



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

Case No: 22125/18

In the matter between:

THE ROAD ACCIDENT FUND

Applicant

and

CHARLES JEKA CHIPOFYA

Respondent

Neutral citation: *The Road Accident Fund v Charles Chipofya* (Case no 22125/2018) [2023] ZAWCHC (02 June 2025)

Coram: LEKHULENI J

Heard: 29 January 2025

Delivered: 02 June 2025

Summary: The respondent claimed damages against the Road Accident Fund arising from injuries he suffered in a motor vehicle accident. The matter was settled, and a draft order was by consent made an order of court. The applicant now seeks rescission of that order as it alleges that when the order was made, it was unaware that the respondent was an illegal immigrant. The court found these allegations to be misleading and demonstrably false. The application for rescission of judgment is dismissed. The applicant is ordered to pay costs of the application including the costs of counsel on scale B.

ORDER

- 1 The application for the rescission of judgment is dismissed.
- 2 The applicant is ordered to pay the costs of the application including the costs of counsel on scale B.

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application for the rescission of judgment. The applicant seeks an order that the court order granted by consent on 12 January 2023 by Goliath AJP, as she then was, be rescinded and set aside. The relief is being brought under the common law ground of *justus error* in that the court order was erroneously granted. The applicant asserts that it was not aware that the respondent was an illegal foreigner whose presence in the Republic violates the Immigration Act 18 of 2002 (*the Immigration Act*), at the time it settled his road accident fund claim. The applicant now seeks an order to set aside the court order of 23 January 2023, which directed it to pay the respondent damages in the sum of R1 461750 00.

[2] The respondent opposed the application and raised a preliminary point that there has been a gross delay in bringing the rescission application. The respondent contended that the applicant has not provided a satisfactory explanation for the considerable delay, which serves as a basis for dismissing the application. On the merits of the application, the respondent asserted that the averments in the founding affidavit are false and misleading and that the applicant has failed to show any form of *justus error* which vitiated consent or that the order was erroneously sought or granted.

The applicant's case

[3] On 30 November 2018, the respondent, instituted an action against the applicant flowing from a motor vehicle accident which is alleged to have occurred on 19 September 2016, between Plettenberg Bay and the Craggs wherein the plaintiff sustained serious bodily injuries. The applicant initially defended the case, but a settlement was reached when the respondent accepted the applicant's offer. On 12 January 2023, Goliath AJP issued an order by mutual consent that directed the applicant to pay R1 461750 in damages to the respondent.

[4] The applicant asserted that when the respondent instituted the legal action, he identified himself as Charles Jeka Chipofya, without providing any other details about his identity. Following the issuance of the court order, the respondent requested payment from the applicant. However, when payment was requested, the applicant required specific documents from the respondent. The applicant pointed out that this requirement is in accordance with treasury regulations, mandating the submission of stamped passports indicating entry and exit before the payment can be processed. This is done to ensure compliance with various laws and regulations applicable to claims against the fund. The applicant posits that it is only when payment is sought to be made that the applicant requires a stamped passport which shows or proves that the respondent was legally in the Republic at the time of the accident.

[5] According to the applicant, the respondent submitted a copy of a passport, which referred to him as Charles Chipeta and not as Charles Jeka Chipofya, and this made the applicant suspect foul play. In response to this suspicion, the applicant investigated through its forensic investigation department to ascertain the circumstances surrounding the dual identity of the respondent. During the investigation, it came to light that the respondent, a Malawian citizen, owns two passports, one naming him as Charles Jeka Chipofya and the other as Charles Chipeta. The applicant stated that when the respondent was confronted about having two passports, he tried to attribute the discrepancy to a data capture error.

However, in the applicant's view, the respondent's explanation appears far-fetched, as it is improbable that such an error could occur.

[6] Subsequent thereto, the applicant inquired with the Department of Home Affairs on the status of the two passports. The information received showed that the latest passport did not exist at the time of the alleged motor vehicle accident on 9 September 2016; the passport date of the first issue was 29 July 2023. Additionally, the movement system record for the other passport revealed that the visa had expired on 10 December 2012. The applicant contended that the Department of Home Affairs' records do not reflect the respondent's exit from the Republic on the old passport or new entry post-December 2012. In the applicant's view, this discrepancy could imply that the respondent was either not present in the country on the date of the accident or was potentially in the country illegally.

