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**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION KIMBERLEY)**

In the matter between:

CASE NO: 1636/2021

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

Edited: YES / NO

B[...], L[...] N.O.

Applicant

And

THE ROAD ACCIDENT FUND

Respondent

And in the matter between:

CASE NO: 1150/2019

V[...] W[...], C[...] J[...] J[...]

First Applicant

V[...] W[...], S[...]

Second Applicant

and

THE ROAD ACCIDENT FUND

Respondent

Neutral citation: *L B[...] v The Road Accident Fund (Case No: 1636/2021)*
and *CJJ V[...] W[...] & Another v The Road Accident Fund (Case No: 1150/2019)*

Coram: Nxumalo J
Date Heard: 29 May 2025
Date Delivered: 08 May 2026

ORDER

- (a) Both applications are hereby dismissed with costs.
 - (b) The costs are to be borne by the applicants jointly and severally, the one paying the other to be absolved.
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JUDGMENT

INTRODUCTION:

- [1] There are two applications before this Court which are against the Road Accident Fund.¹ First is that of Ms L[...] B[...] (case number 1636/21). Second is that of Ms C[...] J[...] J[...] V[...] W[...] and Ms S[...] V[...] W[...] (case number 1150/19).² Whilst the applications were lodged separately, the parties agreed that they should be heard and adjudicated together, in terms of Rule 11 of the Uniform Rules of Court.
- [2] Rule 11 expressly provides that where separate actions have been instituted and it appears to the Court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon (a) the said actions shall proceed as one action; (b) the provisions of Rule 10 shall *mutatis mutandis* apply with regard to the actions so consolidated; and (c) the Court may make any order which to it seems meet, with regard to the further procedure and may give one judgment disposing

¹ Hereinafter simply referred to as “the respondent.”

² Hereinafter simply referred to as “the applicants”

of all the matters in dispute in the said actions. It is so that Rules 10,11,12,13 and 14 *mutatis mutandis* apply to all applications; regard being had to rule 6(14) of the Uniform Rules of Court.

- [3] It is clear from the facts and circumstances of these matters that the relief of the applicants depends upon the determination of substantially the same question of law of fact which, which arise in each application. This Court therefore ordered accordingly.
- [4] Ms L[...] B[...], is a major female person, residing at 1[...] D[...] Street, Keimoes. She is the biological mother and guardian of her minor child, one Ms M[...] L[...] B[...]. Ms B[...] sued in her representative capacity, as the biological mother and guardian of the minor child. The minor child was a dependant of the deceased father, one Mr C[...] V[...] W[...], Who died in a motor vehicle accident on 29 December 2017.
- [5] Ms C[...] J[...] J[...] V[...] W[...], is a major female residing at 2[...] R[...] L[...], Extension 7, Keimoes. Ms V[...] W[...] sued in her personal and representative capacity, as the mother and guardian of the minor child, Ms M[...] K[...] V[...] W[...]. S[...] V[...] W[...], also resides at 2[...] R[...] L[...], Extension 7, Keimoes. The V[...] W[...]s sued in their representative capacities as guardians of the minor child, for loss of support as a result of the demise of the deceased,
- [6] The respondent is the Road Accident Fund, a juristic person established in terms of the provisions of the **Road Accident Fund Act** 56 of 1996,³ with its principal place of business situate at 3[...] I[...] Street, Menlo Park, Pretoria; alternatively 3[...] L[...] Street, New Park, Kimberley.

³ “the Act”

- [7] Both these motions pertain to the amendment of the original orders of this Court, dated 01 July 2021 and 21 February 2023, respectively. The motions are in terms rule 42(1)(b) of the Uniform Rules of Court, by deleting paragraphs 5.1, in each order and substituting same with the following; respectively:

“5.1. Costs of counsel as per the Bar Council parameters of raised counsel fees, which costs shall include, but not limited to, general preparation; consultation; perusal; travel expenses; research; preparation of heads of argument; advise on evidence; preparation for trial; and day fee for 01 July 2022.”⁴

