



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. ✓
DATE: 27/01/2026
SIGNATURE [REDACTED]

Case no. 2016/20672

In the matter between:

EMM MULLER

SAMUEL SITHOLE

HERMANUS LUKAS KRAUSE

RAMOLETSI SARAH MAKGOPA

LEON BEZUIDENHOUT

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

and

ROAD ACCIDENT FUND

First Respondent

JUDGMENT

The judgment and order are published and distributed electronically.

Summary:

Application for declaratory order that RAF is entitled to issue section 17(4)(a) undertakings which specify injuries and envisaged treatment ("injury specific undertakings"). Held that issue had been definitively determined by courts. Further held that purpose of section 21(1)(c) of Superior Courts Act is not to grant a declarator which is required for the convenience of a party or facilitate administration, but for the purpose of determining existing, future or contingent rights or obligations. Court accordingly refused to exercise discretion to grant orders.

PA VAN NIEKERK, J

INTRODUCTION:

[1] In a counter-application the Respondents seek an order in the following terms:

- "1. That a declarator be granted confirming that the RAF is entitled to issue undertakings in compliance with its statutory obligation provided for in Section 17(4)(a) of the RAF Act, that specify the injuries and envisaged treatment covered by the relevant undertakings ("injury specific undertakings");*
- 2. That the RAF is not obliged in terms of Section 17(4)(a) of the RAF Act to issue open-ended certificates to claimants allowing claimants to receive treatment for injuries and/or illnesses that are not causally linked to the injuries suffered in the relevant motor vehicle collision and/or are not caused by the relevant motor vehicle collision, that formed the basis of the liability of RAF in the first place;*

3. *No order as to costs, save in the event that the Applicant or any other party opposes the relief claimed, then in such event the Applicant and/or any such party be ordered to pay the costs of such application;"*

[2] The counter-application follows on a chequered history of litigation between the First Applicant and First Respondent, which eventually culminated in the Second- to Fifth Applicants being joined as interested parties in the litigation after the counter-application was instituted by the Respondents. The material events in this history can concisely be summarised as follows:

[2.1] First Applicant instituted an action against First Respondent during March 2016, claiming damages pursuant to injuries sustained in a motor vehicle accident and for which damages the First Respondent was held to be liable for 100% of the First Applicant's proven or agreed damages in terms of an order of this court dated 30 November 2017;

[2.2] On 16 October 2020 the issue of First Applicant's claim for general damages was finalised and on that date this court made a further order in the matter which included the following order:

"The Defendant furnishes the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 57 of 1996, for injuries the Plaintiff sustained in a motor vehicle collision on 27 September 2015, after such costs had been incurred and upon proof thereof".

[2.3] First Respondent failed to comply with the order to provide the undertaking and after attempts were made by the First Applicant's attorney of record to procure such an undertaking from the First Respondent, an application was launched to

this court to compel the First- and Second Respondents to furnish the undertaking. That order was granted on 23 February 2022;

- [2.4] Notwithstanding the original order to furnish an undertaking dated 16 October 2020 and the subsequent order to compel the undertaking dated 23 February 2022, Respondents remained in default. First Applicant then launched an application for contempt of court where the Second Respondent was joined in his capacity as the Executive Officer of the First Respondent and in which application it was *inter alia* averred that the order of 23 February 2022 was served on Second Respondent and that correspondence was also addressed to Second Respondent in relation to the First Respondent's default to comply with the order to furnish an undertaking, to no avail;
- [2.5] First- and Second Respondents served a Notice of Intention to oppose the contempt application on 23 November 2023, but failed to take further steps as a result of which the matter was set down on the unopposed roll. The Respondents eventually filed an Answering Affidavit and counter-application, as well as an application for condonation for the late filing of the opposing affidavit, and the parties thereafter exchanged further affidavits in their respective capacities as applicants and/or respondents in the main application and counter-application; The matter was initially enrolled on the unopposed motion court roll, then removed from that roll, then enrolled on the opposed motion court roll without the Respondents' opposing affidavit, then removed from that roll and again enrolled as an opposed motion, all caused by Respondents' repeated failures to comply with the relevant court rules and directives.

