**THE HIGH COURT OF SOUTH AFRICA**

**(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: **1082/2019**

Reportable: YES / **NO**

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

Edited: YES / NO

In the matter between:

**RIED, DINA** Applicant

And

**THE ROAD ACCIDENT FUND** Respondent

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Neutral citation: ***Ried v The Road Accident Fund (Case No: 1082/2019)***
Coram: **Nxumalo J**
Heard: **29 May 2025**
Delivered: **12 June 2026**

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**ORDER**

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1. The application is hereby dismissed with costs.

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## JUDGMENT

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**INTRODUCTION:**

[1] This is an application to amend the order of this Court dated 01 July 2022, by deleting paragraph 5.1 thereof and substituting same with the following:

> *"5.1. Costs of counsel, Adv JRF Ernst, 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, advice on evidence, preparation for trial and day fees for 19 November 2021 and 1 July 2022."*[1] (Emphasis supplied)

[2] The applicant contemporaneously seeks costs, only in the event of the motion being opposed. Further and/or alternative relief is also sought. The founding and replying affidavits are deposed to by one Mr André Felix Du Plessis, the applicant's attorney of record, who averred that the contents of the said affidavit, fall within his personal knowledge, unless otherwise stated or where the contrary clearly appears from the context. He further averred that he is duly authorised to bring this application and to depose to the said affidavits on behalf of the applicant.

[3] The respondent is opposed to the order sought being granted and has delivered an answering affidavit to that effect. The said affidavit is deposed to by one Lungile Nkosi, an Acting Team Leader in the respondent's Death Adjudication Department. The said official also

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[1] The relevant portion of the order granted by this Court, by agreement between the parties, reads as follows:
*"5. Subject to the discretion of the taxing master, the Defendant must pay Plaintiff's taxed or agreed party and party costs on the Magistrate's Court scale, which costs shall include, but not limited to the following:*
*5.1 Costs 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 fees for 19 November 2021 and 1 July 2022."*

averred that the contents thereof falls within her personal knowledge, unless indicated to the contrary. Of significance in this regard is the fact that Ms Rabie, who at all material times hereto represented the respondent, has not delivered any confirmatory affidavit in these proceedings.

[4] The applicant is one MS DINA RIED, a major female residing at Dakota Plakkerskamp, No 2[...], U[…], Northern Cape. The applicant is the biological mother of the late Mr Henry Jacobus Ried ("*the deceased*").

[5] The respondent is the ROAD ACCIDENT FUND, a juristic person established in terms of the **Road Accident Fund Act** 56 of 1996 ("***the Act***"), with its principal place of business situate at 3[...] I[...] Street, Menlo Park, Pretoria, Gauteng and 3[...] L[...] Street, New Park, Kimberley, Northern Cape.

**<u>THE FACTS UPON WHICH THE APPLICANT RELIES FOR RELIEF</u>:**

[6] The action arises from a claim for damages resulting from the death of the deceased on 16 September 2016. The claim was brought in terms of the Act, which governs the liability of the Road Accident Fund and the compensation of persons who suffer loss arising from motor vehicle accidents. At the time of the accident, the deceased was a passenger in one of the motor vehicles involved in a head-on collision. The applicant's case (as plaintiff) was that, at the time of the said collision, the deceased was the breadwinner and owed a duty of support to the applicant; alternatively, he had undertaken a duty to maintain the applicant. Consequently, the applicant sued the respondent (as defendant in the action) in the amount of R335 100.00;[2] for the loss of support suffered as a result of the death of the deceased, together with costs of suit and

[2] Three Hundred and Thirty-Five Thousand One Hundred Rand only.

further and/or alternative relief.

[7] The matter was ultimately set down for 01 July 2022. On the said date, it is common cause that the parties settled the matter by agreement. This agreement was made an order of this Court. In terms of the said settlement, it was agreed that the respondent shall pay the applicant a reduced amount of R244 380.00.[3] There is no doubt that the said amount falls well below this Court's minimum monetary jurisdiction and squarely within the jurisdiction of the Magistrates' Court.

[8] In addition to the foregoing, the respondent was also ordered to pay the costs of suit in relevant part as follows:

> *"5. Subject to the discretion of the taxing master, the defendant must pay Plaintiff's taxed <u>or agreed party and party costs on the Magistrate's Court scale</u>, which costs shall include, but are 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 fees for 19 November 2021 and 1 July 2022."* (Emphasis supplied)

[9] Of significance is the fact that paragraph 6 of the said order contemporaneously provided that in the event that the costs are not agreed between the parties, the applicant shall serve the notice of taxation on the respondent and allow the latter 14 (fourteen) Court days to make payment of the taxed costs. It is also so that the applicant entered into a contingency fee agreement with her attorney of record, regard being had to paragraph 7 of the said order.