- [8] The applicants contemporaneously seeks costs, only in the event of the motions being opposed. Further and/or alternative relief, is also sought. Both founding affidavits are deposed to by one Mr André Felix Du Plessis, the applicants’ attorney of record, who averred that the contents of the said affidavit, fall within his person knowledge, unless otherwise stated or where the contrary clearly appears from the context.
- [9] The relevant part of the impugned orders severally direct the respondent to pay the applicants taxed or agreed party and party costs on the Magistrates’ Court scale. Of significance is the fact that, at all material times hereto, the applicants were represented by one Mr Ernst on the instructions of Mr Du Plessis and the respondent, by one Ms Rabie, of the State Attorneys, Kimberley.
- [10] The respondent is opposed to the orders sought being granted and has delivered answering affidavits to that effect. The said affidavits are deposed to by one Ms Kholofelo Maila, a Senior Officer in the Litigation Department of the respondent. The said officer also averred that the

⁴ Emphasis supplied

contents of the said affidavits, fall within her personal knowledge, unless indicated to the contrary. Of significance in this regard is the fact that Ms Rabie has not delivered any confirmatory affidavit in these proceedings.

BRIEF OVERVIEW OF BACKGROUND FACTS:

[11] The actions respectively arise from claims for the payment of compensations for damages resulting from the death of the deceased, one Mr C[...] V[...] W[...], who was involved in a fatal road accident, which is regulated by the Act. The said accident occurred on 29 December 2017. Thereafter, the applicants lodged a claim against the respondent, in their personal and representative capacities, respectively, for the loss of support suffered, as a result of the demise of the deceased.

[12] On 01 July 2022 and 21 February, respectively the parties settled both matters by agreement, which agreements were made orders of Court. In terms of the said settlements, it was agreed that the defendant shall pay the plaintiffs amounts of R104 950.00 (One Hundred and Four Thousand and Nine Hundred and Fifty Rand) R301 370.00 (Three Hundred and One Thousand Three Hundred and Seventy Rand). The respondent was also ordered to pay the costs of both suits; respectively as follows:

“5. *Subject to the discretion of the taxing master, the defendant must pay plaintiff's taxed of agreed subject to the taxing master or agreed party and party costs on the Magistrates' Court Scale, which costs shall include, but not limited to the following-*

5.1. *Cost of counsel, Adv JRF Ernst, which costs shall include, but not limited to general preparation, consultation, perusal,*

travel expenses, research, preparation of heads of argument, advice on evidence, preparation for trial and day fee for 01 July 2022.”⁵

- [13] According to the applicants, whilst compiling the taxed bill of costs, the cost consultant, acting on behalf of the applicants’ attorney of record, indicated that the impugned paragraphs were not in accordance with the necessary statement regarding costs of counsel. That following consultation with the said consultant and counsel, it became apparent that the omissions of the phrases “ ... *as per the Bar Council parameters of raised counsel fees...*” sought to be inserted was as a result of “*mere bona fide errors*”, which has to be rectified.
- [14] Thereafter, according to applicants, the applicants only then addressed the relevant electronic mails on 23 May 2023 and 07 February 2024, respectively to the Office of the State Attorney, Kimberley. Both these mails were for the attention of one Ms Benita Wells, wherein the alleged *bona fide* errors were explained. Significantly the former mail was transmitted almost 10 months after the impugned order was granted and the latter almost one year later. A copies of said mails are attached to the founding affidavits, respectively as annexure LB2 and VW2. It is apposite to quote said annexure, extensively hereunder, for context:

“It is our advice from our cost consultant and also my understanding of how the taxing master will deal with the matters is that the Court orders, where a Magistrate Court costs is awarded, it must be provided for that counsel can include his/her increased costs. In the current Court orders for the above 2 matters, provision was made only for a day fee. It is our advice that this is insufficient as for current Magistrates’ Court fees for counsel an application it would only allow R887 per day and for trial R2 514.50 per day.(sic)

⁵ Emphasis supplied

It is my opinion that none of the parties had a comprehensive or clear understanding of the effect of the prayers in the above two matters' Court orders dealing with Counsel's fees on Magistrates Court scale, as we do not practice in the Magistrates' Court and don't often deal with Magistrates Court scales party and party bills of costs. This is a bona fide misunderstanding and omission on the part of the plaintiff and perhaps both parties and I think you'll agree that the amount of costs to be allowed by the taxing master for Counsel's day fees, if its only on Magistrate Court tariff as indicated above, is not sufficient, especially when I was as attorney for the plaintiff has to account to a plaintiff on the party and party bill of costs, as expectations is that most of/reasonable amount of fees and disbursements will be recovered in the party and party bill of costs. This is especially true where the quantum is "small", i.e. below R400 000.00.