[2.6] During the period March to April 2025 Second-, Third-, Fourth- and Fifth Applicants were granted leave to intervene as a result of the relief sought by Respondents in the counter-application. The Second- to Fifth Applicants similarly obtained orders against First Respondent to furnish an undertaking which First Respondent failed to provide or in the alternative, eventually provided with certain *caveats* which were unacceptable to the Applicants;

[2.7] The matter would normally have been enrolled for hearing during 2025 but as a result of the fact that the parties estimated the hearing of the matter to exceed the time limitation for opposed applications to be set down on the normal opposed Motion Court roll, the Deputy Judge President of this division directed that the matter be heard as a special motion.

[3] Prior to the hearing of the matter the parties provided Practice Notes from which it transpires that the parties are *ad idem* that it is only the Respondents' counter-application which is enrolled for adjudication and that the relief sought by Applicants in the main application, namely the contempt application, stands to be enrolled at a later date.

THE DISPUTE BETWEEN THE PARTIES:

[4] From a perusal of the respective affidavits filed on behalf of the parties, it transpires that the following issues ensued between the parties:

[4.1] First Respondent was ordered to provide undertakings to the Applicants in terms of section 17(4)(a) of the Road Accident Fund Act 57 of 1996 ("RAF Act") in terms of court orders issued from this court, and thereafter eventually provided undertakings which the Applicants refused to accept as, according to the

Applicants, these undertakings do not comply with the court orders because it contained conditions and/or qualifications and/or restrictions and do not strictly follow the wording of section 17(4)(a) of RAF and/or do not comply with the relevant court orders.

- [4.2] In the application terminology is used to describe the caveats in these undertakings provided by First Respondent such as "*injuries specific undertakings*" and/or "*treatment specific undertakings*" while Respondents in the affidavits as well as the words used in prayer 1 of the Notice of Counter-application also refers to "*injuries specific undertakings*". Alternative terminology used in the papers refers to "*baskets care*" undertakings.
- [5] It appears from the affidavits submitted on behalf of the Applicants that the First Respondent provided undertakings which is referred to as a "*contractual undertaking*" which *inter alia* have one or more of the following features:
- [5.1] It limits treatment within the borders of the RSA;
 - [5.2] The compensation for future medical expenses is limited by the contractual undertaking to the Manage Healthcare Guidelines and Principles;
 - [5.3] It excludes social and inter-facility transfers and excludes minor post-operative care;
 - [5.4] First Respondent reserves for itself the right to "*pre-authorise*" treatment;
 - [5.5] The contractual undertaking lists a number of items which it will not pay as well as implementing validations.

- [6] In summary, it was common cause that these undertakings as provided by First Respondent and which the Applicants refused to accept do not follow the wording of the court orders in terms whereof First Respondent was ordered to provide an undertaking, and they do not follow the wording of Section 17(4)(a) of the RAF Act. During argument of the matter Respondents' counsel strongly argued that, in essence, what the First Respondent seeks to achieve is an improved facilitation of administration of claims received from claimants under Section 17(4)(a) by recording in the undertaking the specific injuries for which such undertaking is provided and it is to be noted that the contents of paragraph 1 of the Notice of Motion of the counter-application specifically refers to "*injury specific undertakings*".
- [7] In support of the necessity for an order declaring the First Respondent to be entitled to issue an undertaking that specify the injuries and envisaged treatment cover by the relevant undertakings ("*injuries specific undertakings*") the Second Respondent deposed to an affidavit and *inter alia* made the following averments:
- [7.1] Historically the First Respondent used to provide claimants with non-specific undertakings which were akin to what is commonly referred to as "*a blank cheque*". After Respondent implemented a new system, claimants are dissatisfied and their attorneys refuse to accept such new injury specific undertakings in terms of the new system, which leads to applications against the First Respondent to issue "*blanket*" undertakings; I pause here to note that this averment is not entirely correct. Any Judge of this division will be aware of the substantial number of applications against the First Respondent which finds its way onto the unopposed motion court roll of this division where claimants seek orders against First

Respondent to comply its first obligation to issue an undertaking after remaining in default to do so, court orders notwithstanding.

