

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 042035/22

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
12/3/25	
DATE	SIGNATURE

In the matter between:

SONJA ERASMUS

Applicant

and

THE ROAD ACCIDENT FUND

Respondent

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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 12 March 2025.

Summary: An order *ad factum praestandum* (for the performance of a particular act) is enforceable through a contempt proceedings and not a judicial review. A breach of a Court order does not amount to an exercise of public power and it is not reviewable under a *PAJA* or legality review pathway. A breach of a Court

order occurs only when a party fails to do what a Court of law has directed should be done. When a party refuses to do what has not been ordered by a Court of law, that party does not instead exercise public or statutory power simply because it is an organ of state. Judicial review as a remedy is unavailable. The refusal by the RAF to preauthorise a medical procedure does not amount to exercise of public power and does not amount to an administrative action. At the very least it amounts to exercise of contractual power. The RAF does not breach section 17(4) of the Road Accident Fund Act when it refuses to preauthorise a requested medical procedure. Held: (1) The application for review is dismissed with no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] Thankfully, the Court in *Nxolo v Accident Fund Road (Nxolo)*¹ has, with sufficient perspicacity, put an end to what was a growing practice for litigants seeking to compel compliance with the section 17(4) undertaking orders with another order to compel compliance in *lieu* of contempt proceedings. It does seem that another avenue to achieve similar results is being introduced. The avenue is, to, as it is the case herein, seek a judicial review, in an instance where the Road Accident Fund (RAF) refuses to honour an undertaking in terms of section 17(4) of the Road Accident Fund Act (RAFA). This avenue, before it becomes cancerous and swell the already bulged rolls of this Court, must equally be stamped out instantaneously. This judgment is purposed to do exactly that.
- [2] This is an unopposed application seeking to judicially review two decisions taken by the RAF officials. Both these impugned decisions relate to a rejection or

¹ (34757/2014; 60468/2018) [2024] ZAGPPHC 1350 (11 December 2024)

refusal to preauthorise medical procedures to have been undertaken by the applicant before this Court. The first impugned decision was communicated to the applicant on 30 June 2020. The second one, was communicated to her on 3 March 2022. Disenchanted by both these decisions, the applicant launched the present application on or about 20 October 2022. Unsurprisingly, for reasons unbeknown to this Court, and as it has become customary, the RAF, failed to (a) comply with the call in terms of rule 53(4)(d) of the Uniform Rules of this Court² and (b) to oppose the reliefs sought by the applicant. Given the view this Court takes at the end; the absence of the review record will not play a pivotal role in the determination of the present application. Additionally, given the view this Court takes, although not entirely satisfied that the delay in instituting the present application is condonable or ignorable, this Court would depart from the premise that the delay is condonable and or ignorable.

Pertinent background facts to the present application

- [3] On 26 April 2002, the applicant, Ms Sonja Erasmus (Ms Erasmus) was involved in a motor vehicle collision. As a result, she suffered bodily injuries. Owing to the bodily injuries suffered by her, she instituted an action for damages against the RAF. Ultimately, on 20 May 2009, by agreement between Ms Erasmus and the RAF, an order was made by the Court under the hand of His Lordship Mr Justice Shongwe DJP. Of relevance to the present application, it was ordered that: -

“2 To provide Plaintiff [Ms Erasmus] with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996, limited to 90%, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her arising out of the injuries sustained by her in a motor vehicle collision which occurred on 26 April 2002, after such costs have been incurred and upon proof thereof.”

² The applicant, for some unconvincing reasons, chose not to compel the RAF to heed the call, as it is customarily done. As it was confirmed in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC), a rule 53 record, although benefitting an applicant for review, it also assists a Court to perform its review functions.

- [4] On or about 7 July 2009, the RAF, in compliance with the agreed to order, issued an undertaking in favour of Ms Erasmus, which provided as follows: -

“UNDERTAKING IN TERMS OF SECTION 17(4)(A) OF THE ROAD ACCIDENT FUND ACT, 1996 (ACT 56 OF 1996), AS AMENDED

THE ROAD ACCIDENT FUND, (hereinafter referred to as the FUND)

Having settled the claim for compensation under Section 17 of the Road Accident Fund Act, 1996 ..., lodged with the FUND, by SONJA ERASMUS, Identity Number ... under the FUND's CLAIM NUMBERS: ..., Link number: ..., and was litigated out of the HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION), under Case Number ..., arising from the motor vehicle accident which occurred on 26 APRIL 2002, at or near EDENVALE, PRETORIA STREET, GAUTENG PROVINCE.