It is advised by our cost consultants Peta Fernie attorneys/cost consultants, who has a long-term experience in drafting and taxing/settling both High Court and Magistrates' Court bills of cost that the order with regards to counsel fees must read: "Costs is to include the costs of counsel as per the Bar Council parameters of raised counsel fees".

If you agree with the above, it is my suggestion that we then draft amended Court orders with regards to the prayers dealing with Counsel's fees, and on which two amended Court orders we can then apply for an amendment/varying thereof by agreement and with the defendant's consent. Accordingly, no cost order will be sought in these 2 applications. Look forward to hear from you.

Regards''⁶

⁶ Emphasis supplied

- [15] It is not clear from the said mails as to when the costs consultant was consulted. Same was also never responded to or acknowledged by the respondent. It is against this backdrop that the applicants was lodged these applications on 13 March 2022, approximately 1 year and 6 months later.
- [16] In paragraphs 5.2 and 5.3 of the founding affidavits, the applicant also undertook that this motion will be served on the respondent's attorneys and if successful, the amended Court order will also be served accordingly.
- [17] The foregoing notwithstanding, in paragraph 18 of the answering affidavits (ad paragraph 5) the respondent barely denied the contents of the said paragraph and laconically averred that the impugned cost order was appropriate. The respondent also submitted that this Court cannot make any finding in favour of the applicants as sought since there is no legal basis for same.

THE PARTIES' ARGUMENTS, IN SUM:

The applicant's

- [18] The applicants, in the main submitted that it was incumbent on this Court to correct the said errors to give effect to the true intention of the parties. That same were *bona fide* errors and if rectified, no party would suffer any prejudice. That on the days the matters was settled, both Mr Ernst, counsel for the applicants and his instructing attorney, Mr Du Plessis, were of the opinion that the manner in which the Court orders were drafted was sufficient to exclude counsel's fees from the limitations of rule 69(3) of the Uniform Rules of Court.

- [19] The applicants' attorney further averred that it was only when his costs consultants, were preparing the party and party bills of costs that he was advised that the impugned Court orders did not specifically exclude the effects of rule 69(3), with regard to counsel's fees. That since this was not the intention of the parties, the impugned order should be varied or amended to correctly reflect the intention of the parties. The fact that the matters were settled does not take away the right of the applicants and their counsel to be reimbursed on reasonable and correct party and party scales applicable tariffs.
- [20] Whilst the applicants agreed that the respondent is obliged to protect public funds, the applicants disagreed that the order sought would amount to fruitless and wasteful expenditure. That it is so since the applicants are not claiming exorbitant costs without any legal basis.
- [21] That the applicants' attorney and counsel committed *bona fide* errors in formulating the impugned orders as is. That inadvertently, the impugned phrase "*on Magistrate Court scale*" was inserted with regard to party and party costs. The impugned phrase cannot be used against the applicants to deny them of their fair and reasonable party and party fees and disbursements, with regard to the costs contribution payable by the respondent. The applicants merely seek to vary the impugned orders so as to reflect the true meaning of how counsel's fees and disbursements should have been worded in the said orders. That the said *bona fide* errors were the consequences of the applicants' legal representatives' misinterpretation of import of rule 69(3), at all material times hereto.
- [22] The applicants' attorney, who is the deponent to the founding papers averred that at all material times hereto, he laboured under the misapprehension that the impugned orders were suitably formulated to cover the fees and expenses relating to counsel and that the applicants

would be properly reimbursed for party and party fees disbursements. That in the premise, it was incumbent on this Court to amend the impugned orders so as to give effect to the true intentions of the parties.

[23] That regard being had to the amount awarded, after normal attorney and counsel fees and disbursements have been deducted, the applicants will in effect be out of pocket, which is not the intention towards a claimant or client of an attorney, when a third-party claim is successfully finalised. Fair and reasonable party and party costs must be reimbursed to the applicants. It was therefore necessary for counsel's raised fees as per Bar Council parameters to be included in the impugned order.