- [7.2] Claims based on undertakings issued in terms of Section 17(4)(a) of RAF Act are usually provided and requested long after the relevant certificates have been issued, in some instances decades later, which leads to a very material, practical and almost unsurmountable problem should the detail of the injuries and/or treatment envisaged not be clearly specified in the certificate. In substantiation of this averment Second Respondent makes the following allegation:

"When officials of the RAF receive claims from service providers and/or claimants relating to treatment provided many years after an undertaking had been issued, those officials will have no clarity whether the treatment was specific and appropriate to the injuries sustained. These RAF officials will then have to obtain access to the initial record, including expert reports, relevant pathology and radiology studies, to determine whether expenses claimed and treatment provided were indeed covered by the relevant undertaking. This intensive clinical validation exercise needs to be repeated each time and an undertaking claim is reviewed, based on such undertaking".

ISSUES FOR DETERMINATION:

- [8] In paragraph 1 of the Notice of Motion in the counterapplication, the Respondents seek an order declaring the entitlement of First Respondent to issue an undertaking which is qualified in relation to the envisaged treatment, based on the specific injuries sustained during the motor vehicle accident which created the liability of the First Respondent. Paragraph 2 of the Notice of Motion in the counter application does nothing more than seek

an order to confirm the trite legal position namely that an undertaking in terms of section 17(4)(a) of RAF act is restricted to treatment of injuries sustained in the motor vehicle accident referred to in section 17(1) of RAF act and is not an open or unrestricted undertaking.

- [9] This court's jurisdiction to grant a declaratory order is derived from the provisions of Section 21(1)(c) of the Superior Courts Act 10 of 2013. In *Lueven Metals v Commissioner for SARS*¹ the court explained the approach to be followed by a court when called upon to exercise a discretion under Section 21(1)(c) of the Superior Courts Act as follows:

"Section 21(1)(c) of the Superior Courts Act 10 of 2013 provides a statutory basis for the grant of declaratory orders without removing the common law jurisdiction to do so. It is a discretionary remedy. The question whether or not relief should be granted under the section has to be examined in two stages. In the first place, the jurisdictional facts have to be established. When this has been done, the court must decide whether the case is a proper one for the exercise of its discretion. Thus, even if the jurisdictional requirements are met, an applicant does not have an entitlement to an order. It is for such applicant to show that the circumstances justify the grant of an order".

- [10] The jurisdictional facts that must be established are namely whether the applicant has an interest in an existing, future or contingent right or obligation.² In *Queen Sibongile Winnifred*

¹ *Leuven Metals v Commissioner for SARS* [2023] ZASCA 144 par. 12

² See: *Cordiant Trading CC v Daimler-Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; 2005 (6) SA 205 (SCA) par. [18]

*Zulu v Queen Buhle Mathe & Others*³ the court referred to the enquiry whether the order for declaratory relief should be granted as follows:

“The court considers whether an applicant in seeking such an order has a standing in terms of Section 38 of the constitution. In addition, the doctrine of ripeness is at issue, as consideration is given to whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. The doctrine of ripeness must also require an enquiry as to whether alternative remedies have been exhausted. This is termed premature action. As aforesaid, Section 21(1)(c) of the Superior Courts Act 10 of 2013 enjoins the High Court ‘in its discretion and at the insistence of any interested person to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequently upon determination’. In addition, a court will not grant a declaratory order on moot or academic issues, as this would conflict with the doctrine of effectiveness”.

