respondent's passport without including the pages containing the border control stamps entry.

[3] The Second Respondent issued summons against the Applicant on 19 January 2023, which was served on 23 May 2023. The Applicant offered to settle the Third Respondent's claim. The Third Respondent accepted the offer on the 24th of August 2023

¹ (011795/2022) [2024] ZAGPPHC 258 (26 March 2024).

² Act 56 of 1996.

whereafter the Settlement Agreement was made an order of Court on the 29th of November 2023.

[4] In October 2024, the Applicant sought to obtain a Statement in terms of Section 212 of the Criminal Procedure Act³ ("the Section 212 statement") from the Department of Home Affairs to confirm the legal status of the Third Respondent. The Section 212 statement revealed that the Third Respondent was not legally in the country at the time of the collision. It also exposed that the document named Formal Recognition of Refugee Status in the RSA provided by her to the Applicant was not issued by the Department of Home Affairs and that it is a fraudulent document.

Urgency

[5] The events leading up to the launching of this application was predicated on an instruction to the First Respondent who was instructed by the Third Respondent to immediately attach and remove on 5 November 2024. On 6 November 2024, after receiving the Section 212 statement and respective MCS records, the Second Respondent instructed the Sheriff to cancel the instructions as received. On 7 November 2024, the legal representative for the Second Respondent indicated through an email that she would pend the writ and would revert after consulting with the Third Respondent. However, the First Respondent served the writs on the Applicant on 2 December 2024, with instructions to attach goods and immediately remove assets. On 3 December 2024, the state attorney contacted the legal representative of the Second Respondent for it to be allowed time to investigate the claim and that removal should not be done immediately

³ Act 51 of 1977.

and that removal be held over to allow time to determine the way forward. Later that day the Second Respondent forwarded an email that it would hold over the writ until Monday, 9 December 2024 lunchtime and that First Respondent had been instructed to attach and remove at 14h00.

[6] Rule 6(12) states as follows:

- (a) *In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as it deems fit.*
- (b) *In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.'*

[7] The Applicant contended that urgency for this application was created by the Second and Third Respondents' insistence to proceed with the attachment, despite being provided with documents reflecting the Plaintiff being an illegal foreigner and that the Third Respondent appears to have committed *prima facie* fraud. The Applicant further submitted that notwithstanding the various requests made by the Applicant, the Second Respondent persisted with the instructions to the First Respondent that the attached assets had to be removed imminently and immediately. Additionally, the Applicant asserted that it holds an obligation to protect public funds provided to it. Moreover, the Applicant argued that it would not obtain substantial redress in the ordinary course and

given the ongoing financial pressure and threats of selling its assets in execution, the removal of the assets will have the effect of collapsing the Applicant's Cape Town Branch.

[8] There was no real opposition to the matter of urgency. This court was satisfied that the two requirements of Rule 6(12) for urgency as distilled in the matter of **Salt and Another v Smith**⁴ were met, and proceeded to hear the application.

Principle submissions by the parties

[9] The Applicant correctly identified the requirements for an interim interdict. In light of the conclusion to which I have come, I do not deem it necessary to rehash all the submissions made by the Applicant in this regard, as much of this application turns on the Applicant's reliance on the **Mudawo** matter pending before the SCA, dealing with whether illegal foreigners are covered by Section 17 of the RAF Act. It asserted that once the legal position is pronounced it will result in the Applicant having to attempt to undo the current court order by way of rescission or appeal.

[10] In augmentation of addressing the requirement pertaining to its *prima facie* right, the Applicant *in casu*, submitted that in terms of Section 4(1)(a) of the Act, the Applicant is empowered to stipulate the terms and conditions upon which claims for the compensation contemplated in the Act shall be administered. They contended that the Social Benefit Scheme was not designed and intended to benefit people who are in South Africa illegally, neither to accommodate claims that are fraudulent in nature. Section 42

⁴ 1991 (2) SA 186 at 187A – B. 'This Rule entails two requirements, namely the circumstances relating to urgency which has to be explicitly set out and secondly, the reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course.'

of the Immigration Act ⁵ stipulates that '*no person, shall aid, abet, assist, enable or in any many help*' an illegal foreigner or '*a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable.*' It was argued that the Fund is prohibited from intentionally facilitating any illegal foreigner receiving public services to which such an illegal foreigner is not entitled. The Applicant asserted that they have an obligation to ascertain the status of the person receiving its service. They contended that the Social Benefit Scheme provided for in the Act and which is administered by the Fund was not intended to benefit illegal foreigners. In further amplification, they argued that the reference to "any person" in Section 17 of the Act, is a reference to a South African citizen, a permanent resident or a legal foreigner.