[7] To this end, the applicant is disputing the respondent's entitlement to the payment of damages granted in terms of the order of court sought to be rescinded. The applicant explained that as the order was erroneously granted, had the court been made aware that the respondent was an illegal immigrant and that his status in the country was in contravention of the Immigration Act, the court would not have granted the order. Furthermore, as things stands, the applicant contended that the respondent's identity remains questionable. As such, the order directing the applicant to pay damages to the respondent cannot be enforced as the respondent's identity remains a mystery. According to the applicant, the person who requested payment was not the one who had instituted an action against the applicant. The applicant further posited that until the identity of the claimant is resolved, the applicant is in no position to comply with the court order as it stands. To this end, the applicant sought the rescission of the consent order.

The respondent's case

[8] The respondent opposed the application and asserted that the application is misconceived and without any merit whatsoever and stands to be dismissed with cost on an attorney and client scale. The respondent contends that this application is an abuse of the court process and has been launched solely to obstruct the payment

of damages owed to him by the applicant. This claim encompasses both past and future loss of earnings, as well as general damages. The respondent opined that the applicant was motivated to launch this application solely to avoid a warrant of execution being issued against it. The respondent stated that the application has nothing to do with the respondent's illegal status in the country, which the applicant was fully cognisant of when it elected to settle the applicant's claim.

[9] The respondent explained that the factual basis and rationale for the rescission application is a complete fabrication and distortion of the facts. The respondent asserted that the applicant's allegations - claiming that the applicant was under the misconception that the respondent was legally in the country when the settlement offer was made and that the applicant would not have made this offer had it known about the respondent's illegal status, are false and misrepresent the truth.

[10] The respondent asserted that he (respondent) was born and raised in Malawi. After completing his military service in Malawi, he came to South Africa in 1994. He had thus been living in South Africa for many years when he was involved in the motor vehicle collision on 9 September 2016. During his time in South Africa, and before being involved in the accident, he met and married Elmarie Bezuidenhout, a South African citizen, in 2008, from which two minor children were born.

[11] Following the motor vehicle accident, the respondent's legal representatives received instructions to lodge a claim for compensation against the applicant. Subsequent thereto, the respondent's attorney wrote a covering lodgement letter to the applicant on 12 June 2018, advising the applicant that they had received instructions to lodge a claim on behalf of Charles Jeka Chipofya, also known as Charles Chipeta. According to the respondent, it was explicitly mentioned to the applicant that the respondent was also known as Charles Chipeta because this was the name erroneously inserted in his Malawian passport and work permit. The respondent averred that following the institution of the claim, multiple medical reports were submitted on behalf of the applicant. The respondent propounded that from these reports, it is clear that the respondent holds Malawian citizenship.

[12] After the respondent's RAF claim was lodged, the applicant's attorneys of record considered the merits of the claim and thereafter provided the respondent with a notice in terms of Rule 34 dated 4 March 2020 in terms whereof the merits were settled 100% in favour of the respondent. The matter was then declared trial-ready on quantum, and the parties were allocated the date of 24 November 2022 for the hearing of the quantum. Following extensive negotiations, the applicant delivered a Rule 34 notice to the respondent on 23 September 2022. In this notice, the applicant proposed to pay the respondent the sum of R600,000 as compensation for general damages.

[13] The respondent elected to accept the offer in respect of general damages and the acceptance was conveyed to the applicant in writing on 13 October 2022. Later, the claims handler of the applicant sent an email to the applicant's legal representative on 01 November 2022, attaching documents and an affidavit from the Department of Home Affairs confirming that the respondent's last valid status in the country was a visitor's visa which had expired on 10 December 2012. The parties engaged in settlement negotiations to settle the respondent's special damages.

[14] The respondent posits that on 24 November 2022, the date of trial, Ms Lemmer from the State Attorney's office, who was assigned to deal with the matter on behalf of the applicant, advised the respondent's legal representatives that the applicant was awaiting an offer in respect of the respondent's loss of earnings which offer needed to be signed off by head office in Pretoria. In addition, the respondent asserted that Ms Lemmer informed the respondent's legal representative that the amount the applicant would tender would be much less than the amount the respondent claimed in his actuarial report since the respondent was in South Africa illegally.