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[3] Two Hundred and Forty- Four Thousand Three Gundred and Eighty Rand only.

[10] It is apparent from the foregoing that the order ought to be amended expressly provides for the costs of the action, including the costs of counsel, to be paid on a party-and-party basis on the Magistrates' Court scale, subject to taxation or agreement and the discretion of the taxing master.

[11] It is against this backdrop that, the facts upon which the applicant relies for relief, fall for consideration; to *wit*: Whilst compiling the taxed bill of costs, the costs consultant acting for the applicant's attorney of record, indicated that prayer 5.1 of the Court order is not in accordance with the necessary statement regarding the costs of counsel. Following consultation with the said cost consultant and counsel, it became apparent that this was a mere *bona fide* error which had to be rectified.

[12] Thereafter, according to applicant, the applicant only then addressed the relevant electronic mail on 23 May 2023, to the respondent's attorneys. This electronic mail was addressed to one Ms Benita Wells, wherein the alleged *bona fide* error was put up. Significantly, the said mail was transmitted almost 11 months after the order sought to be amended, was granted. A copy of the said mail is attached to the founding affidavit as annexure DR2. It is apposite to quote the 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 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 R 2 514.50 per day.* (sic)

*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 Magistrate's Court and don't often deal with magistrates court scale party and party bills of cost. 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 the costs to be allowed by the taxing master for Counsel's day fees, if its only on magistrates court tariff as indicated above, is not sufficient, especially when I as attorney for the plaintiff has to account to a plaintiff on the party and party bill of costs, as the expectation is that most of / a reasonable amount of fees and disbursements will be recovered in the party and party bill of costs. This is especially true in matters where the quantums is "small", i.e below R400 000.00.* (sic)

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

*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.*

*I look forward to hear from you.*
*Regards"*[4] (sic)

[13] It is not clear from the said e-mail or the papers before this Court as to when the costs consultant was consulted. The said e-mail was also

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[4] Emphasis supplied.

never responded to or acknowledged by the respondent. It is against this backdrop that the applicant lodged this application on 13 February 2024, approximately 1 year and 7 months down the line.

**THE PARTIES' ARGUMENTS, IN SUM:**

***The applicant's:***

[14] The applicant based this application on the allegation that the incorrect order was granted as a result of a reasonable mistake. That it is so since the applicant's legal representatives were unaware of the impact of the wording of the settlement agreement at the time same was made an order of Court. That consequently, the order in question does not reflect the true intention of the parties. That it was therefore incumbent on this Court to correct the said error to give effect to the true intention of the parties. That same was a *bona fide* error, and if rectified, no party would suffer any prejudice.

[15] That on the day the matter was settled, both applicant's legal representatives were of the mistaken opinion that the manner in which the order in question was drafted was sufficient to exclude counsel's fees from the limitations of rule 69(3) of the Uniform Rules of Court. That the applicant's legal representatives also believed this to be the intention of the respondent and because of a reasonable mistake they were of the view that the wording used would achieve the purpose.

[16] Significantly, the applicant's attorney also averred that it was only when his costs consultants, were preparing the party and party bills of costs that he was advised that the Court order in question 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 order in question should be varied or amended to correctly reflect the intention of the

parties. That the fact that the matter was settled does not take away the right of the applicant and counsel to be reimbursed on a reasonable and correct party and party scale applicable tariff.

[17] That the applicant's legal representatives committed a *bona fide* error in formulating the order in question. That inadvertently, the phrase "*on Magistrate Court scale*" was inserted with regard to party and party costs. That the said phrase can therefore not be used against the applicant to deny her of her fair and reasonable party and party fees and disbursements, with regard to the costs contribution payable by the respondent.

[18] The applicant merely seek to vary the order in question so as to reflect the true meaning of how counsel's fees and disbursements should have been worded in the order sought to be amended or varied. That the said *bona fide* error arose as a consequence of the applicant's legal representatives' having misinterpreted the import of Rule 69(3) at all material times.

[19] The applicant's attorney further averred that at all material times hereto, he laboured under the misapprehension that the order in question was suitably formulated to cover the fees and expenses relating to counsel and that the applicant would be properly reimbursed for party and party fees disbursements. That in the premise, it was incumbent on this Court to amend the order in question so as to give effect to the true intention of the parties.

