



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

**JUDGMENT**

**Reportable**

Case No.: 9105/2023

In the matter between:

**AGGRIPPA MUDAVANHU NHUNGE**

**Applicant**

And

**ROAD ACCIDENT FUND**

**Respondent**

**Coram:** Francis J

**Heard:** 24 April 2026

**Delivered:** 13 May 2026

## **ORDER**

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The respondent is ordered to pay the applicant's costs of this application on the scale as between attorney and client, such costs to include counsel's costs on Scale A in terms of rule 67A of the Uniform Rules of Court.

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## **JUDGMENT**

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**FRANCIS, J:**

### **Introduction**

- [1] On the morning of the hearing, the parties resolved the substantive disputes between them by agreement. The terms of the settlement were embodied in a consent order taken that day, directing the Road Accident Fund ('Fund') to make the decision required by regulation 3(3)(dA) of the Road Accident Fund Regulations, within a stipulated period, in respect of the applicant's RAF 4 serious injury assessment report. The only matter remaining is the question of costs. The parties were unable to agree on it and invited the court to determine that question, and its scale, on the papers and on argument from the bar.
- [2] Applications of this kind, in which a claimant seeks to compel the Fund to discharge its duty under regulation 3(3)(dA), have become a recurring feature of this Division's motion roll. That pattern, and what it suggests about the Fund's approach to such litigation, calls for a fuller treatment of the applicable principles than the question of costs would otherwise require.

### **The principles governing costs after settlement**

- [3] Where the parties have settled the substantive issues and only costs remain, the court need not conduct a full investigation of the merits. It conducts such an

examination of the papers and entertains such an argument as is sufficient to form a view on where the merits and the conduct of the litigation are likely to have lain. The locus classicus is *Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C).

- [4] In *Gamlan* at 700F–701C, the court, drawing on *Jenkins v SA Boilermakers, Iron and Steel Workers' and Ship Builders' Society* 1946 WLD 15, held that a court asked to determine costs after settlement should not descend into adjudicating the merits, but must be sufficiently informed to make a just and sensible order. The question, as the court there put it, is whether, had the matter proceeded, one side would have been “substantially successful” on the material before the court. That is the inquiry I undertake below.
- [5] That approach falls to be applied against the more familiar general rules. Costs lie in the discretion of the trial court, a discretion to be exercised judicially. In *Fripp v Gibbon & Co* 1913 AD 354 at 363, Innes ACJ stated the test in terms still applied:
- “... the law contemplates that he [the trial judge] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties.”
- [6] Subject to that overriding discretion, the general rule is that costs follow the result (*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) at para 3; *Graham v Odendaal* 1972 (2) SA 611 (A) at 616A). The function of a costs order is to provide the successful party with an indemnity for the expense to which it has been put by the litigation (*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488).
- [7] Two points follow. The first is that “success”, for purposes of the cost’s inquiry, is assessed in substance and not in form. Where a respondent concedes the substantive relief sought on the day of the hearing, the applicant is ordinarily to be regarded as the successful party (see *Maluleko v Total SA (Pty) Ltd* [2023]

ZAGPJHC 161). The second is that the court is entitled to weigh the reasonableness of the parties' respective positions, their pre-litigation conduct, and the degree to which the opposition was bona fide and substantial. That much follows from *Fripp*.

### **The factual and procedural matrix**

- [8] A short summary of the relevant facts is sufficient. The applicant was injured as a pedestrian in a motor collision on 18 March 2022. He lodged a claim with the Fund on 19 October 2022. By letter dated 7 February 2023, the Fund acknowledged receipt of the lodgement documents and called for further information. On 31 January 2024, the applicant delivered to the Fund a RAF 4 serious injury assessment report, with a medico-legal report by Dr MB Deacon, an orthopaedic surgeon. From that date, regulation 3(3)(dA) gave the Fund 90 days within which to accept the assessment, reject it with reasons, or direct the claimant to submit to a further assessment. The 90-day period expired on or about 30 April 2024. No decision was taken. On 26 June 2024, the applicant's attorneys demanded a decision within 30 days. No substantive response was received. The application was launched in due course, and the Fund opposed it. By the time the answering affidavit was deposed to on 13 June 2025, more than a year had elapsed since the 90-day period expired.
- [9] The Fund's opposition rested on three grounds, which, while analytically separable, were advanced as a single integrated defence:
- (a) that the applicant's underlying claim had been validly rejected on 7 February 2023 for non-compliance with section 24 of the Act, and that the rejection remained valid and binding until set aside on review, invoking the principle in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), as applied to the Fund in *Road Accident Fund v Duma and Others* 2013 (6) SA 9 (SCA);

- (b) that the applicant had in any event failed to comply with the lodgement requirements of section 24, read with Board Notice 271 of 2022 and the new RAF 1 form promulgated under it; and
- (c) that the applicant's remedy, if any, lay in review proceedings under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and not in compulsion proceedings of the kind brought before the court.