[11] The Respondent however contended that the Applicant's purported interpretation of the Act is untenable if regard is to be had to the principles of statutory interpretation as endorsed by the Constitutional Court. They argued that the ordinary meaning of the words "any person" in the context of a predecessor of the Act⁶ has been determined as a phrase with an "obviously wide meaning", denoted by the grammatical interpretation of the word "any".

[12] The Applicant contended that it's prospects of success in the ***Mudawo*** appeal cements the Funds having a *prima facie* right to the interdictory relief sought. In this regard, the Respondent argued that even in the event of the appeal being successful, such outcome can have no legal effect on the compromise for the following reasons:

⁵ Act 13 of 2002.

⁶ The Compulsory Motor Vehicle Insurance Act, 56 of 1972.

- (a) A compromise or settlement is a contract the purpose of which is to prevent or await or put an end to litigation and has the effect of *res judicata*.
- (b) A compromise is a substantive contract which exists independently of the cause that gave rise to the compromise;
- (c) A compromise may only be set aside on the ground that it was fraudulently obtained on the ground of mistake (*iustus error*), provided that the error vitiated true consent and did not merely relate to the motive of the parties or to the merits of the dispute which was the purpose of the party to compromise.

[13] It was pointed out that there is no suggestion on the papers of fraud or *iustus error* that would entitle the Applicant to revisit the compromise. Furthermore, the Respondent argued that the prospects of success with the contemplated appeal are not addressed in the application, despite the application being premised on such appeal. The Respondent further articulated that the Applicant was at all material times aware that the Third Respondent was a foreigner, but elected not to require of her to present proof that she was legally in the country. Finally, they argue that there is no legal prohibition against them compromising an invalid claim.

Discussion

[14] Whilst the Section 212 statement as it stands remains unchallenged, the question that requires to be answered is whether the pending SCA decision precludes the Respondent from executing on a valid judgment. The ***Mudawo matter*** centres around a policy decision made by the Minister of Transport in July 2022, which effectively excluded illegal foreigners from claiming damages against the RAF. This decision was

implemented through a new RAF 1 form and a Management Directive, requiring foreign nationals to provide proof of legal entry into South Africa and a valid visa to claim compensation.

[15] In ***Mudawo*** the Applicants, including Adam Mudawo, argued that this decision is unconstitutional and ultra vires, as it amends the Act without legislative approval. They claim that Section 17(1) of the Act⁷ in reference to the phrase "*compensate any person*" for losses or damages suffered due to road accidents includes illegal foreigners, regardless of their immigration status. The Applicants further contended that the Act's use of the phrase "any person" implies that the Fund's liability to compensate is not limited to South African citizens or lawful residents, but rather extends to anyone who suffers damage caused by the driving of a motor vehicle in the circumstances described in the section.

[16] The primary significance of ***Mudawo*** pivots on the legal interpretation of "any person" in Section 17(1) of the Road Accident Fund Act. The court definitively ruled that "any person" includes illegal foreigners. In addition, the court found that the Minister of Transport and the Road Accident Fund (RAF) cannot unilaterally change the interpretation of the Act; create administrative barriers to exclude illegal foreigners from claims and effectively amend the Act through policy decisions or management directives. This judgment upholds the principles of legality, rule of law, the broad interpretation of social legislative protection and non-discrimination. It furthermore holds practical

⁷ Section 17 of the Road Accident Fund Act 56 of 1996 states:

"(1) Subject to the provisions of this Act, the Fund shall be liable to compensate any person who has suffered damage caused by the driving of a motor vehicle by any person at any place within the Republic, or in any other country, if the motor vehicle is registered or is required to be registered in the Republic..."

implications in that the court set aside provisions in the new RAF 1 claim form, the RAF Management Directive of 21 June 2022 which required foreign claimants to prove legal entry into South Africa. This is to be viewed against the past context as RAF had historically paid claims for illegal foreigners for more than 25 years. Courts had also previously upheld claims by illegal foreigners without challenge.