[15] Later that afternoon (on 24 November 2022), Ms Lemmer sent an email to the applicant's legal representatives, attaching a copy of the applicant's tender in terms of Rule 34 in respect of the respondent's past and future loss of earnings in the sum of R861 750.00 which was as anticipated, much less than the amount which the respondent was claiming. In the said email, Ms Lemmer attached a copy of the medico-legal report of Moipone Kheswa, the applicant's industrial psychologist,

together with several documents from the Department of Home Affairs, which showed that the respondent did not have a valid visa, which permitted him to be in South Africa. In addition, in the report, Ms Kheswa concluded that at the time of the accident, the respondent was not supposed to be in South Africa, and he had, therefore, incurred no past loss of earnings.

[16] The respondent asserted that on 28 November 2022, the applicant's legal representative confirmed that the respondent's general damages were settled at R600,000 and that the total amount payable to the respondent, including all heads of damages, was R1 461750.00, which the respondent accepted. Following on from the compromise agreement that had been reached between the parties on the entire quantum of the respondent's damages, a draft order dated 12 January 2023 was prepared and presented to the court. The draft order was by agreement made an order of court. The respondent contended that the applicant was neither candid nor forthcoming with the court in the founding affidavit. At the time the settlement agreement was prepared, and the court issued its order, the applicant was aware that the respondent was an illegal foreigner. Consequently, the respondent urged the court to dismiss the application with costs.

Principal submissions by the parties

[17] Mr Mokgope, the applicant's counsel, submitted that the applicant has an obligation in terms of s 17(1) of the Road Accident Fund Act 56 of 1996 (*'the RAF Act'*) to compensate any person, the third party, for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person caused by or arising from the driving of a motor vehicle by any person at any place within the Republic. Counsel referred the court to the case of *AM and Others v Minister of Transport and Another*,¹ in which the full court of the North Gauteng Division of the High Court found that 'any person' in s 17(1) of the Act also includes illegal immigrants. Counsel submitted that the applicant does not agree with the full court's finding and is appealing that judgment to the Supreme Court of Appeal.

¹ (011795/2022) [2024] ZAGPPHC 309 (26 March 2024).

[18] According to counsel, the term 'any person' referred to in the Act cannot include illegal immigrants as this will be in contravention of the Immigration Act, which prohibits illegal immigrants from being in the Republic. It was submitted that the Act is a social legislation which equates to claims for damages being social benefits which, if extended to illegal immigrants, will create an enormous burden on the State. In counsel's view, allowing illegal foreigners to claim from the applicant in terms of the Act offends the provisions prohibiting the aiding and abetting illegal foreigners in contravention of the Immigration Act.

[19] Mr Mokgope further submitted on behalf of the applicant that the applicant presented the offer of settlement in good faith based on the information provided and under the misconception that the respondent was legally in the country. According to counsel, the applicant only became aware of the respondent's questionable immigration status after the settlement was concluded, and an order of court was made. Mr Mokgope submitted that the new information (illegal status of the respondent) constitutes a material fact that was not before the court when the consent order was granted. In counsel's opinion, the applicant's reliance on this information to seek rescission is legally justified. Counsel urged the court to grant the relief sought in the notice of motion.

[20] On the other hand, Mr Coughlan, the respondent's legal representative, took issue with the applicant's delay in bringing this application. Counsel submitted that the applicant did not launch the rescission application upon learning that the respondent was illegal in the country. Mr Coughlan contended that the applicant was fully aware of the respondent's legal status before the settlement agreement was reached and the consent order was granted.

[21] In expanding his argument, counsel submitted that the rescission application relates to a court order which was handed down on 23 January 2023, while the rescission application was only brought on 4 June 2024, which is 501 days after the said order was granted. In the opinion of counsel, this constitutes a considerable delay. Furthermore, Mr Coughlan submitted that the applicant did not explain the gross delay in bringing the rescission application. Mr Coughlan strongly asserted that

the court should exercise its discretion to deny the application for rescission, given the substantial delay in launching the application and the applicant's failure to provide a reasonable explanation for this delay.