### **Evaluation of the merits for costs purposes**

[10] Following the approach in *Gamlan*, I turn to consider whether, had the matter been argued to conclusion, the applicant would probably have been substantially successful. I do so only for purposes of disposing of costs.

(a) *The reliance on Oudekraal and the letter of 7 February 2023*

- (i) The premise of the Fund's reliance on *Oudekraal*, as applied in *Duma*, is that there exists an administrative decision rejecting the applicant's claim, that the decision has not been impugned by way of review, and that until set aside, it stands and produces legal consequences. That premise depends on the letter of 7 February 2023 being a decision of that character. It is not. The letter records receipt of the lodgement documents and asks for further information. It does not invoke section 24, identify any non-compliance, or convey any final view that the claim is invalid. A request for further documents is not a refusal of the claim.
- (ii) There is a further difficulty with this defence. Even if the letter of 7 February 2023 had constituted an administrative decision, it could only have related to the lodgement of the claim under section 24. It could not have been a decision under regulation 3(3)(dA), since the trigger for that regulation, the delivery of a RAF 4 serious injury assessment report, did not occur until 31 January 2024, almost a year later. The relief sought was not the setting aside of any rejection of the claim. It was the compulsion of a peremptory statutory duty in respect of a separate document delivered long after the

letter relied upon. *Oudekraal* and *Duma* presuppose the existence of an act capable of producing legal consequences for the question in issue. A decision under section 24, even if one had been taken, could not dispose of an obligation that had not yet arisen.

(b) *Substantial compliance with section 24*

- (i) The second leg of the defence was that the applicant had failed to comply with section 24, by not lodging on the prescribed RAF 1 form, with the result that no valid claim was before the Fund and no duty to elect arose under regulation 3(3)(dA). The proper approach to non-compliance with section 24 was settled long before this dispute by the Supreme Court of Appeal in *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) and reaffirmed in *Road Accident Fund v Busuku* 2023 (4) SA 507 (SCA). The lodgement requirement is satisfied where the claim form, taken with the supporting documents, contains sufficient information to enable the Fund to investigate the claim. The principle is one of substantial, not perfect, compliance.
- (ii) Applied to the present case, the lodgement meets that standard. The applicant submitted a completed claim form with the supporting documents required by the Fund's own checklist. The answering papers do not identify a single piece of information necessary to investigate the claim that was, in fact, missing. The complaint is one of form, not of substance, of the kind that the Supreme Court of Appeal in *Pithey* held insufficient to invalidate a lodgement.
- (iii) Substantially identical arguments by the Fund were considered and rejected by this Division in *Maarman and Others v Road Accident Fund* [2025] ZAWCHC 106. The court there held that a claim lodged in substantial compliance with the prior RAF 1 form, supported by the documentation reasonably required for investigation, satisfied section 24, and that the Fund could not point to mere form-related differences as a

basis for treating the claim as a nullity. That reasoning, which accords with *Pithey* and *Busuku*, I respectfully endorse.

- (iv) The Fund's own conduct also tells against the section 24 point. The lodgement documents were not returned to the applicant. The applicant was not notified that the claim was invalid for non-compliance with section 24. The Fund engaged with the claim, called for further information, and, in due course, received and held a RAF 4 form for almost two years without invoking any deficiency in lodgement. Having dealt with the lodgement as a valid one for almost two years, the Fund cannot now treat it as a nullity to defeat a duty that has since matured against it.
- (c) *Board Notice 271 of 2022*
- (i) Closely allied to the section 24 point was the Fund's reliance on Board Notice 271 of 2022 and the new RAF 1 form promulgated under it. The submission was that the lodgement was deficient because it did not employ the new prescribed form. Well before the Fund's answering affidavit was deposed to, that very instrument had been declared invalid. In *Legal Practitioners' Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others* 2024 (4) SA 594 (GP), a full court of the Gauteng Division declared Board Notice 271 of 2022, and the new RAF 1 form prescribed under it, invalid and set them aside. The Fund's appeal against that order was dismissed by the Supreme Court of Appeal in *Road Accident Fund and Others v Legal Practitioners' Indemnity Insurance Fund, NPC and Others* [2026] ZASCA 63, delivered on 30 April 2026.
  - (ii) The consequence is that the Fund cannot, in defence of its inaction, invoke a regulatory instrument that has been struck down. The applicant's lodgement falls to be assessed against the prior, valid prescriptions. As I have already said, it satisfied those requirements in substance.