[17] Additionally, **Mudawo** confirmed vital legal principles which in summary, included that administrative actions must comply with the empowering legislation. As correctly pointed out, by the Respondent the legislative intent is to provide the widest possible protection to accident victims and finally that compensation claims are not "social benefits" but legal entitlements. **Mudawo** is said to represent a significant victory for equal protection and access to justice for all persons injured in road accidents in South Africa, regardless of their immigration status.

[18] In essence, the SCA is called upon to decide whether the Minister's policy decision and the RAF's implementation of the new requirements are lawful and within the bounds of the Act. If the decision is deemed unlawful, it could have significant implications for the rights of foreign nationals in South Africa. The reality is that much depends on the outcome of the SCA decision, upon which the Applicant places reliance for the relief it seeks in this matter *in casu*.

[19] *In casu*, RAF made an offer of compromise to which no conditions were attached. The Third Respondent on behalf of the minor child accepted the compromise. The central question in any event is whether all claims that were compromised prior to

the ***Mudawo*** matter will be nullified if the outcome is favourable to RAF. The Respondent argued that the judgment can have no effect on the judgment *in casu*.

[20] It is notable that the focus of the application *in casu* was directed at the pending SCA however, it is apparent that the Applicant, now armed with the Section 212 statement has rethought its approach to this particular matter. It is further noteworthy that summons in this matter was issued on 19 January 2023. The Settlement offer was accepted on 24 August 2023 and the Settlement Agreement was made an order of court on 29 November 2023. However, in July 2022, the Minister of Transport took a policy decision to exclude illegal foreigners from claiming damages against the RAF, which was implemented through a new RAF 1 form and a Management Directive. It is evident that the writ of execution triggered this application which beggars the question whether the Applicant would have done anything if there was no attachment and threatened removal. This court is indeed alive to the fact that the Road Accident Fund relies entirely on the fiscus for its funding and they should be astute to protect it against illegitimate or fraudulent claims. This does not mean that the Applicant may ignore basic procedural requirements. Apart from the doctrine of *res judicata*, the application is silent on whether the compromise was fraudulently obtained, bearing in mind that the compromise was made subsequent to the policy decision in 2022. It is settled law that a judgment may be rescinded or varied on the grounds of mistake common to the parties or *iustus error*.

[21] The misguided approach by the Applicant in launching this urgent application to ward off the impending removal of its property, under circumstances where their interpretation of Section 17(1) of the Act is still to be tested, leaves many questions

unanswered. The Section 212 statement exposed the status of the Third Respondent who was not legally in the country at the time of the collision and that the Formal Recognition of Refugee Status RSA document is a fraudulent document as it was not issued by the Department of Home Affairs.

[22] It was argued that even in circumstances where charges of fraud have been pursued, this does not mean that there was fraud. There are no submissions in the main Application by the Applicants that there was fraud and *iustus error*. These contentions come to the fore in the Applicant's Replying Papers.

[23] It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. It is thus expected of the Applicant to disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet in the founding affidavit.⁸ This legal principle has been enunciated in ***Director of Hospital Services v Mistry***⁹ where the Appellate Division held:

"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:

'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'

⁸ See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T); *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) at 508 B-D.

⁹ 1979 (1) SA 626 (AD) at 635H-636B.

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953 (3) SA 256 (C) at 260)"

[24] The Respondent also referred the court to the matter of **Road Accident Fund v Busuku**¹⁰ ("**Busuku**"), where the court reflected on the principles relating to the interpretation of the Act. In **Busuku** the court noted that the Act is social legislation aimed at providing the greatest possible protection to persons who have suffered loss through negligence or unlawful acts on the part of the driver or owner of a motor vehicle. As such, the provisions of the Act must be interpreted as extensively as possible in favour of third parties to afford them the widest possible protection. However, courts should also be mindful of protecting the Fund against illegitimate or fraudulent claims, although there was no suggestion of such in this case. The court also emphasized the importance of considering the context and purpose of the Act, as well as the need to interpret the legislation contextually, purposefully, and holistically. In this regard, the court in **Busuku** stated that:

'...it is necessary to reflect on the principles relating to the interpretation of the Act. The principles generally applicable to the interpretation of documents are well settled and have been repeatedly restated in this Court.¹¹ In considering the context in which the provisions appear and the purpose to which they are directed it must be recognized that the Act constitutes social legislation and its primary concern is to give the greatest possible protection to persons who have suffered loss through

¹⁰ 2023 (4) SA 507 (SCA) at para 6.

