IN THE SUPREME COURT OF APPEAL OF

SOUTH AFRICA, BLOEMFONTEIN

Court *a quo* Case No: 011795/2022
SCA Case No. _____

ROAD ACCIDENT FUND	**APPLICANT**
And	
ADAM MUDAWO	**FIRST RESPONDENT**
WENILE SIMON NDLOVU	**SECOND RESPONDENT**
BRUCE MTHOKOZISI SIBANDA	**THIRD RESPONDENT**
OYETUNDE ONENIYI AREO	**FOURTH RESPONDENT**

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned,

PHATHUTSHEDZO LUKHWARENI

do hereby make oath and state as set out below:

1.

INTRODUCTION

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1.1 I am an adult, and I am the Acting Chief Executive Officer of the Applicant ("the Fund"). The Applicant was the Second Respondent in the court *a quo*.

1.2 Unless the context otherwise indicates, the contents of this affidavit fall within my knowledge, and they are true and correct.

1.3 Where I make legal submissions, I do so, on the advice of the Applicant's legal representatives.

1.4 The purpose of this application is to apply for leave to appeal to the above-mentioned Court in terms of Section 17(2)(b) of the Superior Courts Act No 10 of 2013.

1.5 The Court *a quo* was a Full Bench constituted in the High Court of South Africa, Gauteng Division, Pretoria. It consisted of Justice Davis J, Justice Mnyovu AJ and Justice Kok AJ.

1.6 The matter is of significant public importance and interest as it impacts all foreign nationals traveling on South African roads and for this reason alone, it calls out for adjudication by the higher Court.

1.7 Additionally, the Applicant contends that the appeal has a reasonable prospect of success.

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THE PARTIES

2.

The Applicant is the **ROAD ACCIDENT FUND** ("the "Fund"), a juristic person established in terms of Section 2(1) of the Road Accident Fund Act, 56 of 1996 as amended (the "RAF Act"), with its principal place of business at 2 Eco Glades Office Park, 420 Witch Hazel Avenue, Centurion, Pretoria.

3.

3.1. The First Respondent is **ADAM MUDAWO**, an adult male Zimbabwean citizen born 6 July 1998, residing at Mamelodi West. The First Respondent was the First Applicant in the Court *a quo*.

3.2. The Second Respondent is **WENILE SIMON NDLOVU**, an adult male born on 21 January 1984, a Zimbabwean citizen, residing at 8325 Crystal Street, Extension, Nellmapius. The Second Respondent was the Third Applicant in the Court *a quo*.

3.3. The Third Respondent is **BRUCE MTHOKOZISI SIBANDA**, an adult male born on the 25th of May 1986, a Zimbabwean citizen with passport number AE323751, residing at 79 Main & Andrews, Rosettenville, Gauteng.

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3.4. The Fourth Respondent is **OYETUNDE ONENIYI AREO**, an adult male born on 4 July 1984 (Nigerian Passport number A06686960) residing at No. 290 Johan Heyns Drive, Gezina, Pretoria, Gauteng. The Fourth Respondent was the Fourth Applicant in the Court *a quo*.

3.5. The **MINISTER OF TRANSPORT** was the First Respondent in the Court *a quo*. The Minister elected to not enter the fray.

ANNEXURES THAT ARE REQUIRED IN TERMS OF SCA RULE 6(2)

4.

4.1 A copy of the order of the Court *a quo* being appealed against and dated the 26th of March 2024, is annexed hereto and marked as Annexure **"M1"**.

4.2 A copy of the judgment of the Court *a quo* dated the 26th of March 2024, is annexed hereto and marked as Annexure **"M2"**.

4.3 The Applicant timeously applied to the Court *a quo* for leave to appeal the judgment and order. Leave to appeal was refused by the Court *a quo*. A copy of the order refusing leave to appeal, dated 9 July 2024, is annexed hereto and marked as Annexure **"M3"**. I also attach the judgment in the leave to appeal as **"M4"**.

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5.

QUESTION(S) AND ISSUE(S) RAISED BY THE PROPOSED APPEAL

5.1 The Applicant contends that the dispute between the parties raises the following questions/issues:

5.1.1. Whether the RAF Act caters for and entitles illegal foreigners to the same benefits to which lawful citizens and permanent residents are entitled?

5.1.2. Whether the management directive and the RAF1 Form violate the rights promised in sections 10, 12, 27, 33 and 34 of the Constitution as far as illegal foreigners are concerned?

5.1.3. The interpretation of the application of Section 4(1)(a) of the RAF Act and the Fund's powers in terms thereof.

5.1.4. The interpretation of Section 17(1) of the RAF Act and specifically the contextual interpretation of the phrase "*any person*".

5.1.5. The interpretation of the RAF Act read together with the Immigration Act 13 of 2002 (the "Immigration Act").

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5.2 The Applicant specifically contends that on a proper interpretation of section 17 of the RAF Act, considering its purpose, the Immigration Act and section 27 of the Constitution, the phrase "*any person*" excludes illegal foreigners whose presence in the Republic constitutes a criminal offence.

5.3 Whilst it is acknowledged that the Supreme Court of Appeal has held that the RAF Act must be interpreted as extensively as possible in favour of claimants, it is contended that there is room to justify an interpretation which results in *illegal* foreigners not benefiting from the RAF Act when the Immigration Act says that they must not be in the Republic.

THE CONSTITUTION

6.

6.1. The preamble to the Constitution recognises "*the injustices of our past*" and was adopted, amongst others, to lay the foundations for a democratic and open society in which "*every citizen is equally protected by law.*" The choice of the phrase "*every citizen*" herein is not an error. It is what the Constitution deliberately intended to say.

6.2 The preamble to the Constitution further records that it was adopted to improve "the quality of life of all citizens." Once again, the choice of the phrase "all citizens" is deliberate and was intended.

6.3 An analysis of the preamble to the Constitution makes it clear that the citizens of the Republic come first and not second. Any law or conduct which puts the citizens of the Republic first cannot for this reason alone be characterised as xenophobic simply because it requires non-citizens, in particular, illegal foreigners, to do more than citizens in order to benefit from the Constitution. The Constitution clearly puts the citizens first and there is nothing xenophobic about requiring non-citizens, in particular, illegal foreigners to do more to prove their entitlement to the benefits provided under the Constitution or any national legislation.

6.4 When section 7 of the Constitution says that the Bill of Rights "enshrines the rights of all people in our country", it is referring to people who are lawfully "in our country" except where a law of general application specifically vests certain defined rights to foreigners who the law requires them to be treated differently and given a certain defined status. The Respondents herein are not such persons and the management directive and the RAF1 Form were not intended to take away any rights which illegal foreigners have in terms of any national or international law recognised by the Constitution.

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6.5 Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The word "*everyone*" refers to every citizen and persons lawfully in the Republic. It would not make any legal sense to have laws which prohibit the unlawful entry into the Republic but at the same time reward people who skip the country's borders and then give them all the benefits provided for by the Constitution and other national legislation. It would defeat the whole purpose of the prohibition against unlawful entry into the Republic and would make a mockery of the provisions of the Immigration Act intended to prevent unlawful entry into the Republic.