[22] On the merits of the application, Mr Coughlan argued that the applicant was aware of the respondent's nationality and legal status in South Africa when it made its settlement offer on 24 November 2022. This offer was made without any conditions, and the consent order was obtained on 12 January 2023. In augmenting this argument, the respondent's counsel passionately asserted that the applicant's rescission application is fundamentally insincere. Counsel emphasised that the sole driving force behind the applicant's attempt to impugn the consent order was to prevent the respondent from issuing a warrant of execution against it.

[23] Mr Coughlan argued that the respondent never misrepresented his status in the country to the applicant, nor was the applicant ever under misapprehension in regard thereto. The settlement agreement was not based on the assumed existence of the respondent's legal status in the country. On the contrary, the applicant was fully cognisant of the respondent's status in the country when it made the offer of settlement on 24 November 2022. To this end, Mr Coughlan applied for the dismissal of the applicant's application with costs on an attorney and client scale.

Issues to be decided

[24] From the above discussion, this court is enjoined to consider the following three disputed issues:

- (a) Was the rescission application brought timeously or within a reasonable time?
- (b) Whether the applicant has shown good cause for rescinding the consent order granted on 12 January 2023?
- (c) Whether an undocumented foreign national is eligible for compensation under the Road Accident Fund Act?

Discussion

[25] For completeness, I take the liberty to discuss the disputed issues discussed above, *ad seriatim*.

Did the applicant bring the rescission application timeously?

[26] The applicant's application is based on the common law. An application for rescission under the common law must be brought within a reasonable time.² An ordinate delay in instituting an application to rescind a default judgment may count against the rescission applicant and result in the rescission application being refused. What is reasonable will depend on the circumstances of the particular case. The 20-day time period referred to in Rule 31(2)(b) of the Uniform Rules of Court is a starting point in determining what is reasonable. Where there has been a delay, the applicant must show that there is a reasonable explanation for the delay.³

[27] In the present matter, the applicant did not launch the rescission application upon learning that the respondent was an illegal foreigner in the country. From the respondent's answering affidavit, the applicant was already fully appraised of this fact before the settlement agreement was reached, and the consent order was granted. In the answering affidavit to which the applicant did not reply thereto, the respondent made it clear that the applicant was aware that the respondent was an illegal immigrant when the consent order was granted. These allegations were not disputed.

[28] It is important to note that the applicant's application for rescission is tied to a court order that was issued on 23 January 2023. Strikingly, this application was not launched until 4 June 2024, a staggering 501 days after the consent order was granted. Moreover, the applicant has not provided any satisfactory explanation for this delay. In my view, this constitutes a substantial and unreasonable delay.

[29] What I find very concerning is that on 26 March 2024, the respondent's legal representative sent an email to the applicant wherein the applicant's attorneys were

² *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* (A221/2019) [2021] ZAGPPHC 599 (16 September 2021) para 7.

³ *Roopnarain v Kamalpathy* 1971 (3) SA 387 (D) at 390F-391D.

advised that the payment of the capital amount of R1 461 750.00 in terms of the court order of 2 January 2023, was still outstanding and that if payment was not effected within the next 10 days, then the warrant of execution would be issued and served. On 15 April 2024, in response to that email, the applicant's attorneys sent an email to the respondent's legal representatives and advised them that the applicant had considered the respondent's email and had instructed them to launch a rescission application, which had already been finalised, and which would be served on the respondent's attorneys shortly.

[30] Notwithstanding, the rescission application was not served nor filed. On 2 May 2024, the respondent's attorney sent another email to the applicant's attorneys and pointed out to them that although they had advised the respondent's legal representatives that an application for recession had been prepared and would be served upon them shortly, they had not received such an application. The applicant's legal representatives were given a period of five days within which to serve and file their rescission application. No application for rescission was forthcoming, and thereafter, the respondent's legal representatives went ahead and issued the warrant of execution on 21 May 2024. However, before the warrant of execution could be served on the applicant, the applicant launched its rescission application, which was served on the respondent's legal representatives on 4 June 2024.