¹¹ See, for example, *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

negligence or through unlawful acts on the part of the driver or owner of a motor vehicle.¹² For this reason the provisions of the Act must be interpreted as extensively as possible in favour of third parties in order to afford them the widest possible protection.¹³ On the other hand, **courts should be alive to the fact that the Fund relies entirely on the fiscus for its funding and they should be astute to protect it against illegitimate or fraudulent claims...** [my emphasis]

[25] The Respondent correctly pointed out that the wide interpretation for the purpose of the Act has been confirmed by the Constitutional Court; however, the excerpt they afore-quoted, stops short of the proviso that *courts should be alive to the fact that the Fund relies entirely on the fiscus for its funding and they should be astute to protect it against illegitimate or fraudulent claims.*'

[26] To my mind, there is too much uncertainty. Even if the outcome of **Mudawo** favours the Fund, the Applicant cannot wish away the existence of the current court order *in casu*. There is a plethora of case law that underscores the legal principle that a court order must be obeyed until it is set aside or varied by a Court of competent jurisdiction. In **Bezuidenhout v Patensie Sitrus Beherend Bpk**¹⁴ the Court held that '*an Order of Court stands until it is set aside by a court of competent jurisdiction, and until then, it must be obeyed even if it may be wrong.*'

[27] This principle emphasises the importance of respecting and complying with

¹² *Road Accident Fund v Masindi* [2018] ZASCA 94; 2018 (6) SA 481 (SCA) para 13.

¹³ See, for example, *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) 286E-F; and *Pithey v Road Accident Fund* [2014] ZASCA 55; 2014 (4) SA 112 (SCA) para 18.

¹⁴ 2001 (2) SA 224 (E) at 229 B – C.

Court Orders, even if they may be perceived as incorrect or unjust. The reasoning behind this is that:

- (a) Court orders provide finality and certainty, allowing parties to move forward;
- (b) Obeying court orders demonstrates respect for the judicial system and the rule of law and
- (c) If parties were allowed to disregard court orders, it would undermine the authority of the Courts.

[28] This principle is essential for maintaining the integrity of the judicial system and ensuring that the rule of law is upheld. It is trite that the underlying common law doctrine of *res judicata* was to give effect to finality of judgments.

[29] Whilst this court is enjoined to protect the Fund against illegitimate or fraudulent claims it can only do so if the Applicant makes out its case for the relief it seeks in the papers. The Founding Affidavit only suggests that once the legal position is pronounced in ***Mudawo*** the Applicant will be vindicated in its stances that it has taken on the “foreigner issue”. It further proposes that once the legal position is pronounced it will result in the Applicant having to attempt to undo the current court order by way of rescission or appeal. In its own argument it uses the word “attempt” meaning that the Applicant does not have confidence in the prospects of success. The Applicant fails to address the proverbial elephant in the room, namely whether the key requirements of Rule 42 have been established; put differently would the Applicant be able to successfully meet the threshold requirements such as *inter alia*, explaining why the application was

not launched within a reasonable time; the delay in obtaining the new facts and mistake or error.

[30] It is therefore settled law that the issues and averments in support of the parties' cases should appear clearly from the Founding Affidavit. The Founding Affidavit is to contain sufficient facts upon which a court may find in the Applicant's favour. The exception to the rule as distilled in ***Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd***¹⁵ is where a new matter is raised that the Applicant could not reasonably foresee, thereby necessitating further new facts in reply:

'A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant.'

[31] It is manifest that no new matter was raised. The Applicant has failed to set out the basis to attack the compromise in its Founding Affidavit. It is uncontroverted that RAF was fully aware that the Claimant was a foreigner. The Respondent argued that there is no requirement that a claimant had to present its own passport. In fact, the Respondent argued that the principle of estoppel finds application in terms of which the Applicant cannot allege afterwards that there was *iustus error*. I agree that the Applicant has failed to make out its case for the relief sought. The application is anorexic on the aspect of prospects of success in both the pending ***Mudawo*** appeal matter and the intended application for rescission *in casu*.

¹⁵ 2013 (2) SA 204 (SCA) at para 26.