[24] When these matters were settled on 01 July 2022 and 21 February, respectively both applicants' legal representatives were of the opinion that the manner in which the impugned Court orders were drafted, was sufficient to exclude counsel's fees from the limitation of rule 69(3). At all material times hereto, it was their intention to exclude the limitation on counsel's fees as set out in rule 69(3). The applicants' attorney believed that this was the respondent's intention too and that the parties were *ad idem* that counsel's fees would not be limited to the Magistrates' Court scale.

[25] It was only when the applicants' costs consultant were busy preparing the party and party bill of costs that the applicants' attorney was advised that the impugned Court orders did not specifically exclude the effects of rule 69(3) on counsel's fees. That since this was not the intention of the parties, the impugned Court order should be varied or amended to correctly reflect the intention of the parties.

The Respondent's Argument, in sum

[26] The respondent, for its own part, maintained that these motions amount to an abuse of Court process as the claimed amounts clearly fall within the monetary jurisdiction of the Magistrate's Court. Thus the actions should not have been instituted in this Court, in the first place. The applicants' decision to issue summons in this Court amounted to abuse of Court process, which must be frowned upon. That the respondent is also obliged to protect public funds. It has a duty to guard against any fruitless and wasteful expenditure; regard being had to the **Public Finance Management Act 1 of 1999**.⁷

[27] That the applicants confirmed that this application was brought solely on the strength of the advice received from their costs consultant. The law is clear regarding the scale of costs, when a matter is settled in the amount such as in these matters. One cannot simply be paid exorbitant costs without any legal basis by an organ of state as same would violate the PFMA and trust that the public has on the respondent.

[28] That these application had no merits and it was therefore proper and necessary for the respondent to oppose the applications. The correct thing for this Court to do, to prevent this kind of hopeless and unnecessary applications clogging the busy Court roll is to order costs against the applicants. In the circumstances, the applications stood to be dismissed with costs. So the respondent's argument, in sum went.

DETERMINATION:

[29] The applicants have predicated their motion on rule 42(1)(b) of the Uniform Rules of this Court. The said rules expressly and unambiguously authorises this Court, in addition to any other powers,

⁷ "the PFMA"

to *mero motu* or upon the application of any party affected, rescind or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. It is trite that such an application must be brought within a reasonable time.⁸

- [30] It follows from the foregoing that the following issues fall for determination in this motion; to wit: (a) whether the applications have been brought within a reasonable time; and (b) whether, regard being had to the facts and circumstances of these cases, the impugned orders suffer from any ambiguity or any patent errors or omissions, within the contemplation of rule 42(1)(b). These issues are determined in turn, hereunder.

Whether the applications has been brought within a reasonable time

- [31] Whilst in cases of matters accessory to judgments, such as interest, costs or the appropriate tariffs of costs, Courts have the discretion to supplement their judgments. There is a generic reluctance to extend this exception beyond its narrow confines.⁹ The relief sought is therefore discretionary.¹⁰

- [32] Rule 69(3), expressly and unambiguously stipulates as follows:

“Save where the defendant or respondent is awarded costs, the tariff of maximum fees for advocates between party and party referred to in part IV of Table A of Annexure 2 to the Rules of the Magistrates’ Court (hereinafter referred to as the tariff)” shall apply where the amount or value of the claim falls within the jurisdiction of the Magistrates’ Court, unless the Court, on

⁸ *FNB v Van Rensburg NO* 1994(1) SA 677 (T)

⁹ *Thompson v SABC* 2001 (3) SA 746 (SCA)

¹⁰ *Thivase Royal Council v Thivase* 1992 (4) SA 852 (A) at 862J

request made before or immediately after giving the judgment, otherwise directs.”¹¹

[33] It can be deduced from the foregoing that the default position is that the tariff of maximum fees for advocates between party and party referred to in part IV of Table A of Annexure 2 to the Rules of the Magistrates’ Court apply *ipse jure* where the amount or value of the claim falls within the jurisdiction of the Magistrates’ Court, unless the Court, on request made before or immediately after giving the judgment, otherwise directs. No request has been made as contemplated.

[34] As alluded above, the impugned orders are dated 01 July 2022 and 21 February, respectively. The motions were both lodged 13 February 2024. The former 18 months later and latter almost a year later. It is not clear on the papers as to when did the alleged consultation with the costs consultant occur. This Court is of the opinion that a delay of 18 and almost a year *sans* any explanation for the delay, is inordinately long; regard being had to the facts and circumstances of this case.