- (iii) That the Fund continued to advance reliance on Board Notice 271 of 2022 in these proceedings, more than a year after it had been declared invalid by the full court, is a matter to which I return below.

(d) *The "PAJA-only" defence*

- (i) The third strand of the Fund's opposition was that the applicant's remedy, if any, lay in review proceedings under PAJA, and not in compulsion proceedings of the kind brought before the court. The argument calls for care, since the relationship between common-law mandamus and PAJA's failure-to-decide jurisdiction is not as straightforward as the Fund's submissions suggested.
- (ii) The applicant's complaint was a failure to act, not an act done. PAJA contemplates that failure: section 6(2)(g) renders the failure to take a decision reviewable, and section 6(3) provides for relief where an administrator has failed to decide within a prescribed period. The relief sought in this application, an order compelling the Fund to take the decision required by regulation 3(3)(dA), is in substance available under PAJA. The question is therefore not, as the Fund framed it, "PAJA or no PAJA", but whether the procedural vehicle adopted by the applicant was an appropriate one.
- (iii) So framed, the answer is straightforward. Where a statutory functionary has failed to discharge a peremptory duty, an application to compel the performance of that duty is an orthodox procedural vehicle, whether characterised as a mandamus at common law or as relief under section 6(3) of PAJA. The substantive complaint, the relief sought, and the legal basis upon which it is sought are all identified in the founding papers. The Fund did not contend in its answering affidavit that the application's procedural form prejudiced it, and no such prejudice could have arisen. The argument that the application was incompetent because it was not styled as a PAJA review must fail. That conclusion accords with *Maarman*.

(e) *The Fund's peremptory duty under regulation 3(3)(dA)*

- (i) Underlying each of the three defences is a more basic point. Regulation 3(3)(dA) imposes a peremptory duty on the Fund. Within 90 days of receipt of a serious injury assessment report, the Fund must do one of three things: accept the assessment, reject it with reasons, or direct the claimant to submit to a further assessment. The provision uses the word “shall”, and the structure of the regulatory scheme leaves no room for inaction. A claimant who has lodged a claim and submitted a RAF 4 form is entitled, as of right, to a decision within the prescribed period. Where no such decision is taken, the claimant is entitled to come to court to compel one.

[11] Taken together, I am satisfied that, had the matter proceeded to a full hearing, the applicant would probably have been substantially successful within the meaning of *Gamlan*. The reliance on the letter of 7 February 2023 faced two difficulties, either of which would likely have been dispositive: the letter is not, on its face, a rejection, and on no view could it have addressed an obligation that arose almost a year later. The section 24 objection ran against the substantial compliance principles in *Pithey* and *Busuku*, and against the Fund's own treatment of the claim. The reliance on Board Notice 271 of 2022 was, by the date of the answering affidavit, reliance on an instrument that had been struck down. The procedural objection misconceived the nature of the relief sought. The settlement on the day of the hearing gave the applicant the substantive relief he sought in court. He is, on the test in *Gamlan*, to be regarded as the substantially successful party, and the ordinary rule that costs follow the result applies.

**The scale of costs**

[12] The applicant seeks costs on the attorney-and-client scale. Such an order is exceptional. It will be made only where the court finds that a party's conduct has been vexatious, reckless, dishonest, malicious or frivolous, or is otherwise such as to constitute an abuse of process (*Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607; *Plastic Converters Association of SA v National*

*Union of Metalworkers of SA* (2016) 37 ILJ 2815 (LAC) at para 46; and see *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC)). The Fund did not, in its written submissions, address the scale of costs, save to oppose costs altogether.