Places on record *that it has been agreed between the parties* that the CLAIMANT shall be entitled to 90% of his/her proven damages emanating from the collision as contemplated by Section 17 of the Act

Undertakes under section 17(4)(a) of the said Act to compensate the CLAIMANT for the costs of future accommodation in a hospital or nursing home or treatment of or rendering of services or the supplying of goods to the said CLAIMANT after the costs have been incurred and on proof thereof.

- [5] The undertaking was signed by an official of the RAF and Ms Erasmus. On 22 June 2020, Ms Erasmus made a request to the RAF for a preauthorisation for the payment of the costs related to a medical procedure to be performed on 8 July 2020. It is apparent that Ms Erasmus submitted this request in the belief that the terms of the undertaking afforded her the right to place such a request. Allegedly, such requests were effortlessly made and honoured in the past. Again, on 16 November 2021, Ms Erasmus made another request for the procedure to be performed on 31 November 2021.
- [6] On 30 June 2020, the RAF communicated to Ms Erasmus, the following, with regard to the request for preauthorisation made on 22 June 2020: -

"Good day Mrs Erasmus, I have received feedback from the head office today and your request for preauthorization of the requested procedure *has been declined* on the basis that *the RAF does not assume liability for the procedure as it is not directly connected to the injuries sustained in the accident in 2002.*"

- [7] On 3 March 2022, the RAF communicated to Ms Erasmus, the following, with regard to the request made on 16 November 2021: -

"The Fund hereby declines request Surgical Intervention For thoraco-lumbo-sacral spine...

Above Request Declined by Medical Advisor as per Below Medical Reasons

... Funding of this procedure is not supported *as no nexus could be established between the claimant's back problems and the injuries she sustained in the accident.*

- [8] Notwithstanding the reasons outlined in the communication of 30 June 2020, on or about 19 October 2021, Ms Erasmus launched a request for access to records of a public body in terms of section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA) and described the record sought to be accessed or the relevant part thereof as follows: -

"Complete record of findings of the medical review panel and *full reasoning* behind rejection for pre-authorisation of back surgery on or about June 2020 for Ms Sonja Erasmus ...

- [9] On 13 December 2021, the RAF indicated to Ms Erasmus' attorneys of record that it was struggling to obtain the entirety of the file contents. It is apparent that no further steps as contemplated in the PAIA were taken by Ms Erasmus³. It is also apparent that on 25 October 2021, another PAIA request was made, but the RAF provided, what Ms Erasmus considered to be, irrelevant information with no reasoning process at all. As indicated above in October 2022, the present application was launched.

Evaluation

³ Sections 74-78 of PAIA provides remedies for failure to heed a request.

[10] In the present constitutional era, two judicial review pathways are available where an exercise of public or statutory powers is involved. Those are; (a) the PAJA review; and (b) the legality or rationality review. A PAJA review is reserved for administrative actions as defined in the PAJA. A legality review is reserved for the exercise of public power that is either unlawful; irrational or arbitrary. It is significant to mention that a PAJA review must be brought in terms of section 6 read with section 7 of the PAJA. Section 6(1) of the PAJA, specifically provides that any person may institute proceedings in a Court or tribunal for the judicial review of an administrative action. In terms of section 6(2) of the PAJA, the power to judicially review an administrative action is to be confined to the grounds specified in sections 6(2)(a)-(i) of the PAJA.

[11] Accordingly, any party, seeking to judicially review an administrative action, must predicate the review application on any or all of the grounds specified in section 6(2). Such grounds ought to be specifically pleaded in the founding affidavit. Nowhere in the founding affidavit does Ms Erasmus remotely mention section 6 of the PAJA. It is perspicuous that Ms Erasmus has not launched a PAJA review. It is trite that in motion proceedings a party stands and fall by the allegations made in the founding affidavit. Ms Erasmus pinned her colours to the mast and testified as follows: -

“14.8 In the premises, it is submitted that on the *principle of legality and rationality*, the decisions of the RAF to refuse to compensate me for medical expenses as set out in paragraph 5 *supra*, should be reviewed and set aside.”

[12] Undoubtedly, hers is a legality and rationality review as opposed to a PAJA review. In my view, any party seeking to launch a PAJA review, must of necessity plead that the decision so impugned amounts to an administrative action as defined in section 1 of the PAJA. Pleading as such, engages the jurisdiction of a Court in terms of the PAJA. A finding that a decision is not an administrative action as defined in section 1 of the PAJA dislodges a judicial review from the parameters of the PAJA.

[13] Impermissibly, in the heads of argument, counsel for Ms Erasmus placed heavy reliance on PAJA as if a PAJA review was pleaded. Since this Court takes a view

that this is not a pleaded PAJA judicial review, it is obsolete to entertain any legal argument annexed to any of the provisions of the PAJA. In any litigation, the duty of a Court is to determine or decide a case as pleaded. Differently put, a Court is confined to the four corners of the pleaded case. In order to determine what case has been presented for a decision of the Court, a judge must look to the founding affidavit. The founding affidavit in the present matter does not mention the PAJA or a decision alleged to be an administrative action.