6.6 Section 9(3) of the Constitution prohibits unfair discrimination "*against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*" The management directive and the RAF1 Form do not discriminate against any person on any of the prohibited grounds. These two instruments only require foreign claimants to produce proof that they were lawfully in the Republic when their claims arose. This is clearly intended to ensure that illegal foreigners do not benefit from the social benefit scheme administered by the Fund, which was designed, and it is implemented for the benefit of South African citizens, permanent residents and those who are lawfully in the Republic.

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6.7 The management directive and the RAF1 Form do not in any way violate the rights promised in sections 10, 12, 27, 33 and 34 of the Constitution as far as illegal foreigners are concerned. In the first place, illegal foreigners must first establish that they are the holders and beneficiaries of such rights before any question of contravention of those rights in relation to them can even arise.

6.8 The Respondents cannot be heard to seek to enforce rights which cannot possibly be available to people who are illegal foreigners in the Republic, who, on the face of it, should not be in the Republic in the first place and their presence in the Republic constitutes a criminal offence.

6.9 On the Respondents' reading of the law, an illegal foreigner only needs to skip South African borders to become vested with the rights and benefits promised in the Constitution and, in this case, in the RAF Act and need not even be asked to prove that their presence in the Republic is lawful. This is wrong.

6.10 It is not xenophobic for the Fund and the Minister to prescribe requirements that are consistent with the rule of law, which requires people to obey the law and to face the consequences of disobedience. The refusal of RAF Act benefits to illegal foreigners must be and it is a lawful consequence for skipping the country's borders and disobeying the laws relating to entry into the Republic. Such unlawful conduct cannot be rewarded by being vested

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with all the rights promised in the Constitution and entitlement to the benefits of the social benefit scheme administered by the Fund.

THE RAF ACT

7.

7.1. The RAF Act established the Fund to, in terms of section 3 thereof, make payment of compensation for loss or damage wrongfully caused by the driving of motor vehicles in the Republic.

7.2. Section 4(1)(a) empowers the Fund to stipulate "the terms and conditions upon which claims for the compensation contemplated in section 3, shall be administered." The RAF Act applies to "the driving of motor vehicles" inside the Republic and the claimant under it must necessarily have been in the Republic lawfully in order to avoid people who are in violation of the laws benefitting from a social benefit scheme designed for the citizens of the Republic and those who are lawfully in the Republic, such as permanent residents.

7.3. Section 17(1) of the RAF Act provides that the Fund shall, under the circumstances prescribed thereunder, "be obliged to compensate any person" for any loss suffered as a result of any injury caused by or arising from the driving of a motor vehicle "at any place within the Republic."

7.4. The Fund's power, in terms of section 4(1)(a) of the RAF Act, to stipulate the terms and conditions upon which claims for compensation shall be administered is wide enough to entitle the Fund to issue the management directive on the terms on which it did. Those terms do not in any way discriminate against the applicants and any foreign national who is lawfully in the Republic.

7.5. In terms of section 26 of the RAF Act, the Minister may make regulations regarding any matter that shall or may be prescribed in terms of the RAF Act "*or which it is necessary or expedient to prescribe in order to achieve or promote the object of this Act.*" The applicants' suggestion that the Minister exceeded his powers is not supported by the empowering provision which is also wide enough to empower the Minister to prescribe the evidence which a claimant must submit in support of a claim failing which a claim shall then not be entertained.

7.6. There is nothing unconstitutional about prescribing that foreign claimants must submit proof that they were lawfully in the Republic when the claim arose. This is clearly to ensure that illegal foreigners do not benefit from the social benefit scheme administered by the Fund in circumstances where there is a prohibition against them being in the Republic. Otherwise, the prohibition is meaningless, and crime then pays.

THE IMMIGRATION ACT

8.

8.1 The admission of foreign nationals into the Republic of South Africa is regulated by, amongst others, the Immigration Act. The Immigration Act was promulgated to regulate the admission of persons to, their residence in, and their departure from the Republic of South Africa and for matters connected therewith.

8.2 In terms of Section 42 of the Immigration Act "***no person, shall aid, abet, assist, enable or in any manner help"*** **an illegal foreigner or "*a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable***".

8.3 Section 44 of the Immigration Act provides as follows:

> "*44. ORGANS OF STATE*
>
> *When possible, an Organ of State shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Director-General of any illegal foreigner, or any person whose status or citizenship could not be ascertained, provided that such requirement shall not prevent the rendering of services to*

which illegal foreigner and foreigners are entitled under the Constitution or any law."

8.4 Section 49 of the Immigration Act deals with offences. Sub-Section (4) provides that anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence and liable on conviction to a fine.

8.5 The Fund provides public services, and it is clearly prohibited from intentionally facilitating any illegal foreigner receiving public services to which such an illegal foreigner is not entitled.

COURT *A QUO'S JUDGMENT*

9.

9.1. The Court *a quo* interpreted the phrase "*any person*" to include illegal foreigners. As a result, a finding that the Fund and the Minister had acted *ultra vires* followed and the review succeeded in terms of Section 6(2)(a)(i) of PAJA.

9.2. It is contended that there is a reasonable prospect of a Court of appeal finding differently in respect of the interpretation and specifically that such interpretation is at odds with the Immigration Act.

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9.3. The Court *a quo* never dealt with the Constitutionality arguments relating to the exclusion of illegal foreigners as claimants against the RAF, it is with respect, a matter of public importance that the higher Courts pronounce thereon to establish legal certainty.

9.4. It is contended that if a purposive approach is taken in interpreting Section 17 of the RAF Act that the proper interpretation which gives due reference to the purposive approach and to the constitutional obligations being balanced is that "*any person*" does not include a person that has no lawful right to be in the Republic.

9.5. A reasonable legislator, in considering a social benefit scheme, cannot legislate or cater for a person who is not meant to be present in the country.

9.6. The Court *a quo* found that the Fund's conduct of previously interpreting the RAF Act as to include claims of illegal foreigners amounted to conduct that constitutes *subsecuta observatio* (subsequent observance of a provision in a certain way).

9.7. Essentially finding that the Fund is barred from changing its stance, even though such change is to correct an illegality and conflict with the Immigration Act.

9.8. This issue alone is a compelling reason to entertain the proposed appeal.

9.9. The Court *a quo* also criticised the Fund for having upheld claims of illegal foreigners in the past and not appealing such decisions. It is contended that such action flows directly from an incorrect previous interpretation.

9.10. The Court *a quo* described the Fund's argument of the conflict with the Immigration Act as "*a last-ditch attempt*". With respect, it is contended that the Fund raised the issue from the outset in the matter and stands by the argument and its purposive interpretation.

SECTION 17(1)(a)(ii) OF THE SUPERIOR COURTS ACT 10 OF 2013

10.