- [13] Three features of the respondent's conduct, taken together, persuade me that an order on the attorney-client scale is warranted.
- [14] The first is the duration and character of the breach. Almost two years passed between the delivery of the RAF 4 form and the hearing. The Fund took no decision, made no request for a further assessment, and offered no acceptable explanation. That is not an isolated administrative oversight; it is a sustained failure to perform a peremptory statutory duty owed to a claimant under a no-fault compensation scheme, on the timely operation of which injured persons depend.
- [15] The second is the character of the opposition. By June 2025, when the answering affidavit was deposed to, each of the principal grounds of opposition was foreclosed by binding or persuasive authority. The reliance on Board Notice 271 of 2022 had been overtaken by the full court's judgment in *LPIIF* more than a year earlier. The section 24 argument ran counter to the substantial compliance principles laid down by the Supreme Court of Appeal in *Pithey* and *Busuku*. It had been applied to near-identical facts in *Maarman*. The *Oudekraal* defence rested on a letter that, on any fair reading, was neither a final decision nor directed at the RAF 4 assessment. A litigant is, of course, free to advance arguable points. But to press, as a single integrated defence, arguments that the case law had closed against the Fund, while the underlying duty remained unperformed, is a factor that may legitimately be factored into the cost award.
- [16] The third is the lack of attention to the specific facts. Material portions of the answering affidavit, notably paragraphs 21 and 23, correspond closely to submissions recorded in *Maarman*. I do not draw any conclusion as to whether or how the affidavit was prepared. It is enough to record that the answering papers do not, on their face, engage with the features of this claimant's lodgement, the

documents he supplied, or the period of inactivity that followed. An answering affidavit which confines itself to recycled jurisdictional objections, without engaging with the particulars of the claim before the court, tends to confirm that the opposition was not substantial in the relevant sense.

- [17] I am aware of the systemic pressures under which the Fund operates, including a high volume of claims, well-known administrative constraints, and a workforce processing matters at scale. None of that displaces the rule that a public body must act lawfully, must perform its peremptory duties within the periods prescribed by the legislature, and must, when it litigates, observe the same standards of reasonable conduct as any other party. As the Constitutional Court reaffirmed in *Public Protector v SARB*, the higher standard of conduct expected of public officials extends to the conduct of litigation. That obligation is not relaxed by the volume of claims under management.
- [18] It does not assist the Fund that it conceded the substantive relief on the day of the hearing. The applicant had by then incurred the expense of preparing and prosecuting the application in its entirety. A late concession does not retrospectively erase the costs occasioned by earlier opposition. It still leaves the question of costs unresolved.
- [19] In all the circumstances, the conduct of this litigation crosses the threshold for an order on the attorney-client scale, and I am satisfied that such an order is fair.

### **The allegation that the application was premature**

- [20] In its written submissions and in correspondence preceding the hearing, the Fund contended that the application was premature because the applicant ought to have launched a PAJA review of the supposed decision of 7 February 2023 before bringing compulsion proceedings. The point was not pursued at the hearing and, in any event, is not persuasive. The letter of 7 February 2023 was not a decision rejecting the claim. Even if it had been, the Fund's actions could not preclude a claimant from approaching the court to compel the discharge of a separate peremptory duty arising under regulation 3(3)(dA) (see *Maarman*). The applicant

gave clear notice of his intention to bring this application in his attorneys' letter of 26 June 2024 and waited almost a year before launching it. The litigation was neither precipitate nor misconceived. It became necessary because the Fund failed to act.

### **Counsel's fees**

[21] Counsel for the applicant asked that any costs award include the costs of counsel under rule 67A of the Uniform Rules of Court, taxed on Scale A. That is the appropriate scale. While the application raised certain questions of law, it was argued as an ordinary opposed motion. The principal legal issues, namely the relationship between section 24 and regulation 3(3)(dA), the application of the *Oudekraal* and *Duma* principles, and the consequences of the *LPIIF* declaration, had already been canvassed in earlier judgments of this and other Divisions. Scale A reflects the complexity of the matter as it was actually argued.

### **Order**

[22] I make the following order:

The respondent is ordered to pay the applicant's costs of this application on the scale as between attorney and client, such costs to include counsel's costs on Scale A in terms of rule 67A of the Uniform Rules of Court.

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**M FRANCIS**

Judge of the High Court

**Appearances:**

For Applicant: Adv Naseerah Essa

Instructed by: Campbell Attorneys

For Respondent: Mr Brett Lategan

Instructed by State Attorney (Cape Town)