[11] In the aforesaid decision⁴ it was further held that it does not follow that the court must exercise its discretion in favour of an applicant that has established the jurisdictional facts, but that the discretion is exercised in the light of all relevant considerations. It is trite law that, despite the jurisdictional facts having been proved, the court may exercise its discretion against an applicant if the declaratory relief would be abstract, academic or hypothetical. Additionally, it was held that the court may refuse to grant a declaratory order

³ *Queen Sibongile Winnifred Zulu v Queen Buhle Mathe & Others* 2024 JDR 1017 SCA para. [12]

⁴ See: *Queen Sibongile Winnifred Zulu v Queen Buhle Mathe & Others*, *supra*, par. [13]

when the subject matter of the order sought had been definitively determined by a court or the legislator.⁵

[12] *In casu*, there is no doubt (and it was not argued otherwise by Applicants) that Respondents established the jurisdictional facts to enable this court to exercise a discretion under Section 21(1)(c) of the Superior Courts Act 10 of 2013. This court should therefore proceed to the second stage of the enquiry namely to determine whether this court should exercise its discretion in favour of the Respondents to grant the relief as claimed in the Notice of Motion in the counter-application for declaratory orders.

EXERCISE OF DISCRETION:

[13] The permissible content of an undertaking in terms of section 17(4)(a) of RAF Act has been the subject various judgments and is settled law. In *Marine & Trade Insurance Co. Ltd v Katz NO*. 1997 (4) SA 961 (A) the court was called upon to decide on the form and contents of an undertaking in terms of Section 21 (1C)(b) of the Compulsory Motor Insurance Act 56 of 1972 ("CMVIA") which was repealed when RAF act was promulgated. That specific section of CMVIA provided a similar provision for the issue of an undertaking by an insurer and was the predecessor to the provisions of Section 17(4)(a) of RAF Act. The two sections are virtually identical, as was held in paragraph [16] of *Barnard NO. v Road Accident Fund*⁶:

⁵ See: *Queen Sibongile Winnifred Zulu v Queen Buhle Mathe & Others*, *supra*, par. [14]

⁶ 2017 (1) SA 245 (ECP)

“It’s wording, save for the reference to the Multilateral Motor Vehicle Accident Fund (the predecessor to the current fund) is identical to Section 17(4)(a) prior to the amendments referred to below.”

[14] In the Katz decision *supra* the court (*coram* Trollip JA) held that such an undertaking must follow the wording of the empowering act. The interpretation of Section 21(1)(c) by Trollip JA in the *Marine & Trade Insurance Company Ltd v Katz* NO decision *supra* was applied by courts in various divisions of the High Court to the interpretation of Section 17(4)(a) of the RAF Act⁷, specifically in relation to the issues raised in this application by Respondents.

[15] In my view it is important to note that Trollip JA, in *Marine & Trade Insurance Company v Katz* NO, *inter alia* provided the following reasoning why undertakings should follow the wording of the empowering act and not contain any qualifications, conditions or caveats namely:

[15.1] There are no words in the empowering section that endow a trial court with a discretionary power (to include qualifications);⁸

[15.2] The trial court does not have a discretion as to the form or contents of the undertaking that it orders the insurance to provide the insurer to provide.⁹ Any elaboration of the kind of hospital accommodation, treatment, services or goods covered by the categories which Respondents intend to insert in the undertaking could well give rise to lengthy and expensive disputes between parties at the trial which will necessitate speculation or guess work by the trial court. The purpose of

⁷ See: *Marais v Road Accident Fund* 2025 JDR 3526 (WCC) paras. [38] – [39]; *Mathemelo v Road Accident Fund* [2023] JOL60956 (GP) at para. [22].