10.1. Section 17(1)(a) of the Superior Courts Act states as follows"

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

(ii) there is some other ***compelling reason*** *why the appeal should be heard, including conflicting judgments on the matter under consideration." (own emphasis).*

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10.2. The Fund deals with thousands of claims by illegal foreigners and has a constitutional duty towards all of South Africa's citizens to ensure that those claims are dealt with lawfully.

10.3. The issues raised and their consequences fall squarely within what is envisaged by the phrase "compelling reason". The matter warrants being pronounced on by the higher Court to establish legal certainty and prevent any incorrect application of the issues going forward.

10.4. It is contended that by using "**or**" in between Section 17(1)(a)(i) and Section 17(1)(a)(ii) it is indicative that a compelling reason is stand-alone requirement.

10.5. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect of future disputes.

10.6. The Courts have stated that merits of the appeal remain vitally important and will often be decisive. This principal stems from prior to the enactment of the Superior Courts Act and was adopted from the approach to the issue of mootness on appeal[1].

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[1] See *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* (864/2011) **[2012] ZASCA 166**; **2013 (3) SA 315** (SCA) para 5

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10.7. Accordingly, the Court has a discretion to entertain the proposed appeal and it is contended that it would be in the interests of justice to do so.

CONCLUSION

11.

11.1 The Court *a quo* should have held:

11.1.1. That on a proper interpretation of section 17 of the RAF Act, considering its purpose, the Immigration Act and section 27 of the Constitution, the phrase "*any person*" excludes illegal foreigners whose presence in the Republic constitutes a criminal offence.

11.1.2. That the actions of the Fund and the Minister were not *ultra vires*;

11.2 The Applicant will seek the following relief on appeal:-

11.2.1. That the judgment and order of Court *a quo* is set aside and replaced with the following:

"1. *That application is dismissed;*

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1. *The Applicants are ordered, jointly and severally, to pay the costs of the application with costs of two counsel."*

DEPONENT

THUS SWORN TO AND SIGNED BEFORE ME AT Sandton ON THIS, THE 22 DAY OF JULY 2024, THE DEPONENT HAVING ACKNOWLEDGED THAT HE UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, AND THAT THE CONTENTS THEREOF ARE TRUE, THAT HE HAS NO OBJECTION TO THE TAKING OF THE OATH AND THAT HE CONSIDERS THIS OATH TO BE BINDING ON HIS CONSCIENCE.

COMMISSIONER OF OATHS
FULL NAME:
CAPACITY:
ADDRESS:

ANDILE MPHALE
COMMISSIONER OF OATHS
4th FLOOR SOUTH TOWER LOBBY
140 WEST STREET, SANDTON
JOHANNESBURG, 2196
TEL: 011 492 1341

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ANNEXURE "M1"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 22/011795

PRETORIA 26 MARCH 2024

BEFORE THE HONOURABLE MR JUSTICE DAVIS
BEFORE THE HONOURABLE MR JUSTICE MNYOVU, AJ
AND BEFORE THE HONOURABLE MR JUSTICE KOK, AJ

In the matter between:

ADAM MUDAWO	1ST APPLICANT
WENILE SIMON NDLOVU	2ND APPLICANT
BRUCE MTHOKOZI SIBANDA	3RD APPLICANT
OYETUNDE ONENIYI AREO	4TH APPLICANT

And

MINISTER OF TRANSPORT	1ST RESPONDENT
THE ROAD ACCIDENT FUND	2ND RESPONDENT

HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

JUDGMENT

2024-07-17

1. The provisions of the substituted RAF1 claim form prescribed by Government Notice R2235 published in Government Gazette 46661 dated 4 July 2022 issued by the Minister of Transport (first respondent) in terms of section 26 of the Road Accident Fund Act, 56 of 1996, is reviewed and set aside to the extent that both part 6.1 (substantial compliance injury claims) and part 12.1 (substantial compliance death claims) thereof require that, if a claimant is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident.

2. The provisions of the RAF Management Directive dated 21 June 2022 titled Critical Validations to Confirm the Identity of South African Citizens and Claims Lodged by Foreigners, is reviewed and set aside to the extent that:

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2.1. In respect of foreign claimants, it requires that proof of identity must be accompanied by documentary proof that the claimant was legally in South African at the time of the accident;

2.2. In respect of foreign claimants, they are required to provide copies of their passports with an entry stamp and where they have left South Africa, the passport must have an exit stamp and should the foreign claimant still be in the country, that proof of an approved visa must be submitted before the RAF is prepared to register such claimants' claims;

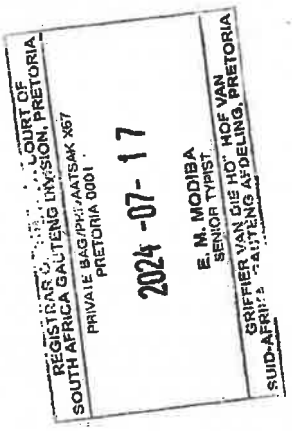
2.3. It is required that copies of the passports of foreign claimants may only be certified by the South African Police Service.

3. The first and second respondents are jointly and severally ordered to pay the applicants'osts of the application, including the costs of two counsel and senior counsel, where utilized, the one paying the other to be absolved.

BY THE COURT

REGISTRAR
AJ

Attorney:


REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2024 -07- 17
E. M. MODIBA
SENIOR TYPIST
GRIFFIER VAN DIE HOË HOF VAN
SUID-AFRIKA GAUTENG AFDELING, PRETORIA

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ANNEXURE "M2"

HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 011795/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE: 26 MARCH 2024

SIGNATURE

In the matter between:

ADAM MUDAWO	First Applicant
WENILE SIMON NDLOVU	Second Applicant
BRUCE MTHOKOZI SIBANDA	Third Applicant
OYETUNDE ONENIYI AREO	Fourth Applicant

and

MINISTER OF TRANSPORT	First Respondent
THE ROAD ACCIDENT FUND	Second Respondent

Summary: *Administrative action – policy decision by a Minister effectively resulting in an amendment of as Statutory provision – beyond the powers of a Minister to do so – the use of the words "any person" in section 17 of the Road Accident Fund Act 56 of 1996 (the Act) does not exclude illegal foreigners – neither the publication of an amended RAF 1 form nor the circulation of a Management Directive by the Road Accident Fund may preclude illegal foreigners from claiming compensation under the Act nor prevent such persons from lodging claims.*

ORDER

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1. The provisions of the substituted RAF1 claim form prescribed by Government Notice R2235 published in Government Gazette 46661 dated 4 July 2022 issued by the Minister of Transport (first respondent) in terms of section 26 of the Road Accident Fund Act, 56 of 1996, is reviewed and set aside to the extent that both part 6.1 (substantial compliance injury claims) and part 12.1 (substantial compliance death claims) thereof require that, if a claimant is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident.