[20] That regard being had to the amount awarded, after normal attorney and counsel's fees and disbursements have been deducted, the applicant will in effect be out of pocket, which is not the intended result in respect of a claimant or client of an attorney upon successful finalisation of a third-party claim. That fair and reasonable party and party costs must be

reimbursed to the applicant. It was therefore necessary for counsel's raised fees as *per* Bar Council parameters to be included in the order sought to be amended.

[21] That when this matter was settled on 01 July 2022, the applicant's legal representatives were of the opinion that the manner in which the order in question was drafted was sufficient to exclude counsel's fees from the limitation of rule 69(3). That at all material times hereto, it was their intention to exclude the limitation on counsel's fees as set out in the said rule. The applicant's 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.

[22] That a party cannot be prescribed as to its choice of forum. That whilst the amount claimed falls within the monetary jurisdiction of the Magistrates' Court, the applicant was nevertheless entitled to issue summons out of this Court, which has a concurrent jurisdiction with the latter.

[23] That whilst the applicant agreed that the respondent is obliged to protect public funds, the applicant disagreed that the order sought would amount to fruitless and wasteful expenditure. That it is so since the applicant is not claiming exorbitant costs without any legal basis, so the applicant's argument went, in sum.

***<u>The respondent's</u>:***

[24] The respondent, for its own part, in the main maintained that this motion amounts to an abuse of Court process as the claimed amount clearly falls within the monetary jurisdiction of the Magistrate's Court. Thus, the actions should not have been instituted in this Court, in the first place. That the applicant's 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 ("the ***PFMA***").[5]

[25] That the applicant confirmed that this application was brought solely on the strength of the advice received from the costs consultant. That the law is clear regarding the scale of costs, when a matter is settled in the amount such as in this matter. That 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.

[26] That whilst it is so that a party cannot be prescribed as to its choice of forum, such a party may face a cost order on a lower scale, such as in this matter. That to the extent that this application had no merits, it was proper and necessary for the respondent to oppose same. That the correct thing for this Court to do, to prevent this kind of hopeless and unnecessary applications clogging its busy roll is to dismiss this motion with costs. So the respondent's argument, in sum, went.

**DETERMINATION:**

[27] It is significant to point out at the onset that this Court has already handed down a joint judgment in *Beukes v RAF*[6] and *Van Wyk v RAF,*[7] which are *pari materia* to the matter in *casu*. The reliefs sought were also similar. In the absence of any basis to distinguish those matters, this Court follows the reasoning therein.

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[5] In terms of Section 1 of the PFMA "*fruitless and wasteful expenditure*" means expenditure which was made in vain and would have been avoided had reasonable care had been exercised. Section 81(1) of the PFMA, for its own part, expressly stipulates that an accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer willfully or negligently, *inter alia*, makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.

[6] Case number 1636/21.

[7] Case number 1150/19.

[28] The applicant, as in the abovementioned cases, has predicated this motion on rule 42(1)(*b*) of the Uniform Rules of this Court. The said rule expressly and unambiguously authorises this Court, in addition to any other powers it may have, 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]

[29] It follows from the foregoing that the following issues fall for determination in this motion; to *wit*: (a) whether the application was brought within a reasonable time; and (b) whether, regard being had to the facts and circumstances of this matter, the order sought to be amended or varied suffer from any ambiguity or any patent error or omission, within the contemplation of rule 42(1)(*b*). These issues are determined in turn, hereunder.

***<u>Whether the application has been brought within a reasonable time</u>:***

[30] Whilst in matters accessory to judgments, such as interest, costs or the appropriate tariff of costs, Courts have a discretion to supplement their judgments, there is a general reluctance to extend this exception beyond its narrow confines.[9] Rule 42 confers upon the Court a discretion to order rescission or variation, which discretion must be exercised judicially. The relief sought is accordingly discretionary.[10]

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

*"Save where the defendant or respondent is awarded costs, <u>the tariff of</u>*

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[8] ***First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: in re First National Bank of Southern Africa Ltd v Jurgens and Others*** 1994 (1) SA 677 (T) at 681B–G; see also ***Firestone South Africa (Pty) Ltd v Genticuro AG*** 1977 (4) SA 298 (A) at 306H.

[9] See generally ***Thompson v South African Broadcasting Corporation*** 2001 (3) SA 746 (SCA).

[10] ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*** 2003 (6) SA 1 (SCA) paras 5- 7.