⁸ See: *Marine & Trade Insurance Company Ltd v Katz* NO (*supra*), p. 971, para. [e] to [f]

⁹ See: *Marine & Trade Insurance Company Ltd v Katz* NO (*supra*), p. 971, par. [h]

the relevant section is to avoid such speculation or guess work as far as possible by means of a simple and straightforward undertaking.¹⁰

[16] In *Mathemelo v Road Accident Fund*¹¹ it was held as follows:

"[21] Before a full court of this division, the defendant placed on record that it had made a blanket election to compensate the claim for future medical expenses by way of a section 17(4)(a) undertaking in terms of the Road Accident Fund Act 57 of 1996.

[22] As for the wording or content of this undertaking it must follow the wording of the act. The SCA in *Katz* held that:

'Without such consent, the trial court cannot direct that the undertaking should specify or detail any particular kind of a hospital accommodation, treatment, services, or goods covered by those categories. Any elaboration of that kind could well give rise to the lengthy and expensive disputes between the parties at the trial, and, in any event, may still necessitate speculation or guess work by the trial court about what hospitalisation, treatment, etc. will become necessary in the future'.

[23] The defendant must provide the plaintiff with a section 17(4)(a) undertaking which adopts the wording of section 17(4)(a). This order is in line with the declaratory order issued by Judge van der Westhuizen J. to the following effect; 'it is declared that respondent, when invoking Section 17(4)(a) of the Road Accident Fund, no. 57 of 1996 as amended, and

¹⁰See: *Marine & Trade Insurance Company Ltd v Katz NO* (supra), p. 972, para. [d] to [e]

¹¹ *Mathemelo v Road Accident Fund* supra, at para. [21] to [23]

electing to compensate a road accident dictum with an undertaking, that such undertaking should adopt the wording of Section 17(4)(a) and must be free from any limitations, caveats, restrictions and specifications'."

- [17] The reference in the Mathemela judgment as quoted *supra* where the learned Judge refers to the judgment of van der Westhuizen J. is a reference to *Muller obo Human & two others v Road Accident Fund* (Case no. 066777/23), Gauteng Division, Pretoria, where Van der Westhuizen J. declared that an undertaking in terms of Section 17(4)(a) must be free from limitations, caveats, restrictions and specifications. In heads of argument filed on behalf of Respondents it was submitted that the judgment of Van der Westhuizen J. (*supra*) is the subject of a rescission application. That, of course, is irrelevant.
- [18] From any reasonable reading of the various judgments referred to *supra* it is clear that the subject matter of the order sought by Respondents had been definitively determined, not only by this court, Coram Van der Westhuizen J. in the matter referred to *supra*, but by other courts in other divisions, guided by the principles established by Trollip JA. In the *Marine & Trade Insurance Company Ltd v Katz NO* judgment.
- [19] The declarator sought in paragraph 1 of the Notice of Motion in the counter-application is therefore legally untenable. The declarator sought in paragraph 2 of the Notice of Motion in the counter-application simply seek to declare a legal interpretation which is common cause, not contentious, and clearly not ever challenged by any of the parties and will provide no further clarity or any advantage to any party.
- [20] The reasons advanced by Respondents for approaching this court for the declaratory orders are summarised in paragraph [7] *supra*. During argument Respondent's counsel, on direct questioning from this court, confirmed that the declaratory orders are required to

facilitate and expedite the First Respondent's process of administering claims. Section 21(1)(c) of the Superior Courts Act provides a discretion to a court to grant a declaratory order when there is a real dispute on an existing, future or contingent right or obligation and in my view is not intended to be used as a means to grant orders which will provide some measure of convenience or facilitate the administration of court orders which any party is obliged to comply with in terms of a clear statutory provision which have been interpreted definitively by courts, the judgments of which binds this court.

