IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 046038/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

26/08/2024 LAMopa

In the matter between:

THE ROAD ACCIDENT FUND	**FIRST APPLICANT**
CHAIRPERSON OF THE BOARD, ROAD ACCIDENT FUND	**SECOND APPLICANT**
CHIEF EXECUTIVE OFFICER, ROAD ACCIDENT FUND	**THIRD APPLICANT**

and

LEGAL PRACTITIONER'S INDEMNITY INSURANCE FUND	**FIRST RESPONDENT**
W E EMERGENCY RESPOND TEAM (PTY) LTD	**SECOND RESPONDENT**
TSHOLOFELO TLHAJWANG OBO MINOR	**THIRD RESPONDENT**
REBECCA MASABATA MOHAPI	**FOURTH RESPONDENT**

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CHRISJAN TOLO	**FIFTH RESPONDENT**
JOHANNA SUSANNA VISAGIE	**SIXTH RESPONDENT**
LUCKY DUMISANI SEBATLELO	**SEVENTH RESPONDENT**
A WOLMARANS INC	**EIGHTH RESPONDENT**
LOUBSER VAN WYK ATTORNEYS	**NINTH RESPONDENT**
THE LEGAL PRACTICE COUNCIL	**TENTH RESPONDENT**
THE MINISTER OF TRANSPORT	**ELEVENTH RESPONDENT**

LEAVE TO APPEAL JUDGMENT

Introduction

1) What serves before this court are applications for leave to appeal and cross-appeal our judgment handed down on 20 March 2024. The first, third and fourth respondents in the main application in which we have given judgment seek leave to appeal our judgment and the orders made by us ('the applicants for leave') Essentially, they submit that there have been significant developments in the matter of *Mautla and Others v Road Accident Fund and Others*[1] as a result of which there exist compelling reasons why leave to appeal should be granted. The third applicant in the main application (Tlhajwang) seeks leave to cross-appeal our order dismissing Tlhajwang's application and submits that condonation should have been granted for the late launching of the review application.

The law in brief

[1] 2023 ZAGPPHC 1843 (6 November 2023).

2) When dealing with an application for leave to appeal, it is trite that courts focus on s 17(1)(a) of the Superior Courts Act 10 of 2013, which provides for the following:

'*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

(a) (i) the appeal would have a reasonable prospect of success; or

(b) *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;'*

Submissions

3) Counsel for the applicants for leave ultimately advanced their grounds for leave to appeal on the following :

Ad ground 1

4) The RAF1 form does not constitute a regulation and consequently does not qualify as administrative action. The submission is that the publication of the RAF1 Form does not amount to the making of subordinate legislation constituting an administrative action, that could be challenged under PAJA.

Ad ground 2

5) The gist of this ground of appeal is that this court erred in dismissing the applications of the second, third and tenth applicants without making an adverse cost order in favour of the applicants for leave.

Ad ground 3

6) The applicants for leave submitted that this court erred in finding that the principle of sufficiency had a bearing on deciding upon the legality of the RAF1 form.

7) In view of the fact that the Minister did not oppose the review brought against the exercise of her powers in issuing the RAF 1 Form and the applicants for leave had also not contested this exercise of power in the main proceedings , counsel for the

applicants for leave was constrained to concede that leave to appeal could only be sought in respect of the order made in paragraph (iii) of the judgment, the Board Notice. Accordingly, the remaining grounds that were directed to the Minister's decision to issue the RAF1 Form were abandoned. Following the full court's dismissal of the application for leave to appeal in the *Mautla* judgment, which also dealt with an RAF 1 Form issued by the Minister and a Board Notice published by the RAF (prior in time to the RAF1 Form and the Board Notice at issue in these proceedings), counsel for the applicants for leave submitted that the Supreme Court of Appeal has requested the parties in *Mautla to* argue the question of leave to appeal before that Court, and if necessary,to be prepared to argue the merits. Notwithstanding the concession that there are differences between this matter and *Mautla,* counsel, however, submitted that there are also important similarities, between the two matters, which relate to the interpretation of sections of the Road Accident Fund Act, the ambit of the powers conferred by these sections, such as s 24 (1)(a), and the constitutionality of Regulation 7 *vis a vis* the RAF's powers to publish an RAF 1 Form.