[31] Distinctly, the delay is inordinate and inexcusable. An undue delay can be fatal to a rescission of judgment application, calling for its dismissal. It is important to note that the applicant was fully aware of the respondent's illegal status and the existence of two different surnames at the time the settlement was reached, and when the court issued the consent order. Accordingly, the applicant acquiesced to the judgment. Acquiescence in the execution of a judgment must surely, in logic, normally bar success in an application to rescind on the same basis as acquiescence in the very granting of the judgment itself would.⁴

[32] As foreshadowed above, the applicant did not take the court into its confidence and explain the cause of the delay, and neither filed an application for

⁴ *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1977 (1) SA 861 (R) at 862F-G.

condonation for the late filing of the rescission application. It seems to me the applicant is using the application for rescission as a stratagem to prevent the respondent from going ahead with its warrant of execution. In my opinion, the applicant's application falls to be dismissed on this ground alone. However, for the sake of thoroughness, I will consider the remaining questions discussed above.

Did the applicant show good cause for the rescission of the consent order?

[33] As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reasons for this age-old rule are twofold. First, once a court has pronounced a final judgment, it becomes *functus officio*, and its authority over the subject matter has ceased. The second reason is the principle of finality of litigation that is, it is in the public interest that litigation be brought to finality.⁵

[34] As discussed above, the applicant's application is premised on the common law. In terms of the common law, the grounds for setting aside a judgment are very narrow. A judgment can be rescinded at the instance of an innocent party if it were induced by fraud on the part of the successful litigant or fraud to which the successful litigant was party. Apart from fraud, the only other basis recognised in our law as empowering a court to set aside its own order is *justus error*, the occurrence of which is said to be relatively rare and exceptional.⁶

[35] In the present matter, the applicant relies on the existence of a *justus error*, and as a result, the applicant contended that the order was therefore erroneously granted. To satisfy the requirement that the order was erroneously sought or granted, the applicant must show on a balance of probabilities that at the time the order was granted, there were material facts that the court was unaware of and that had these facts been known to the court, the court would not have granted the order. In other words, the applicant must demonstrate that there was a deliberate and intentional non-disclosure and withholding of crucial and material facts and

⁵ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G and 309A; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) paras 22 and 29.

⁶ *Moratis Inv (Pty) Ltd Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) paras 12 and 13.

information to the court, which induced the court to grant the order. This simply means that the court must have been misled into granting the order.

[36] A judgment given by consent may be set aside on good cause and sufficient cause shown.⁷ In setting aside the judgment granted by consent, the courts have regard to the following factors:

- (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;
- (b) the bona fides of the application for rescission;
- (c) the bona fides of the defence on the merits of the case which prima facie carries some prospects of success; a balance of probability need not be established.

[37] All these factors must be viewed in conjunction with each other and with the application as a whole.⁸ In this case, the explanation proffered by the applicant is that it acted under the misconception that the respondent was legally in the country when the offer of settlement was made to the respondent. Furthermore, the applicant asserted that had the applicant been aware of the illegal status of the respondent at the conclusion of the matter, it would not have extended an offer to the respondent. From the documents filed on record, these allegations are misleading and demonstrably false.

[38] The respondent never misrepresented his status in the country to the applicant, nor was the applicant ever misapprehensive about it. The settlement agreement was not based on the assumed existence of the respondent's legal status in the country. This conclusion is fortified by the fact that the applicant's legal representatives advised the respondent's attorneys that the respondent's claim would be reduced because he was an illegal immigrant. This averment was not disputed by the applicant or the applicant's counsel. Clearly, the applicant was fully cognisant of the respondent status in the country when it made the offer of settlement on 24 November 2022. Furthermore, the respondent provided a plausible

⁷ *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A).

⁸ *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132G-I.

explanation in the form of an affidavit to the applicant for having two different names. When the offer was made, the applicant was aware of this alleged discrepancy.

[39] Notably, the reduced amount that the applicant chose to offer the respondent concerning his loss of income was partly based on the fact that the respondent was not legally in the country when the offer was made. Furthermore, after the claim was lodged, numerous medical-legal reports were served and filed on the applicant, from which it would have been patently obvious to the applicant that the respondent is a Malawian citizen an illegal immigrant. For example, the medico-legal report of the respondent's Industrial psychologist, Amorei Engelbrecht, dated 30 September 2022, served on the applicant states that the respondent is a Malawian citizen and includes the respondent's Malawian passport number.