2. The provisions of the RAF Management Directive dated 21 June 2022 titled Critical Validations to Confirm the Identity of South African Citizens and Claims Lodged by Foreigners, is reviewed and set aside to the extent that:

2.1 In respect of foreign claimants, it requires that proof of identity must be accompanied by documentary proof that the claimant was legally in South African at the time of the accident;

2.2 In respect of foreign claimants, they are required to provide copies of their passports with an entry stamp and where they have left South Africa, the passport must have an exit stamp and should the foreign claimant still be in the country, that proof of an approved visa must be submitted before the RAF is prepared to register such claimants' claims;

2.3 It is required that copies of the passports of foreign claimants may only be certified by the South African Police Service.

3. The first and second respondents are jointly and severally ordered to pay the applicants' costs of the application, including the costs of two counsel and senior counsel, where utilized, the one paying the other to be absolved.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J (Mnyovu AJ and Kok AJ concurring)

Introduction

[1] The Road Traffic Management Corporation has reported in public documents[1] that, during the year in which this application had been launched 12 436 people have died in road traffic accidents in South Africa. In addition to this tragic statistic, many more thousands of people are annually injured in road traffic accidents on South African roads. These accidents don't discriminate in respect of the victims thereof between race, gender, age, income or, importantly for this matter, between illegal foreigners and citizens or persons legally in the country.

[2] The Road Accident Fund (the RAF) has an obligation in terms of section 17(1) of the Road Accident Fund Act[2] to *"... compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic ...".*

[3] Until recently "any person" was treated and interpreted by the RAF to include illegal foreigners injured or killed in road accidents which took place in South Africa.

[4] The CEO of the RAF, Mr Collins Letsoalo, contended in papers before us that the Minister of Transport (who is cited as the first respondent in this matter, hereafter "the Minister") has in July 2022 taken a policy decision to exclude illegal foreigners from the benefit of claiming damages against the RAF. The Minister sought to achieve this by publishing a new RAF 1 form[3] inter alia dealing with new requirements of nationality and legal entry into South Africa.

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[1] aa.co.za/road-fatality-numbers-are-a continuing-national-crisis/ and https://www.rtmc.co.za>trafficreports
[2] 56 of 1996 (the Act).
[3] Published by way of R 2255 in Government Gazette 46661 of 4 July 2022.

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[5] The publication followed a Management Directive of the RAF dated 21 June 2022 dealing with "*Critical Validations to Confirm the Identity of South African Citizens and Claims Lodged by Foreigners*".

[6] Both the new RAF 1 form (and the strict requirement of full compliance therewith) and the Management Directive have been described by the CEO to be Constitutionally valid on the following basis: "*The management directive and the RAF 1 form do not discriminate against any person on any of the prohibited grounds. These two instruments only require foreign claimants to produce proof that they were lawfully in the Republic when their claims arose. This is clearly intended to ensure that illegal foreigners do not benefit from the social benefit scheme administered by the Fund which was designed and is implemented for the benefit of South African citizens, permanent residents and those who are lawfully in the Republic*".[4]

[7] The applicants seek to have the requirements of the published new RAF 1 form (pertaining to foreigners) and the management directive reviewed and set aside on the basis that the new requirements are unconstitutional and *ultra vires*.

[8] Whilst the general validity and legality of the Minister's publication form the subject matter of an independent review under case no 046038/2022, which was heard by another full court of this Division on 26 – 28 February 2024 (that is a week prior to the hearing of this matter), the current matter is limited to the issue of claims by illegal foreigners.

The parties

[9] The first applicant is a foreign national who had been issued an asylum seeker permit in terms of section 22 of the Refugees Act, 130 of 1998 on 20

[4] Second respondents Heads of Argument par 3.9 and par 2.12 of the CEO's answering affidavit.

August 2020. This entitled him to work and study in the Republic. He was involved in a motor vehicle accident on 26 January 2022 when an oncoming overtaking vehicle collided head-on with the scooter he was driving. The first applicant sustained severe injuries, including multiple facial fractures, a left orbital fracture, a mandible fracture, a de-gloving injury to his nose and a skull base fracture. His asylum seeker permit had lapsed on 20 February 2021 and because he now has no valid passport, stamped to affirm his entry into South Africa nor a valid asylum seeker permit, he cannot satisfy the requirements of the new RAF 1 form nor would the RAF entertain any claim by him in terms of the Act.

[10] The second applicant sustained injuries whilst being run over by a motor vehicle on 23 November 2021. Pursuant to this, the second applicant had lodged a claim with the RAF on 15 June 2022 (that is before the date of the Management Directive and the Minister's publication of the new RAF 1 form). Although the RAF had assigned a reference number to the second applicant's claim (No 19891223 PEF), it now refuses to register his claim due to the fact that he is a foreign national without a passport stamped with his entry into South Africa.

[11] The third applicant was also a pedestrian who was injured in a motor vehicle accident, this time on 8 September 2021. The incident had been reported to the Moffatview SAPS, pursuant to which a claim had been lodged with the RAF on 30 August 2023. Despite his claim having been assigned a reference number (083 02023 495000 RT), the RAF refuses to register his claim. The reasons for this was that applicant is a foreign national in possession of a valid passport but with no stamped proof of entry into South Africa or a valid visa.

[12] The position of the fourth applicant is slightly different from the other applicants in that, although he is similarly a foreign national who had sustained injuries in a motor vehicle accident in the Republic (on 15 March 2020), he had

already obtained judgment in case no 9130/21 in this Division against the RAF for payment of compensation for the injuries sustained and loss of earnings suffered by him. The date of the judgment is 24 July 2023 and the amount of it is R2 612 934.40. No rescission application is pending against this judgment but the RAF has to date failed or refused to pay it. The fourth applicant claims that the reason for this refusal is the fact that although his matter pre-dates the management directive and the Minister's publication, payment is held back because he is a foreign national with only a passport (and no visa). The RAF has not denied this accusation nor has it furnished Adv Tsatsawane SC, who appeared for the RAF in this matter, with any other reasons for its refusal to satisfy the court order in question.

[13] The second, third and fourth applicants were all granted leave to intervene in this matter by various judges prior to the matter being enrolled before this full court.

[14] The first respondent is the Minister. He has withdrawn his initial notice of intention to oppose and has since delivered a notice to abide. The Minister has also declined to deliver an affidavit, nor has he furnished reasons for the policy decision ascribed to him and neither did the record filed in terms of Rule 53 contain any details of such policy decision. The only indication of administrative action by the Minister is contained as follows in the publication of 4 July 2022 itself: "*The Minister of Transport, in terms of section 26 of the Road Accident Fund Act 1996 (Act No 56 of 1996) herewith prescribed the RAF Form 1 (sic) in the Schedule. (Signed) Mr F A Mbalula. Minister of Transport 30/06/2022*".

The new RAF 1 form

[15] The "important information" prescribed as an introduction to the RAF 1 form inter alia warns claimants that "*your attention is drawn to the provisions of*

section 24(4)(a) that any form that is not completed in its full particulars shall not be acceptable as a claim under the Act". Claimants are then warned of the consequences of this as follows: "*Consequently, your submitted form would not interrupt prescription as provided for in section 23 of the Act*".