Whether the impugned orders suffer from any ambiguities or patent errors or omissions, within the contemplation of rule 42(1)(b)

[35] Of significance in this regard is the fact that the “ambiguity”, “error” or “omission” contemplated in rule 42(1)(b), must be attributable to the Court such that the judgments patently do not reflect its intentions.¹²

[36] It is not so in this case since its nub is the allegation is that it was only whilst compiling the taxed bills of costs, that the costs consultant indicated that paragraphs 5.1 of the Court orders, respective are not in

¹¹ Emphasis supplied

¹² *Thivase Royal Council v Thivase* 1992 (4) SA 852 (A) at 863

accordance with the necessary statement regarding costs of counsel.¹³ That it was only during consultation with the costs consultant and counsel that it became apparent that these were mere errors, which have to be rectified.¹⁴ The applicants contemporaneously contended that the impugned tariff of costs are mere “...*bona fide misunderstanding and omission on the part of the plaintiff and perhaps both parties.*”¹⁵

- [37] It follows from the foregoing that these motions do not implicate rule 42(1)(b), but rule 42(1)(c). The latter rule specifically and unambiguously permits this Court to similarly rescind or vary an order or judgment granted as a result of a mistake common to the parties. The respondent unequivocally denies that paragraph 5.1 of the impugned orders came about as a result of any mistake common to the parties or at all.
- [38] It must be accepted that a settlement, whether or not is embodied in an order of Court, is a substantive contract which exists independently of the cause that gave rise to it. To the extent that the applicants seek to rectify settlement agreements which were subsequently made orders of Court. The general rules applicable to the rectification of contracts are implicated, in *casu*.
- [39] It is so that the object of rectification is to have a written contract conform to the common intention of the parties. A party claiming rectification, as in *casu* must therefore *inter alia* prove *bona fide* common or unilateral errors in drafting the impugned documents; that the written documents did not reflect the common intention of the parties correctly. The common continuing intention of the parties, as it existed when the agreements were reduced to writing must also be

¹³ Paragraph 3.3, p 7, Founding Affidavit.

¹⁴ Paragraph 3.4, *ibid*

¹⁵ Paragraph 3, p13, *ibid*

established. Same may be deduced from an antecedent agreements, for instance.¹⁶ In addition, it must also be alleged and proved that the errors were *iustus*. Incidental mistakes or mistakes relating to the reasoning or motivation behind the agreements only, is not *iustus*.¹⁷

[40] The respondent denies that the mistake in *casu* is mutual. There is also nothing that establishes the common continuing intention of the parties, as it existed when the agreements was reduced to writing which is *contra* paragraph 5.1. of the impugned orders. Nor are there any alleged facts evincing any antecedent agreements *contra* same. Significantly, on the version of the applicants, the mistakes in *casu* were allegedly discovered whilst compiling the taxed bills of costs and only when the costs consultant indicated that paragraph 5.1 of the Court orders are respectively not in accordance with the necessary statements regarding costs of counsel.¹⁸

[41] The foregoing evinces that the applicants' alleged *bona fide* misunderstanding and omissions pertaining to the costs tariffs in fact are incidental mistakes or mistakes relating to the reasoning or motivation behind the agreements and nothing more. It is also clear from the founding papers that the applicants have also subsequently created retrospective mistakes by means of fresh evidence which was not relevant when the parties entered into the impugned settlement agreements. In the premise, this Court finds that the alleged errors is not *iustus* and therefore renders the application to be dismissed with costs, respectively.

ORDER:

[42] The following order therefore issues:

¹⁶ *City Council of the City Durban v Rumdel Construction* [1997] 3 All SA 20 (D)

¹⁷ *Van Reenen Steel v Smith NO* 2002(4) SDA 264 (SCA)

¹⁸ Paragraph 3.3, p 7, Founding Affidavit

- (a) THE APPLICATIONS ARE BOTH DISMISSED WITH COSTS.
- (b) THE COSTS OF BOTH APPLICATIONS ARE TO BE BORNE BY THE APPLICANTS JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED.

APS NXUMALO J
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

For the Applicant:
On instructions of:

MS SNYDERS
André Du Plessis Attorneys
Pretoria
c/o **Engelsman Magabane Inc.**
Kimberley

For the Respondent:
On instructions of:

MR MOGANO
Office of the State Attorney
Kimberley