[40] In that report, the respondent informed Ms Engelbrecht that he had attempted to apply for citizenship in South Africa by virtue of his marriage to a South African citizen. However, he was not awarded citizenship at the time since some African nationals had been misusing the system by marrying South Africans to gain citizenship. The fact that the respondent was a Malawian citizen was never withheld from the applicant.

[41] Most importantly, after the merits were settled, on 1 November 2022, the claims handler of the applicant sent an email with an affidavit from the Department of Home Affairs confirming that the respondent's last valid status in the country was a visitor's visa, which had expired on 10 December 2012. In addition, on 10 November 2022, the claims handler sent an email to the respondent's attorneys, attaching a further affidavit from the Department of Home Affairs. In the affidavit, Klass Mahlangu, an assistant director in the Department of Home Affairs employed in the Immigration Services: Directorate Temporary Residence Functional Services in Pretoria, stated that in terms of section 29(1)(f) of the Immigration Act, the respondent is a prohibited person and does not qualify for a port of entry visa, admission into the Republic, a visa or a permanent resident permit as he has been found with a fraudulent visa.

[42] Despite all this information, the applicant settled the respondent's claim and consented to have the draft order made an order of court. More so, when the applicant made a tender in terms of Rule 34, the applicant's legal representative, Ms Lemmer, attached a copy of the medico-legal report of Moipone Kheswa, the applicant's Industrial psychologist, together with a number of documents from the Department of Home Affairs. These documents clearly showed that the respondent did not have a valid visa which allowed him to be in South Africa.

[43] In addition, in the said report, Ms Kheswa concluded that at the time of the accident, the respondent was not supposed to be in South Africa, and he had, therefore, incurred no past loss of earnings. Paragraph 4 of the affidavit of Lungi Adonis employed by the National Department of Home Affairs attached to Ms Lemmer's email specifically recorded that on 24 October 2022, the status of Charles Chipeta, who is the Malawian National, was verified on the movement control system and was found to be illegal in the country as his last valid status which is a visitor's visa expired on 10 December 2012. In the circumstances, there can be no suggestion of any *justus error* having occurred when the applicant made its offer to settle the respondent's claim and when it consented to the order, nor can it be said that the order was erroneously sought or erroneously granted by the court.

[44] The applicant did not refute the allegations made by the respondent in the answering affidavit. As discussed above, the respondent's answering affidavit is supported by several correspondences exchanged by the applicant's legal representatives and that of the respondent. From these correspondences and expert reports, especially the applicant and the respondent's Industrial Psychologists, it is patently clear from these documents that the applicant never laboured under a mistaken belief or was ignorant of any material facts when it settled the respondent's RAF claim. Accordingly, the applicant's purported explanation of the circumstances in which the settlement was concluded and judgment entered against it are false and cannot be accepted.

[45] It must be stressed that the parties concluded a settlement (a compromise) and settled the litigation between them. It is proper to observe that a compromise (*transactio*) is the settlement of disputed obligations by agreement. It is a contract

which has as its object the prevention, avoidance, or termination of litigation. It has the effect of *res judicata* irrespective of whether it is embodied in an order of court.⁹ The compromise between the applicant and respondent extinguished their disputed rights or obligations. The purpose of this compromise was to prevent or put an end to the litigation between the applicant and respondent. Thus, the compromise of the applicant and respondent had the effect of *res judicata*.¹⁰ This principle envisages that parties may not again litigate on the same matter once it has been decided on the merits. It changes the terms of the settlement agreement to an enforceable court order.

[46] Granting the rescission application under these circumstances will offend the principle of *res judicata* and also amount to an abuse of process. Accordingly, the applicant's application for rescission stands to be dismissed on the grounds of *res judicata*. This leads me to the last disputed issue for consideration.

Is the applicant precluded from compensation under the Road Accident Fund Act?

[47] At the hearing of this matter, it was argued that the applicant presented the offer of settlement in good faith based on the information provided and under the misconception that the respondent was legally in the country. The applicant further submitted that the phrase 'any person' referred to in section 17(1) of the Road Accident Fund Act could not include illegal immigrants as this would be in contravention of the Immigration Act, which prohibits illegal immigrants from being in the Republic. According to the applicant, this prohibition is established by section 49 of the Immigration Act, which emphasises the seriousness of the offences and the consequences thereof.