[14] In a legality judicial review, which the present application is one, there is no time period prescribed within which to launch a review application. The time periods mentioned in section 7 of the PAJA finds no application in this instance. In a legality judicial review, a condonation application is not required. Thus, the provisions of section 9 of the PAJA finds no application in the present instance. What finds application is the common law rule of undue or inordinate delay. In terms thereof, a two-stage enquiry is contemplated. Firstly, a factual enquiry must be conducted to determine as to whether an inordinate delay is present or not. Secondly, if an inordinate delay is present, whether in all the circumstances the delay is excusable or not. In a legality review, different approach to inordinate delay was found to be applicable by the Constitutional Court⁴.

[15] As indicated at the dawn of this judgment, this Court shall depart from the premise that there was an inordinate delay and such a delay is, in the interests of justice excused. In a legality review, there are basically three legs to challenge a decision, which must be an exercise of statutory or public power; namely; (a) lawfulness; (b) rationality; or (c) arbitrariness. With regard to lawfulness, the only question is whether the decision complies with the legal prescripts, if any have been prescribed⁵. The key question in this instance is whether the RAF was exercising statutory or public power or not when it declined the preauthorisation requests. It has been acknowledged by the Constitutional Court that a determination whether a public function is involved is an unenviable difficult task⁶. The fact that the actor is an organ of state is not and should not be decisive. The

⁴ See *SITA SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC)

⁵ See *Minister of Defence v Motau* 2014 (5) SA 69 (CC).

⁶ See *Chirwa v Transnet Limited and others* 2008 (4) SA 367 (CC).

nature of the function performed, often times, provides the much needed guidance as to whether an exercise of public power is involved. In my considered view, there is no exercise of statutory or public power involved herein. The power located in section 17(4)(a) of the RAFA is the power to be exercised by a competent Court, if a claim for the costs of the future accommodation; treatment or supply of goods is included. In this instance, the Court has already exercised that statutory power and directed the RAF to provide an undertaking and the RAF duly obliged.

- [16] Of particular significance is that the direction to the Fund or its agent is to undertake to compensate only after the costs have been incurred and the proof thereof is furnished. In the present instance, Ms Erasmus did not incur the costs at all. Nowhere in the agreed to Court order is it ordered that Ms Erasmus must seek and be furnished with a preauthorisation. As to why that approach was taken, this Court is unable to comprehend. It may have been an internal practice, but it is not one that is legislated or ordered. The Court order is, in line with the enabling section, lucid and clear. First incur the costs and thereafter submit proof. Once that is done, the statutory duty to compensate as undertaken arises.
- [17] On 7 July 2009, the RAF complied with the order of the Court. What the RAF was ordered to perform was to furnish an undertaking and it duly did. Where a Court orders a person to perform a particular act and that person fails to perform as ordered, the remedy of the aggrieved person is to approach a Court for a contempt order. However, on the facts of the present application, a case for contempt is not makeable at all. The RAF has complied.
- [18] When the RAF refused a preauthorisation, which was not ordered by the Court, the RAF was not acting in contempt. Importantly, the RAF, in refusing to preauthorise, it was not exercising a statutory or public power. There is nothing public about the RAF refusing to accede to a request of a claimant, which is not predicated on any Court order or a statutory provision. Even if the preauthorisation was, on any benign interpretation, obliquely predicated on the Court order, such refusal would, at the minimum, only amount to a breach of a Court order as opposed to an exercise of a statutory or public power susceptible to a judicial review either on the PAJA or legality basis.