- [21] During argument Respondents' counsel handed up a draft order which, according to counsel, is intended to convey that Respondents do not seek a declaratory order *contra* the provisions of the limitation of damages in terms of section 17(1) of RAF Act, but serves to confirm that the insertion of the *caveat* as sought in paragraph 1 of the Notice of Motion in the counter-application is purely to assist in identifying the nature of injuries and envisaged future medical care of a claimant for the purposes as set out in paragraph [7] *supra*. This draft order reads *verbatim* similar to the contents of paragraph 1 of the Notice of Motion in the counter-application, with the exception that an additional qualification (quoted hereunder in italics) is inserted at the end of the proposed order, so that the proposed order reads thus:

- "1. It is declared that the RAF is entitled to issue undertakings in compliance with its statutory obligations provided for in Section 17(4)(a) of the ARF Act 56 of 1996, that specify the injuries and envisaged treatment covered by the relevant undertakings ("injury specific undertakings"), *without in any manner limiting the RAF's liability and/or obligations in terms of Section 17(4)(a) of the RAF Act 56 of 1996.*"

[22] In my view, the insertion of that portion of the draft order quoted above in italics is nothing more than a mere re-statement of the proper interpretation of the present trite legal interpretation of section 17(4)(a) read in conjunction with section 17(1) of RAF Act as appears from the various authorities referred to *supra*. In my view the reference to "injury specific undertakings" together with the added caveat as quoted in italics as it appears in the proposed order places the proposed draft order squarely into the category of orders which are referred to in paragraph [20] *supra*, namely a declaratory order which is not intended to achieve the purpose provided for in terms of section 21(1)(c) of the Superior Courts Act, but an order required for convenience of the Respondent's administration.

CONCLUSION

[23] Considering the aforesaid, I am therefore of the view that I cannot exercise a discretion in favour of Respondents and grant the declaratory orders as prayed for, and/or as proposed in the draft order handed up by Respondents' counsel. The counter application therefore stands to be dismissed.

COSTS:

[24] At the hearing of the matter all Applicants sought a punitive order for costs against the Respondents. I am of the view that the Applicants are entitled to costs on a punitive scale for the following reasons:

[24.1] The authorities referred to *supra* clearly disposed of the legal principles which informs the issues in this application, most of which were readily available to

Respondents at the time when this counter application was launched; It thus raises questions about the underlying motives for this application.

[24.2] The issues raised in this counter-application were not raised at the first instance when the Respondents' right to tender an undertaking arose, nor was it raised at the time when Respondents were obliged to comply with the respective court orders in favour of the Applicants to furnish an undertaking. The concise history of litigation which I have referred to above is the proverbial tip of the ice-berg. A reading of the various affidavits of Applicants demonstrate that numerous interlocutory applications, all eventually unopposed, had to be launched repetitively by the Applicants against First Respondent in order to achieve the most basic level of compliance with procedural prescripts, such as the attendance of a pre-trial conference or the filing of discovery affidavits.

[24.3] From the history of the litigation in this matter it is, in my view, clear that this counter-application was launched as a proverbial knee-jerk reaction after an application was launched for the committal of the Second Respondent for contempt of the various orders of court. If the Respondents held the *bona fide* view that First Respondent was entitled, on a proper interpretation of the underlying legal principles and authorities, to provide the Applicants with undertakings in the form advocated by the Respondents, they could have opposed the matters at the first instance when orders were granted against First Respondent to furnish an undertaking and could have made representations to those courts. If unsatisfied with any adverse finding, they could have escalated the issue to higher courts on appeal. Instead, it was only after the Applicants had to incur substantial legal costs and after numerous procedural delays which can

only be described as a frustration of the Applicants rights under section 34 of the Constitution, culminating in an application for the contempt of the Respondents being launched, that the Respondents' ill-founded entitlement to the declaratory order was raised by way of a counter-application;

[24.3] In my view, the inference of *mala fides* is inescapable.

In the premises, I make the following order:

1. The Respondents' counter-application is dismissed;
2. Respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the Applicants' costs on the scale as between attorney and client, taxed on Scale C, including costs of two counsel where so employed.




**P A VAN NIEKERK
JUDGE OF THE GAUTENG DIVISION,
PRETORIA**

APPEARANCES

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ADV. F. DE W KEET

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