[48] It is appropriate to begin by observing that a similar argument raised by the applicant's counsel in this matter was considered and dismissed by the full court of the North Gauteng Division of the High Court in *AM and Others v Minister of*

⁹ *Karson v Minister of Public Works* 1996 (1) SA 887 (E) 893.

¹⁰ *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) para 16.

Transport and Another.¹¹ The full court found that 'any person' in section 17(1) of the Act also includes illegal immigrants. Mr Mokgope, the applicant's counsel, submitted that the applicant does not agree with this finding and is appealing the judgment. While I appreciate that the applicant is appealing the matter, I must add that I am persuaded by the views expressed by the full court in that matter.

[49] In addition, the Road Accident Fund has an obligation in terms of section 17(1) of the Road Accident Fund Act to compensate any person (the third party) for any loss or death caused by or arising from the driving of a motor vehicle by any person at any place within the Republic. Section 17(1) of the Act specifically refers to 'any person'. It is apposite to remind ourselves that a fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.¹² There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;¹³
- (b) the relevant statutory provision must be properly contextualised;¹⁴ and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.¹⁵

[50] The meaning of the words 'any person' in section 17(1) is clear and unambiguous. Giving these words their grammatical meaning does not produce an absurd result. Simply put, the words 'any person' in section 17(1) of the RAF Act refers to everybody. The phrase 'any person' has been interpreted by the RAF over the years to include illegal foreigners injured or killed in road accidents which took place in South Africa. However, in a significant shift, the fund recently enacted new directives to exclude illegal immigrants from the provisions of the Act. Seemingly, this measure was taken with the aim of curbing and preventing fraudulent claims.

¹¹ *AM and others v Minister of Transport and Another* (011795/2022) [2024] ZAGPPHC 309 (26 March 2024).

¹² *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

¹³ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* 2014 (3) BCLR 265 (CC) paras 84-86.

¹⁴ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 24.

¹⁵ *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 37.

[51] In my opinion, the current legislative framework of the RAF Act does not support the fund's position to exclude illegal immigrants from the application of the Act. I must also add that many developed nations across the globe, recognise claims for bodily injuries in motor vehicle accidents for all individuals, regardless of their immigration status. In the UK, for instance, illegal foreigners are entitled to compensation if they are victims of a motor vehicle accident injured in the UK. The UK's legal system does not discriminate based on immigration status on compensation for personal injuries. Similarly, in Canada's various provinces, the compensation for bodily injuries arising from motor vehicle accidents is not based on immigration status.

[52] However, I am mindful that in the province of Ontario, the Court of Appeal for Ontario in *Silva v John Doe*,¹⁶ rejected a motor vehicle accident claim of an illegal foreigner (appellant) who was involved in a hit and run accident. At the time of the accident, the appellant did not have a motor vehicle or other insurance to respond to a claim for damages in respect of his injuries sustained in the accident. He, therefore, sued the unidentified driver ("John Doe") and the Superintendent of Financial Services (*'the Superintendent'*) under the Motor Vehicle Accident Claims Act, R.S.O. 1990, c. M.41 (*'the Act'*) for compensation from the Motor Vehicle Accident Claims Fund. The Superintendent defended the action on the basis that the appellant's claim was statute barred by reason of s 25(1) of the Act. That section prohibits payments from the fund to non-Ontario residents save in specified circumstances. Section 25(1) reads:

‘The Minister shall not pay out of the Fund any amount in favour of a person *who ordinarily resides in a jurisdiction outside Ontario* unless that jurisdiction provides persons who ordinarily reside in Ontario with recourse of a substantially similar character to that provided by this Act.’

[53] The matter was by agreement decided through a summary judgment motion procedure. The court had to decide whether someone (an illegal foreigner) who lived

¹⁶ 2016 ONCA 700.

in Ontario continuously for almost a decade but did so without having legitimate immigration status could be considered a true resident. The motion court judge rejected the appellant's claim, finding that the appellant was not ordinarily a resident of Ontario at the time of the accident and that his physical presence in the province resulted from deception and illegality. The appellant appealed the decision, contending that the motion judge did not apply the proper test under section 25(1) of the Act.