[16] The portions of the form objected to by the applicants are the requirements that a foreign national must provide proof by way of annexures in the form of a passport with stamped entry stamps and a visa, indicating that the foreigner was legally in South Africa at the time of the accident.

The Management Directive

[17] The Management Directive targeted in this application is that of the RAF dated 21 June 2022. It was issued by the RAF's Acting Chief Operations Officer.

[18] The heading of the Management Directive reads "*Critical Validations to Confirm the Identity of South African Citizen and Claims Lodged by Foreigners*". After dealing with the procedures regarding claims by South African citizens, the Management Directive prescribes the following regarding claimants who are foreign nationals: "*In instances where the claimant or injured is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South African at the time of the accident. A copy of the foreign claimant's passport showing the entry stamp and/or exit stamp must be submitted. Where the passport does not have any stamp, the RAF will not be lodging such a claim. Where the passport does not have an exit stamp, proof that the claimant is still in the country must be produced. In this instance the passport copy indicating approved Visa must be submitted. Copies of the passport must be certified by the SAPS*".

[19] Apart from the evidentiary requirements stipulated by the Management Directive and the new RAF 1 form, some of which may, even for legitimate

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reasons, be difficult or impossible to comply with, the outcome sought to be achieved, has expressly been stated by the RAF's CEO, was to exclude illegal foreigners from claiming compensation in terms of the Act for injuries sustained and damages suffered, of whatever nature, due to accidents which had occurred inside South Africa.

The applicants' respective cases

[20] The first and second applicants' grounds of attack and claims for the reviewing and setting aside of the Minister's decision and the publication of the new RAF 1 form as well as the Management Directive were that these decisions offend various Constitutional rights which the applicants claim even illegal foreigners are entitled to. The rights claimed vary from rights to equality, dignity, health care and social security, just administrative action and access to courts.

[21] The assertion of these Constitutional rights were hotly contested and debated, not only in the papers but also in argument before the court, but the direct and more frontal attack was based on the *ultra vires* principle[5]. This has been put as follows in the founding affidavit: "*Neither the [RAF] nor the [Minister] has the authority to make laws and regulations which offend the main Act and exclude persons otherwise entitled to claim from its ambit. This is trite law and principles encapsulated in the doctrine of legality and the Rule of Law*". Later on in the founding affidavit the conduct of the Minister and the RAF respectively are described as constituting "*a remarkable change in the law ... not envisaged by the Act*".

[22] The third applicant made common cause with the first two applicants, but was more concerned about the impossibility to comply with certain of the

[5] The principle that a functionary cannot exercise more power that afforded to him or her by the enabling statute. To do so, would be to act beyond the scope of one's powers.

prescripts. So, for example, would a person with a valid asylum seekers permit (entitling such a person to remain in South Africa pending determination of his or her status) but not being in possession of a passport, be excluded from submitting a claim. The way in which the form has been designed and the manner in which the wording of the Management Directive has been couched, would therefore in some instances even exclude persons who are legally in the country. Examples of other permutations of travel documentation have also been cited.

[23] The fourth applicant's case was that, despite being armed with a court order, payment of that order is being withheld or refused simply because he is an illegal foreigner, even though the new RAF 1 form and the Management Directive were not even in force when his claim had been lodged.

The *ultra vires* review

[24] Section 6(2)(a)(i) of PAJA has statutorily concretised the basis of judicial review under this rubric as follows: "*A court ... has the power to judicially review an administrative action if ... the administrator who took it ... was not authorised to do so by the empowering provision ...*".

[25] The exercise of administrative action, including the exercise of public power must "*happen within the bounds set by the legal framework ...*"[6], in this case, the Act.

[26] The *ultra vires* doctrine "*...demands, of every exercise of public power, a consistent compliance with the bounds set for the exercise of that power as provided for by the applicable law and the Constitution*".[7]

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[6] *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) at par [40] (*Afribusiness*).
[7] *Afribusiness* (above) at par [39].

[27] In *Fedsure*[8], the Constitutional Court put it as follows: "*It seems central to the concept of our Constitutional order that the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*".

[28] The respondents accepted that their conduct was based on a (new) interpretation of the Act (without any amendment thereto). In addition the RAF's CEO claimed that this interpretation was enforceable due to it constituting "a policy decision" by the Minister. If their interpretation is therefore incorrect, the decisions could not have been taken because to allow them to stand, would in effect amount to an amendment of the Act or a limitation thereof, something neither the Minister nor the CEO was empowered to do. That power resides in the Legislature.

[29] The interpretation of a provision of a statute (in this case section 17(1) of the Act, referred to in paragraph [2] above) comprises of "... *a unitary endeavour requiring the consideration of text, context and purpose*".[9]

[30] The Constitutional Court has determined that the principles of statutory interpretation start with the words used in the text, but that these are three interrelated "riders" to "giving" the words used their ordinary grammatical meaning namely:

> "*(a) that statutory provisions should always be interpreted purposively;*

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[8] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at par [58].

[9] *Betterbridge (Pty) Ltd v Masilo & Others* NNO 2015 (2) SA 396 (GNP) at par [8], referring to *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

(b) the relevant statutory provisions must be properly contextualized; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)".

[31] Starting with the text, the ordinary meaning of the words "any person" in the context of the one of the Acts predecessors[10] has been determined as being a phrase with an "obviously wide meaning".[11] The wide meaning is clearly denoted by the grammatical interpretation of the word "any".

[32] Turning to context and purpose, the "primary concern" of the Act, has recently been found by the Supreme Court of Appeal *"... to give the greatest possible protection to persons who have suffered loss through negligence or through unlawful acts on the part of the driver of a motor vehicle. For this reason the provisions of the Act must be interpreted as extensively as possible in favour of third parties to afford them the widest possible protection".*[12]

[33] Although the Act has been described as social legislation, that does not equate to damages claims being "social benefits" in the same manner as say, social grants or unemployment benefits are. Social benefits are those the Government dispenses at its discretion while the social legislative intention of the Act is to protect drivers from delictual claims they could not otherwise satisfy

[10] The Compulsory Motor Vehicle Insurance Act 56 of 1972.
[11] *Stegen & Others v Shield Insurance Co Ltd* 1976 (2) SA 175 (N) at 177B - C
[12] *Road Accident Fund v Busuku* 2023 (4) SA 507 (SCA) at par [6] (*Busuku*).

and to ensure that those who have suffered delictual damages are not, through the impecunity of the wrongdoer, made to suffer as a consequence.[13]

[34] Similarly, where the Supreme Court of Appeal in *Busuku* referred to the exclusion of certain claims as being "illegal", it referred to fraudulent claims, that is where claims are instituted where there have been no accidents or actual injuries. It did not disqualify illegal foreigners from otherwise valid claims.