*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 request made before or immediately after giving the judgment, otherwise directs."*[11] (Emphasis supplied)

[32] 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.

[33] As alluded to above, the order sought to be amended is dated 01 July 2022. The motion was only lodged on 13 February 2024, approximately 19 months later. It is not clear from the papers when the alleged consultation with the costs consultant occurred. This Court is of the view that a delay of 19 months, *sans* any explanation thereof, is inordinately long; regard being had to the facts and circumstances of this case.

***Whether the order in question suffer from any ambiguity or any patent error or omission, within the contemplation of rule 42(1)(b):***

[34] 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 judgment patently does not reflect its intention.[12]

[35] Patently, the essence of this motion is the assertion that it was only whilst

[11] Before its deletion by GN R4477 of 8 March 2024.
[12] ***First Consolidated Leasing Corporation Ltd v McMullin*** 1975 (3) SA 606 (T) at 608F; see also ***Seatle v Protea Assurance Co Ltd*** 1984 (2) SA 537 (C) at 541C.

compiling the taxed bills of costs *ex post facto*, that the costs consultant indicated that paragraph 5.1 of the Court order in question is not in 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 same was a mere error, which has to be rectified.[14] The applicant contemporaneously contended that the impugned tariff of costs is a mere "*…bona fide misunderstanding and omission on the part of the plaintiff and perhaps both parties.*"[15] It is apparent from the foregoing that the alleged error is in no way attributable to this Court. Not at all.

[36] It follows from the foregoing that this motion does 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 order in question came about as a result of any mistake common to the parties or from any mistake at all.

[37] It must be accepted that a settlement or compromise (*transactio*), 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. It follows that to the extent that the applicant seeks to rectify a settlement agreement which was subsequently made an order of Court, it is trite that the general rules applicable to the rectification of contracts are implicated.[16]

[38] 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

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[13] Paragraph 3.3, p 6, Founding Affidavit.
[14] Paragraph 3.4, p 7, *ibid.*
[15] Paragraph 3, Annexure DR2 to the Founding Affidavit.
[16] See ***Mafisa v Road Accident Fund*** 2024 (4) SA 426 (CC) paras 33-38.

error in drafting the impugned document; that the written document did not reflect the common intention of the parties correctly. The common continuing intention of the parties, as it existed when the agreement was reduced to writing, must also be established. Same may be deduced from antecedent agreements, for instance.[17] In addition, it must also be alleged and proved that the error was *iustus*. Incidental mistakes or mistakes relating to the reasoning or motivation behind the agreements only, are not *iustus*.[18]

[39] The respondent denies that the mistake in *casu* is mutual. Nothing therefore evinces the common intention of the parties as it existed when the settlement was made an order of Court.[19] Nor are there any alleged facts evincing any antecedent agreement *contra* same. Significantly, on the version of the applicant, the mistake in *casu,* was allegedly discovered *ex post facto* whilst compiling the taxed bills of costs and only when the costs consultant indicated that paragraph 5.1 of the Court order are respectively not in accordance with the necessary statements regarding costs of counsel.

**CONCLUSION:**

[40] The foregoing evinces that the applicant's legal representative's alleged *bona fide* misunderstanding and omission pertaining to the costs tariffs in fact is an incidental mistake or mistake relating to the reasoning or motivation behind the agreement and nothing more. It is also clear from the founding papers that the applicant has also subsequently created a retrospective mistake by means of fresh evidence which was not relevant when the parties entered into the settlement agreement which was subsequently made an order of Court.

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[17] See ***City Council of the City of Durban v Rumdel Construction*** **(Pty) Ltd & Others** [1997] 3 All SA 20 (D).
[18] See ***Van Reenen Steel (Pty) Ltd v Smith NO and Another*** 2002 (4) SA 264 (SCA).
[19] See ***Kathmer Investments (Pty) Ltd v Woolworths*** **(Pty) Ltd** 1970 (2) SA 498 (A) at 503.

[41] In the premise, this Court finds that the alleged error is not *iustus* and therefore, renders the application to be dismissed with costs.

**ORDER:**

[42] The following order therefore issues:

**1. THE APPLICATION IS HEREBY DISMISSED WITH COSTS.**

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

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| For the Applicant: | **MS JA SNYDERS** |
| *On instructions of:* | **André Du Plessis Attorneys**<br>Pretoria<br>c/o **Engelsman Magabane Inc.**<br>Kimberley |
| For the Respondent: | **MR M MOGANO** |
| *On instructions of:* | **Office of the State Attorney**<br>Kimberley |