[54] The Ontario Court of Appeal rejected the argument and found that the key to the engagement of s 25(1) is simply whether the appellant resided in the province at the time. The appeal court confirmed the finding of the motion court judge that *de facto* physical presence in Ontario, even if continuous, does not automatically establish ordinary residence in Ontario for the purpose of access to the fund. Notably, the court dismissed the application and found that the legislative history of s 25(1), considered by the motion court judge, reflected a legislative intention to avoid unnecessary payments out of the fund, which relies on public money sourced through Ontario's consolidated revenue fund.

[55] By parity of reasoning, our Road Accident Fund Act is different. It is designed and couched to include illegal foreigners to benefit from the fund in case of motor vehicle accidents. The fund is intended to compensate any person injured through the negligent driving of a motor vehicle. Even if I am wrong in my finding, I firmly believe that the applicant's application must fail as the Directive issued by RAF, which requires foreign nationals to submit proof that they were lawfully in the country at the time of the injury, does not apply retrospectively.

[56] It is common cause that the plaintiff was involved in a motor vehicle accident on 9 September 2016. Thereafter, the plaintiff issued summons against RAF on 13 November 2018. On 21 June 2022, the RAF issued the directive requiring all foreign nationals who lodged claims against the RAF to submit proof that they were lawfully in the country at the time of the injury. On 4 July 2022, by way of a notice in the Government Gazette, the Minister of Transport promulgated the RAF 1 claim form incorporating the requirements in terms of the Directive of 21 June 2022.

[57] The RAF1 form in effect, when the respondent lodged his claim, did not stipulate a requirement to prove the legality of the respondent's residence in the Republic. The Directive issued by the RAF was issued long after the respondent's claim was lodged with the fund. I must stress the fact that there is a strong presumption in our law that new legislation is not intended to be retrospective.¹⁷ There is another well-established rule of construction, namely that even if a new statute is intended to be retroactive insofar as it affects affected rights and obligations, it is nonetheless presumed not to affect matters that are the subject of pending legal proceedings. Therefore, the general rule is that a statute is as far as possible to be construed as operating only on facts that come into existence after its passing.¹⁸

[58] Moreover, the RAF Act is primarily concerned with giving the greatest possible protection to people who have suffered loss through negligence or through unlawful acts on the part of the driver or owner of a motor vehicle. As correctly pointed out by Mr Coughlan, the provisions of the RAF Act must be interpreted as extensively as possible in favour of third parties to afford them the widest possible protection.

[59] Accordingly, eligibility for the RAF fund is not contingent upon a person's legal status within this country. An individual's legal standing does not influence their eligibility for RAF benefits. Simply put, it is not the person's immigration status in the country that makes a person legible to the RAF benefits. The benefits that are provided under RAF are incidents of a motor vehicle accident, rather than benefits linked to an individual immigration status in this country. Moreover, the RAF fund is financed primarily through the payment of fuel levies. The payment of fuel levies is charged indiscriminately to a person buying fuel. Therefore, any road user involved in a motor vehicle accident and sustains a serious injury is entitled, in my view, to be compensated by the Fund. The fact that a person is illegal in the country is not an obvious relevance to the question of eligibility.

[60] Considering the context and the purpose of the RAF Act, the eligibility for RAF benefits depends on satisfying the RAF Act requirements. Such an approach

¹⁷ *Kaknis v Absa Bank Ltd and Another* 2017 (4) SA 17 (SCA) para 10.

¹⁸ *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 65-67.

accords with section 39(2) of the Constitution which enshrines the rule of statutory interpretation that statute must be construed consistently with the Constitution and must promote the spirit, purport and objects of the Bill of Rights. Section 9 of the Bill of Rights states that everyone is equal before the law and has the right to equal protection and benefit of the law.

[61] Pursuant to the above consideration, it is my firm view that even if the RAF's appeal to the Supreme Court of Appeal should be successful, that outcome can have no bearing on the outcome of this application for various reasons, one of which is that the new RAF1 claim form and the RAF's management directive cannot apply retrospectively. As a result, the applicant's application must fail.

Order

[62] In the result, the following order is granted.

62.1 The applicant's application is hereby dismissed.

62.2 The applicant is ordered to pay the costs of this application, including the costs of counsel on scale B.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv Mokgope
Instructed by: Mpoyana Ledwaba Inc

For the Respondent: Adv Coughlan
Instructed by: Sohn and Wood Attorneys