[35] I am of the respectful view that this court is bound by the Supreme Court of Appeal's interpretation of the wide application of the Act, which should inform the interpretation of the words "any person" insofar as it relates to illegal foreigners.

[36] Moreover, that wide interpretation of the purpose of the Act, has been confirmed by the Constitutional Court in *Coughlan NO v RAF.*[14]

[37] So, if the text of the Act (using the words "any person") and the purpose of the Act (to provide the widest possible protection to victims of vehicle accidents) are wide enough to include any claimant, whether he is legally in South Africa or not, is there any other context which would lead to a narrower interpretation?

[38] The RAF relied on *Chola v Road Accident Fund*,[15] a judgment of the Johannesburg Court of this Division, in support of its argument that the Minister and the RAF were entitled to interpret the Act as excluding illegal foreigners from claiming against the RAF and that they were therefore entitled to take the

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[13] See for example *Monyamane, Social Security* "benefits" and the collateral source rule, De Jure Pretoria Vol 49 2016 in which article the difference between damages and social benefits (such as child care grants and foster care grants) feature.

[14] 2015 (4) SA 1 (CC) at par [59] with reference also to *Mvumvu & Others v Minister of Transport and Another* 2011 (2) SA 473 (CC) and *Engelbrecht v RAF* 2007 (6) SA 96 (CC).

[15] 4182/2019 (Gauteng Local Division, Johannesburg) 9 May 2023.

administrative actions which they did. In that matter Baqwa J found as follows: "*It is true and it is trite that the Road Accident Fund will be liable to compensate any person who is a victim of a motor vehicle accident within the Republic of South Africa in terms of the ... Act, but I must state at the very beginning of this brief judgment that I accept as submitted by Ms Aamir Singh for the defendant, that "any person" does not include an illegal foreigner .... The requirement to prove legality of entry into the Republic of South Africa is provided for in terms of Regulation 7(1) of the Road Accident Fund Regulations 2008, and in that sense, it is a requirement which has been factored into the so-called RAF 1 in terms of the Act and it came into effect on 1 June 2022. Its provisions cannot therefore be ignored by this court .... Counsel for the defendant submits, as a matter of law, ... the plaintiff is duty bound to prove that he entered the country legally and that "any person" in the Act does not include an illegal foreigner. I am inclined, as already alluded to, to accept the correctness of that submission*".

[39] I have quoted the relevant parts of my learned brother's judgment rather extensively to illustrate how he got to his conclusion. It matters not that Baqwa J's judgment was in respect of a prior RAF 1 form devised by the RAF and which has since been set aside as having been published *ultra vires*, as the power to promulgate regulations resides with the Minister,[16] the current RAF 1 form is in pari materia with the RAF's previous attempts at amending the form, the only difference is that the amendments have this time round been published by the Minister.

[40] It is clear however, that Baqwa J merely accepted the arguments of the RAF and based his judgment on the RAF 1 requirements. This is so because there was not before him, as before us, a direct attack on the decision to exclude illegal foreigners *in toto* from the operation of the Act. Baqwa J was faced with an

[16] *Mautla & Others v RAF* (29459/2021) [2023] ZAGPPHC 1843 (6November 2023) (*Mautla*)

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application for postponement, which he granted. The comments by Baqwa J are therefore obiter in relation to the issues we have to decide and even if those comments were not obiter, we respectfully find that they were clearly wrong.

[41] The fact that the issues relating to claims by illegal foreigners would still have to be decided separately from the issue of a postponement which served before Baqwa J, was dearly foreseen by him as is apparent from the following passage of his judgment: " *I have given serious consideration to the possibility of ordering a separation of issues and making an order in terms of section 17(4), for the issuing of a certificate by the defendant and an order for general damages separate from the loss of earnings but as defendant's counsel submits, the Mudawo case [the present application] is about "capacity to claim by a plaintiff". The fact of the matter therefore is, it is either he has that capacity or alternatively he does not have. This, to use a colloquial phrase, is the postponement granted the million dollar question which has to be answered by the ape court*". It was for that reason that Baqwa J granted a postponement of the matter before him. For the RAF to rely on the judgment of Baqwa J as being determinative of the issues is therefore incorrect.

[42] There are two further indications that the law has not changed and that the Act has always been interpreted to include claims of illegal foreigners. The first such indication is that the RAF itself has, since the promulgation of the Act interpreted the Act as being inclusive of such claimants and it has over the course of more than 25 years paid out such claims without demur[17]. The second is that our courts have also upheld claims of illegal foreigners against the RAF without the RAF appealing or applying for rescission of such orders[18], despite even

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[17] This conduct constitutes *subsecuta observatio* (subsequent observance of a provision in a certain way) which has traditionally been regarded as of assistance in interpreting legislation: L. C. Steyn, Die Uitleg van Wette, 5th Ed at par 157.

[18] *Rumbidza v RAF* (83879/2014) [2015] ZAGPPHC 1071 (2 September 2015) and *Lesoana v RAF* (1135/2011) [2013] ZAFSHC 39 (7 March 2013).

having been represented. Admittedly in these cases the issues mostly related to the absence of work permits and the arguments centered around the validity of a claim for a loss of an illegal income, but that factual circumstance came about as a result of the claimants' status as illegal foreigners.

[43] In *RAF v Sheriff of the High Court, Pretoria and Macamo*[19], a matter which only came before court some four months ago, the facts were as follows: the plaintiff (*Macamo*) was a foreign national who had instituted action in 2019 against the RAF for damages suffered pursuant to a motor vehicle accident which had occurred in the Republic. Due to litigation delinquency on the part of the RAF, its defence had been struck out on 4 October 2021. On 21 July 2022 the RAF made an offer to *Macamo* which was accepted by him. On 26 August 2022 the parties to that action submitted joint submissions on the settlement offer and the acceptance thereof, in accordance with this Division's Practice Directives. On 18 April 2023 the accepted settlement offer was made an order of court. Due to non-payment of the order, it was included in a list of unfulfilled execution orders which has led to a proposed sale in execution on 7 November 2023. The RAF applied to have the sale stayed, claiming that the order had erroneously been granted. The RAF claimed that since there had not been compliance with the Management Directive of 21 June 2022, no offer of settlement should have been made alternatively, insofar as it had been made, it had been done without authority. Twala J referred to the issue of the RAF's attempted exclusion of illegal foreigners with reliance on Section 4(1)(a) of the Act appearing to be in breach of the Constitution's equality provisions but in the end found that the Management Directive did not have such retrospective effect that it invalidated the authority to settle. The application for a stay was refused. Although both

[19] (011̈4226/2023) [2023] ZAGPJHC 1336 (20 November 2023).

parties relied on different parts of this judgment, it was not conclusive of the issue to be determined in this matter.