8) The decision of the SCA, the argument continued, provides a compelling reason for this matter to be placed before the SCA. Counsel's submission was that there is an overlap between *Mautla* and the case before us, at least in so far as both cases concern the proper interpretation of the powers of the Minister and those of the RAF.

9) We find this argument persuasive. The SCA has not granted leave to appeal. And we are not convinced that the SCA will do so because, to the extent of the identity between the two cases, we do not think that there is a reasonable prospect that an appellate court would reverse our judgment as to the powers at issue and the basis upon which we determined that their exercise was unlawful. But two judges of the SCA have taken the view that the question of leave to appeal warrants argument before that Court. Once that is so, we cannot speculate as to what decision the SCA might ultimately take. Should that Court ultimately entertain the merits, there are different outcomes that may result. The SCA may dismiss the appeal ,but determine a remedial regime at odds with that of the High Court, or uphold the appeal. In either circumstance, it would be deeply inimical to the public interest, given the subject matter

at issue and its remedial consequences, if the case before us was not before the SCA at the time that *Mautla* is heard, so as to permit the appellate court to give a judgment that would determine the position in both cases. We consider this to be a compelling circumstance warranting the grant of leave. It should not be understood thereby that we consider there to be reasonable prospects of success. We do not. But, as explained, we think that there are reasons of public policy as to why the SCA should be the ultimate arbiter of the matter, given the identity of the powers at issue in both *Mautla* and the present matter.

10) On the ground of appeal concerning our decision not to award costs, counsel conceded that there was no misdirection and consequently the matter is not appealable.

11) For the first applicant in the main action, the LPIIF, counsel submitted that what was sought in the *Mautla* matter markedly differs from this matter, in that it dealt with decisions taken by the RAF, Management Directive and two Board Notices, which were withdrawn and led to the 6 May publication. The Board Notice was withdrawn on 31 May 2022. In *casu*, he recorded that since the Minister was not part of the proceedings, this was an unopposed review. Questioning the *bona fides* of the RAF, he submitted that initially the LPIIF maintained that there was an overlap between this case and *Maulta,* but the RAF adopted the stance that the two matters were separate. To amplify this point, he referred to the RAF's answering affidavit at 135 and 136, where the Fund said:

"The Applicant's argument centers on the Management Directive and more specifically requiring peremptory compliance with the revised requirements.

Without running the risk of repeating myself, the application before the Honorable Court concerns the Board Notice and not the Management Directive."

12) On behalf of the eighth applicant in the main application, counsel aligned himself with the LPIIF and opposed the application for leave to appeal, especially, on the orders that affected the Minister who did not participate nor put up any affidavit in the main action. The orders are not against the RAF, he argued. He, however, pointed out that leave could only be granted in respect of paragraph (iii) of the judgment. He

submitted that the invitation by the SCA should not be a reason to grant leave to appeal for the following reason:

(1) One of the findings in *Mautla*, which is a legal finding this court made, is that the RAF has no power to issue RAF 1 Form. Therefore, that proposition of law will be scrutinised by the SCA. If *Mautla* is overturned, he argued, that would not have an impact on this matter because the old RAF1 Form would be resurrected.

(2) Responding to the court's proposition that if the SCA finds that the RAF does have the power to set up these pre-claim administrative requirements, counsel conceded that under those circumstances the basis on which this court granted paragraph (iii) of its order would be wrong.

Counsel for the sixth respondent aligned himself with the submissions made by the two counsel. Seventh and ninth respondents' counsel submitted that the applicants' application for leave to appeal enjoyed no prospects of success and engaged the court at length on the interim regime.