[32] To my mind, if the Applicant was serious about launching an application for rescission, the papers for such application had to already have been prepared, if regard is to be had to the history of this matter. No timeline commitment to such application is made again reiterating that the Applicant has adopted a supine approach for approximately 1 year after the compromise was made an order of court. There has also been a significant time lapse since July 2022. The compromise was concluded subsequent to the policy decision. This court has a measure of understanding that the Section 212 statement only came to hand on 9 October 2024, however, the Applicant has not, despite being armed with this information, prepared papers to deal with the rescission of the extant judgment, that cannot be wished away.

Conclusion

[33] The Applicant's approach to this application, was in my view, mistakenly focussed, on staying the execution of the warrant pending the outcome of the SCA judgment instead of pursuing its challenge regarding the compromise in this matter. Even if the SCA matter as previously stated supports the Applicant's interpretation of Section 17 of the RAF Act, same does not render the existing judgment *in casu* a nullity and ultimately, a rescission of judgment application or appeal would have to follow. As demonstrated earlier, this is not just for the asking, but a proper basis for the relief sought must be made out, which the Applicant has failed to do on these papers.

[34] Whilst the outcome of the SCA decision in **Mudawo** is crucial, as it will determine the rights of foreign nationals in accessing compensation for road accidents; the pending outcome cannot in my view, be authority to stay the warrant of execution in

this matter. The outcome in respect of **Mudawo**, will hold significance to claims of this nature in general. However, this matter *in casu* must be decided on its own merits. Whereas there are allegations of fraud, it is uncontroverted that the child of the Third Respondent, who was born in South Africa was injured in a motor vehicle accident that occurred in South Africa.

[35] This court is alive to the potential consequences if the Fund's assets were to be removed, which may have a crippling effect on the already strained circumstances under which the Applicant operates. The balance of convenience, must also be considered not only insofar as it relates to the Fund but also insofar as it relates to the injured child of the Third Respondent. In weighing up the prejudices, this court is also to factor into the consideration the public interest and the consequence of a dismissal of the application. Therefore, it is my view that the Applicant cannot expect the Respondent to wait until the outcome of the **Mudawo** decision and then only if the judgment is favourable to proceed with Part B of this application to apply for the rescission, which is, as I have earlier pointed out not just for the asking. For more than 20 years, similar claims were compromised by RAF until the policy decision was made in 2022.

[36] Therefore, the prospects of success in the **Mudawo** application, do not translate in the Fund having a *prima facie* right to the interim interdictory relief sought for the reasons discussed earlier. Moreover, the Constitutional Court in **Municipal Manager OR Tambo District Municipality and Another V Ndabeni**¹⁶ reaffirmed that a court order is binding until it is set aside by a competent court and that this necessitates compliance,

¹⁶ [2022] 5 BLLR 393 (CC).

regardless of whether the party against whom the order is granted believes it to be a nullity or not. To my mind, the pending SCA decision does not preclude the Respondent from executing on a valid judgment. Consequently, in considering the matter in its entirety, the application falls to be dismissed.

[37] I interpose to state that the dismissal of this application on these papers does not preclude the Applicant from nonetheless pursuing other remedies.

Costs

[38] Counsel for the Respondent argued that because the Applicant has failed dismally in the endeavour to establish any basis in fact or in law for the relief sought, that costs on a punitive scale ought to be awarded which costs are to include the costs of counsel on scale "C".

[39] It is trite that costs follow the result. I can find no cogent reason why such an order ought not to follow. Given the nature and complexity of the matter, in the exercise of my judicial discretion, I am of the view that the costs of counsel on scale "B" is warranted. Furthermore, I am not inclined to grant a punitive cost order against the Applicant as the court is mindful that it is state-owned entity that provides financial assistance to victims of road accidents or their families using public funds.

Order:

[40] In the result, the Court, after having heard Counsel for the Applicant and

Counsel for the Third Respondent, and having read the papers filed of record make the following orders:

- (a) The Applicant's application is dismissed with costs, which costs are to include the costs of counsel on Scale "B".



ANDREWS, AJ

Acting Judge of the High Court, Western Cape Division

Appearances

For the Applicant: Advocate F S Goosen
Instructed by: The Office of the State Attorney

For the Third Respondent: Advocate H G McLachlan
Instructed by: Kruger & Co

Date of Hearing: 11 December 2024

Date of Judgment: 18 December 2024

This judgment was handed down electronically by circulation to the parties' representatives by email.