[44] The reference to Section 4(1)(a) of the Act briefly needs attention. This is the section which empowers the RAF to issue directives dealing with the internal administration of the RAF and the manner in which claims "shall be administered". These directives do no acquire the force of law and cannot impermissibly conflict with the provisions of the Act.[20]

[45] In a last-ditch attempt, the RAF argued that, in allowing illegal foreigners to claim from the RAF in terms of the Act, would offend against the provisions prohibiting the "aiding and abetting" of illegal foreigners.[21] In my view the entertainment of the enforcement of a delictual claim provided for in the Act cannot be interpreted as "aiding" or "abetting" an illegal foreigner to contravene either the Immigration Act or the Refugees Act.[22] The RAF is obliged to compensate victims of motor vehicle accidents as provided for in section 17 of the Act and the discharge of such obligations cannot be interpreted to constitute "aiding" and "abetting". The proposition that it would do so, needs only to be stated to illustrate its absurdity.

Summation and conclusion

[46] We find nothing in the text of the Act, the context of the RAF scheme as a whole and the purpose of the Act which leads us to conclude that the words "any person" in section 17 of the Act should be restrictively interpreted so as to exclude illegal foreigners.

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[20] *Mautla* (above) at paras [47], [57] and [69].
[21] Section 42(1)(a)(ix) of the Immigration Act, 13 of 2002 (the Immigration Act).
[22] 130 of 1998.

[47] We find that the administrative actions of the RAF in prescribing the Management Directive of 21 June 2022 and that of the Minister in publishing the new RAF 1 form on 4 July 2022, insofar as those actions, in the way they have been formulated and are to be enforced to exclude claims by illegal foreigners, offend against the provisions of section 17 of the Act.

[48] Neither the Minister, nor the RAF, are in law permitted, either by way of a "policy decision" or by way of a novel interpretation of the Act, to amend or limit the ambit of the Act. To do so would be beyond their powers.

[49] The impugned decisions therefore fall foul of section 6(2)(a)(i) of PAJA and they are to be reviewed and set aside to the extent necessary.

[50] Having reached the above conclusions, we find it unnecessary to deal with the Constitutionality arguments relating to the attempted exclusion of illegal foreigners as claimants against the RAF.

Costs

[51] We find no cogent reasons to depart from the customary rule that costs should follow the event. Having regard to the complexity of the matter and the public interests involved, we are of the view that the employment of multiple and senior counsel was justified. Having regard to the absence of an explanation as to why the fourth applicant has not been paid and the failure to deal with his accusations that non-payment was an *ex-post facto* attempt at making the exclusion of illegal foreigners also applicable to him, despite an order of this court, we find, in the exercise of our discretion, that he should not be excluded from the order for costs.

Order

The following orders are made:

A.M

1. The provisions of the substituted RAF1 claim form prescribed by Government Notice R2235 published in Government Gazette 46661 dated 4 July 2022 issued by the Minister of Transport (first respondent) in terms of section 26 of the Road Accident Fund Act, 56 of 1996, is reviewed and set aside to the extent that both part 6.1 (substantial compliance injury claims) and part 12.1 (substantial compliance death claims) thereof require that, if a claimant is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident.

2. The provisions of the RAF Management Directive dated 21 June 2022 titled Critical Validations to Confirm the Identity of South African Citizens and Claims Lodged by Foreigners, is reviewed and set aside to the extent that:

    2.1 In respect of foreign claimants, it requires that proof of identity must be accompanied by documentary proof that the claimant was legally in South African at the time of the accident;

    2.2 In respect of foreign claimants, they are required to provide copies of their passports with an entry stamp and where they have left South Africa, the passport must have an exit stamp and should the foreign claimant still be in the country, that proof of an approved visa must be submitted before the RAF is prepared to register such claimants' claims;

    2.3 It is required that copies of the passports of foreign claimants may only be certified by the South African Police Service.

3. The first and second respondents are jointly and severally ordered to pay the applicants' costs of the application, including the costs of two counsel and senior counsel, where utilized, the one paying the other to be absolved.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree

B F MNYOVU
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree

A KOK
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 5 March 2024

Judgment delivered: 26 March 2024

A.M

APPEARANCES:

For the First Applicant:	Adv B P Geach SC together with Adv R Hawman
Attorney for the First Applicant:	Roets & van Rensburg Inc., Pretoria
For the Second Applicant:	Adv F H H Kehrhahn together with Adv S Cliff
Attorney for the Second Applicant:	Mduzulwana Attorneys Inc., Pretoria
For the Third Applicant:	Adv M Snyman SC together with Adv F H H Kehrhahn
Attorney for the Third Applicant:	KWP Attorneys, Randburg
For the Fourth Applicant:	Adv P van der Schyf
Attorney for the Fourth Applicant:	Slabbert & Slabbert Attorneys, Pretoria
For the First Respondent:	No appearances.
For the Second Respondent:	Adv K Tsatsawane SC together with Adv C Rip
Attorney for the Second Respondent:	Malatji & Co Attorneys, Sandton c/o Ditsela Inc., Pretoria

ANNEXURE "M3"

JUDGES APPEAL
RULE 49(6)

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 011795/2022

PRETORIA 9 JULY 2024

BEFORE THE HONOURABLE MR JUSTICE DAVIS
BEFORE THE HONOURABLE JUSTICE MNYOVU, AJ
BEFORE THE HONOURABLE JUSTICE KOK, AJ

In the matter between:

THE ROAD ACCIDENT FUND		APPLICANT
AND		
ADAM MUDAWO	1ST	RESPONDENT
WNILE SIMON NDLOVU	2ND	RESPONDENT
BRUCE MTHOKOZI SIBANDA	3RD	RESPONDENT
OYETUNDE ONENIYI AREO	4TH	RESPONDENT

HAVING HEARD counsel for the parties and having read the record of appeal against the judgment of the Honourable Mr Justice **DAVIS** delivered on **26 MARCH 2024**.

IT IS ORDERED THAT

JUDGMENT

The application for leave to appeal is refused with costs, such costs to include the costs of two counsel, where so employed.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
Private Bag X67, Pretoria 0001
2024 -07- 17
GD-PRET-017
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA

BY THE COURT

REGISTRAR

ATT: MALATJI & CO
C/O DITSELA INC

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ANNEXURE "M4"

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 011795/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 9 JULY 2024

SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND	Applicant
and	
ADAM MUDAWO	First Respondent
WENILE SIMON NDLOVU	Second Respondent
BRUCE MTHOKOZI SIBANDA	Third Respondent
OYETUNDE ONENIYI AREO	Fourth Respondent

Summary: *Leave to appeal – no reasonable prospects of success and no "other compelling reason" – leave to appeal against an order whereby the*

A-M

Minister of Transport and the Road Accident Fund unilaterally sought to exclude illegal foreigners from the operation from the Road Accident Fund Act 56 of 1996 refused.

ORDER

The application for leave to appeal is refused with costs, such costs to include the costs of two counsel, where so employed.

JUDGMENT

This matter has been heard virtually and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically with the effective date of the judgment being 9 July 2024.