- [19] Although this Court has established that the PAJA review had not been pleaded, a refusal to preauthorise the two procedures, in this Court's considered view, does not amount to an administrative action as defined in section 1 of the PAJA. When regard is had to the reasons advanced by the RAF for the refusal, it is beyond perspicuous that no exercise of public power was involved. According to the RAF, rightly or wrongly so, the undertaking, as ordered and given, is confined to damages emanating from the collision. The factual question whether the contemplated procedures relate to the collision injuries is more a matter of medical opinion. When the RAF expressed such an opinion, in the view of this Court, no exercise of a statutory or public power was involved.
- [20] An undertaking is effectively a contract concluded between the RAF and the claimant, in this instance, Ms Erasmus. Failure to perform in terms of a contract constitutes a breach and or repudiation. Such happening entitles the aggrieved party to make an election whether to cancel the contract and sue for damages or insist on specific performance. The known remedies for a breach of contract are (a) a specific performance claim or alternatively (b) a damages claim after an election to cancel has been made by the aggrieved. A submission that the undertaking is an empowering document as contemplated in section 1 of the PAJA is without merit. If anything, in using the agreed to terms of the undertaking to refuse the preauthorisation, the RAF will certainly be exercising a contractual power as opposed to a statutory or public power. Such an exercise of power is not reviewable under the PAJA or legality judicial pathway⁷. It is a misguided suggestion to suggest that the RAF is exercising section 17(4)(a) powers. As dealt with above a competent Court is empowered to order the RAF to furnish an undertaking and all the RAF must do is to comply. There are no powers reserved for the RAF in section 17(4). This Court is alive to a raging debate as to whether exercise of contractual power by an organ of state may or may not involve administrative law principles⁸. However, to my mind, if there is any contractual power exercised by the RAF, in this particular instance, there is no element of

⁷ See *Cell C Service Provider (Pty) Ltd v MEC: Free State Provincial Government Department of Treasury* [2019] All SA 80 (FB).

⁸ See *SANParks v MTO Forestry (Pty) Ltd and Another* [2018] (5) SA 177 (SCA) and *Vodacom (Pty) Ltd v National Commissioner of Police and others* (18770/2022) dated 17 March 2023 and the authorities cited therein.

coercion involved. It is a question of whether the damages emanate from the 2002 accident or not. The question whether the damages covered are only those emanating from the accident is a matter involving the interpretation of the terms of the undertaking and nothing more. A claim for breach of contract will certainly remedy the situation as opposed to a legality review. A legality challenge is reserved for cases involving bureaucratic actions of the state or its organs. In a pure breach of contract claim, Ms Erasmus may lead evidence to demonstrate that, as contemplated by the terms of the contract allegedly breached, the contemplated procedures emanate from the accident injuries. It will be chaotic to suggest that in any breach of contract claim, once the state or its organ is involved, an exercise of public power emerges to a point that a legality challenge may be indiscriminately mounted.

[21] A further observable fundamental difficulty for Ms Erasmus is that the undertaking specifically provides that compensation is possible only after the costs have been incurred and a proof thereof is furnished. This term of the undertaking is specifically provided for in section 17(4)(a) of the RAFA. In other words, the jurisdictional requirements for the decision to compensate is first the incurring of the costs and the proof thereof. All the more reasons why the claim is purely contractual. First incur, exhibit proof and then demand payment. Elementarily, if Ms Erasmus proves incurrence, *prima facie*, she is entitled to compensation. Refusal to compensate is nothing but the breach of the undertaking, which must equate a breach of contract claim. Clearly, Ms Erasmus takes a view that her entitlement to be compensated arises from the provisions of the undertaking as she interprets it. According to her, as provided for in the undertaking, the procedures are linked to the injuries she sustained in a motor vehicle collision some 20 years ago.

[22] As indicated above, section 17(4) of the RAFA, empowers a competent Court to order furnishing of an undertaking and not the RAF itself. The section does not empower the RAF to issue any preauthorisation. Accordingly, by deciding to refuse the preauthorisation, the RAF does not in any manner or form breach section 17(4) nor act unlawfully. It may well be so that it is acting in breach of the undertaking, which is nothing but a breach of contract claim.

[23] Irrationality only occurs when, in the exercise of statutory or public power, the repository of power acts contrary to the stated purpose of the statutory power⁹. This Court, firmly holds a view that in refusing to preauthorise, the RAF did not exercise a statutory or public power. That should then mark the end of the enquiry with regard to rationality. Nevertheless, as *Albutt* informs us that the duty of a Court in a rationality exercise is to assess the means employed by the decision maker as opposed to a Court acting as a repository of powers. The purpose of a section 17(4) undertaking is to compensate for injuries emanating from the accident. If indeed the procedures that were to be performed some 20 years later are not linked to the collision injuries, then the means employed by the RAF to refuse preauthorisation is rational as it serves the purpose of the power.

Conclusions

[24] In summary, Ms Erasmus having not pleaded a PAJA review, she is not permitted to, only in argument, punt for a PAJA review. The impugned decisions are nevertheless not administrative actions. The RAF having complied with the Court order, it cannot be accused of contempt nor any exercise of a statutory or public power. The RAF in refusing to preauthorise, it exercised no public power nor acted unlawfully. Since no exercise of public power is involved; the element of rationality does not feature at all.

[25] For all the above reasons, I make the following order:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

⁹ See *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (5) BCLR 391 (CC).

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:

Instructed by:

For Respondent:

Date of hearing:

Date of judgment:

Mr R W Grunder

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No appearance.

7 March 2025

12 March 2025