Finally, the leave to cross-appeal was mounted by counsel for Tlhajwang. Dealing with the question of condonation, he referred to the matter of *Steenkamp and Others v Edcon Limited* [2] where the court said:

"The decision to grant condonation is either yes or no: there is no wide range of available options for the decision-maker as envisaged in *Trencon*. A court can either grant or deny the condonation. But the election of either option is equally permissible and is something that reasonable judges could disagree on. To grant condonation is an exercise of judicial discretion that is only fettered by being judicially explained."[3]

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[2] (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) (30 April 2019

[3] Supra paras 31 and 32

He submitted that the review was not properly a PAJA review, and hence the less exacting regime of condonation of application to a legality review should have been applied. But, even under PAJA, it was common cause that all the applications were outside 180 days as provided under PAJA, yet some applicants were granted condonation, while the third respondent was refused on the ground that it failed to apply for condonation in terms of s 7(1) of PAJA. Furthermore, a proper counting of the days within which to bring a PAJA review should have yielded a computation that the third applicant fell within the 180 day prescription.

Discussion

13) As to the cross appeal of Tlhajwang, we consider that by reason of the binding authorities referenced in our judgment, there is no basis to suppose another court would reasonably consider the review to be a legality review. Tlhajwang never sought condonation in the main application. Accordingly there was no basis to grant it. And the argument now raised that condonation was not necessary, was not made before us when we heard the main application. Tlhajwang had contended it was not relying upon PAJA. This application for leave to cross- appeal is thus devoid of merit and must be dismissed. We make no order as to costs.

14) As to the application of the applicants for leave, where reasonable prospects of success are not present, as we find, we must enquire whether there are compelling reasons to grant leave to appeal. For us, as indicated, legal certainty in this field is of paramount importance. The subject matter of the litigation affects many people, including many who are disadvantaged. The regime of application to the making of claims against the RAF is a matter of high public importance.. As the court held in *Ramakatsa,* the court must make an enquiry "whether there is a compelling reason to entertain the appeal. Compelling

reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes."

15) Here, as we have explained, is an issue of public importance, that must serve before the SCA. At the centre of this case, like *Mautla*, is the interpretation of statutory powers and their application. We have in our judgment pronounced on these matters and do not think there is a reasonable prospect that another court would decide these questions differently. However, for the reasons given above, we are of the view that there are compelling reasons to grant leave to appeal paragraph (iii) of our judgment so as to permit the SCA to decide issues relevant to the Board Notice and its remedial consequences that are common as between *Mautla* and the present matter. There is no basis to grant leave to appeal to the applicants for leave in respect of the exercise by the Minister of her powers to issue the RAF 1 form because the applicants for leave did not oppose the review in respect of the exercise of these powers. No such appeal would be competent, and such leave was abandoned before us.

16) In the course of hearing the application for leave to appeal, it was drawn to our attention that the applicants for leave had been making use of their application to avoid giving effect to the interim remedial regime ordered by us. We expressed considerable concern as to this course of conduct. While the applicants for leave are entitled to seek leave to appeal in respect of those orders made by us that they contested in the main application, it is not clear how they can frame an application for leave to encompass the exercise by the Minister of her powers to issue the RAF 1 form and use such application to rely upon suspension to avoid the remedial regime ordered by us, as it relates to the RAF 1 form , and its consequence for the administration of claims that fall within the authority of the RAF. While we make no findings at all on this matter , we have nevertheless ordered the CEO of the RAF to file an affidavit explaining the Fund's failure to implement the interim regime ordered by this court. Counsel undertook to prevail on the RAF to file this affidavit on or before16 August 2024.

Order

1. The applicants are granted leave to appeal paragraph (iii) of the order granted on 20 March 2024.
2. Costs of the application for leave to appeal are costs in the appeal.

2. The application for leave to cross-appeal is dismissed.

3. The CEO of the First Applicant (the RAF) is ordered to file an affidavit by 16 August 2024 explaining the conduct and decisions taken by the RAF in respect of the issues set out in paragraph 16 of this judgment.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT, PRETORIA

I CONCUR

P.P.

D. UNTERHALTER

JUDGE OF THE HIGH COURT, PRETORIA

I CONCUR

M.P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the 1st, 2nd & 3rd Applicants	:	Adv T Pillay
	:	Adv N Mahlangu
	:	Adv T Makola
For the 1st & 4th Respondents	:	Adv E Van As
For the 2nd Respondent	:	Adv BP Geach SC
For the 3rd Respondent	:	Adv M Snyman SC
	:	Adv F H H Keherhan
Date of hearing	:	08 August 2024
Date of judgment	:	26 August 2024

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