DAVIS, J (Mnyovu AJ and Kok AJ concurring)

Introduction

[1] In June and July 2022 the Minister of Transport (the Minister) and the Road Accident Fund (the RAF) sought to put measures in place whereby illegal foreigners would be excluded from the operation of the Road Accident Fund Act[1] (the RAF Act). This was done by the promulgation of a "new RAF 1 claim form.

[1] 56 of 1996.

[2] On 26 March 2024 this full court reviewed and set aside the abovementioned measures.

[3] The RAF now seeks leave to appeal the above judgment and order to the Supreme Court of Appeal.

Reasonable prospects of success?

[4] In attempting to illustrate the RAF's prospects of success on appeal, Adv Tsatsawane SC argued that the main issue was whether the use of the words "any person" in the RAF Act includes persons who are present in South Africa contrary to the provisions of the Immigration Act[2] at the time of the motor vehicle accident in respect of which they claim damages.

[5] To motivate the RAF's position, Adv Tsatsawane SC referred the court to the judgment of the Constitutional Court in *Chakanyuka and Others v Minister of Justice and Correctional Services*[3] (*Chakanyuka*). In the consolidated cases in *Chakanyuka* the Constitutional Court declined to confirm a finding that section 24(2) of the Legal Practice Act[4] was unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as legal practitioners. The RAF argued that similarly, it was justified in denying illegal foreigners access to the benefits of the RAF Act.

[6] The statutory provisions of the Legal Practice Act are however distinguishable from the provision under consideration in the RAF Act. Section 24(2)(b) of the Legal Practice Act expressly provides that a High Court must admit "*any person who ....satisfies the court that he or she is a (i) South African citizen or (ii) permanent resident in the Republic*". The RAF Act contains no

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[2] 13 of 2002.
[3] CCT 315/21, CCT 321/21 & CCT 06/22 [2022] ZACC 29 (2 August 2022).
[4] 28 of 2014.

A.M

similar qualifications when it provides that "any person" is entitled to claim damages in terms of the scheme of the RAF Act.

[7] Contrary to the limitations imposed by the Legislature in the Legal Practice Act on applicants who wish to practice law in this country, the Legislature imposed no such limitations on claimants who suffered damages as a result of motor vehicle accidents which occurred in the country. The decision in *Chakanyuka* is therefore not only against the RAF, but supports the finding of this court that, absent any limitation in the RAF Act itself, the words "any person" must be interpreted to be inclusive and without any qualification or limitation.

[8] Apart from this argument, the RAF's application for leave to appeal takes the matter no further. The notice of application consists of three paragraphs only. The first paragraph consists of a proverbial "one-liner" which simply and without foundation proclaims that "there is a reasonable prospect of success".

[9] The second paragraph, in the first six sub-paragraphs thereof, simply lists the elements of this court's findings while simultaneously alleging that the court had erred in respect thereof. No grounds have been set out substantiating these allegations or criticisms.

[10] In paras 2.7 and 2.8 the RAF repeated the argument that section 4 of the RAF Act, granting the Minister and the RAF the power to prescribe the manner in which the RAF deals with claims, empowers them to exclude illegal foreigners from the operation of the RAF Act by requiring proof of the legality of their foreigner status before entertaining their claims. The argument that the Minister or the RAF may by the use of subordinate regulation change or amend the ambit of a statute itself, needs only to be stated to show its fallacy. It is trite that this cannot be done.

[11] In paras 2.9 to 2.14 of the RAF's notice, the argument is again advanced that because the Immigration Act prescribes who may legally enter the country, the persons referred to in the RAF Act must be interpreted to only refer to such persons. Again, the RAF Act does not provide for such limitation and there is, in the absence of qualifications, no indication that the wide provisions of the RAF Act should be restricted to a narrower interpretation than the actual words used.

[12] In contrast to the RAF's argument, the fact that the Supreme Court of Appeal has held that the provisions of the RAF Act must be interpreted "*as extensively as possible in favour of claimants*" has in fact been conceded by the RAF in para 2.15 of its notice of application for leave to appeal.

[13] In para 2.16 and its sub-paragraphs, this court is criticised from having mentioned in its judgment that the RAF Act has always been interpreted as conferring benefits on illegal foreigners. The basis of the criticism was that this was not an issue raised in the papers. The respondents pointed out that this criticism was not justified as the second respondent in his founding affidavit in the main application expressly stated that the exclusion of claims by illegal foreigners has "never" existed before. The point was expressly made[5] that the new requirements constituted "novel barriers".

[14] Based on the above, we find that there are no reasonable prospects of success on appeal. The RAF has therefore not satisfied the requirements of section 17(1)(a)(i) of the Superior Courts Act[6].

Compelling reason to grant leave to appeal?

[15] In an attempt to satisfy the requirements of section 17(1)(a)(ii) of the Superior Courts Act, the RAF simply in the concluding paragraph of its notice of

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[5] Para 27 of the Founding Affidavit in Caselines 019-16.
[6] 10 of 2013

application for leave to appeal, aver that the matter is of significant public importance and interest and that therefore leave to appeal should be granted.

[16] It is trite that the absence of a reasonable prospect of success is a relevant factor in considering whether, despite this absence, another "compelling reasons" exist justifying the granting of leave to appeal[7].

[17] One can readily conceive a situation where a notionally large (but unknown) number of persons who has previously been able to claim damages from the RAF, had that right curtailed by an order of court, could argue that such termination constituted a "compelling reasons" to consider the granting of leave to appeal. But here the position is the opposite. The order of this court effectively maintained the status quo of claimants whose claims have consistently been recognised by the RAF. The RAF has not even described what "compelling reasons" would be in its favour which would justify the granting of leave to appeal in these circumstances.

Conclusion

[18] We therefore find that none of the requirements for the granting of leave to appeal have been satisfied. Having reached this conclusion, we also find no reason why costs should not follow this event.

Order

The following order is made:

The application for leave to appeal is refused with costs, such costs to include the costs of two counsel, where employed.

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[7] *Minister of Justice and Constitutional Development v South African Litigation Centre* 2016(3)SA 317(SCA) at par [24]

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree

B F MNYOVU
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree

J A KOK
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 June 2024

Judgment delivered: 9 July 2024

APPEARANCES:

For the Second Applicant:	Adv K Tsatsawane SC together with Adv C Rip
Attorney for the Second Applicant:	Malatji & Co Attorneys, Sandton c/o Ditsela Inc., Pretoria
For the First Respondent:	Adv B P Geach SC together with Adv R Hawman
Attorney for the First Respondent:	Roets & van Rensburg Inc., Pretoria
For the Second Respondent:	Adv F H H Kehrhahn together with Adv S Cliff
Attorney for the Second Respondent:	Mduzulwana Attorneys Inc., Pretoria
For the Third Respondent:	Adv M Snyman SC together with Adv F H H Kehrhahn
Attorney for the Third Respondent:	KWP Attorneys, Randburg
For the Fourth Respondent:	Adv P van der Schyf together with Adv D Hinrichsen
Attorney for the Fourth Respondent:	Slabbert & Slabbert Attorneys, Pretoria