THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No:724/2023

and 724B/2023

In the matter between:

THE ROAD ACCIDENT FUND	**FIRST APPELLANT**
C P LETSOALO (THE CHIEF EXECUTICE OFFICER OF THE ROAD ACCIDENT FUND)	**SECOND APPELLANT**
THE BOARD OF THE ROAD ACCIDENT FUND	**THIRD APPELLANT**

and

DUMISANI ELVIS HLATSWAYO	**FIRST RESPONDENT**
MZWANDILE MODCAY MASILELA	**SECOND RESPONDENT**
THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	**THIRD RESPONDENT**
THE GENERAL BAR COUNCIL OF SOUTH AFRICA	**FOURTH RESPONDENT**
PRETORIA SOCIETY OF ADVOCATES	**FIFTH RESPONDENT**

Neutral Citation: *The Road Accident Fund and Others v Hlatshwayo and Others* (724/2023 and 724B/2023) [2025] ZASCA 17 (5 MARCH 2025)

Coram: MOCUMIE, HUGHES and SMITH JJA and DOLAMO and MOLITSOANE AJJA

Heard: 11 November 2024

Delivered: 5 March 2025

Summary: Civil procedure-whether it was competent for the full court to inquire into the issue of costs occasioned by the late settlement of two Road Accident Fund matters –

whether the full court erred in ordering costs *de boniis propriis* against the Chief Executive Officer of the Road Accident Fund (the CEO) and the Road Accident Fund Board (the Board) pursuant to the findings of the inquiry – whether it was proper for the full court to order costs *de boniis propriis* against the RAF Board where the Board was not joined to the proceedings – whether costs were properly granted against the CEO and the Board in light of the indemnity provision in s 15(3) of the Road Accident Fund Act 56 of 1996 – whether malice on the part of the CEO and the RAF board has been established as required in terms of s 15(3)

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP and Mphahlele DJP and Mashile J, sitting as court of first instance):

1 The appeal against the first appellant is dismissed.

2 The appeal is upheld in respect of the second and third appellants.

3 The first appellant shall pay the first and second respondents' costs of the appeal, including the costs of two counsel, where so employed.

4 The order of the high court is set aside and replaced by the following order:
'The defendant is ordered to pay the plaintiffs' costs of suit, including the costs of the inquiry and of two counsel in the inquiry, where so employed.'

JUDGMENT

Molitsoane AJA (Mocumie, Hughes, Smith JJA and Dolamo AJA concurring)

Introduction

[1] At the heart of this appeal is an order against the appellants to pay the costs occasioned by the late settlement of the third-party claims of Mr Dumisani Elvis Hlatshwayo (the first respondent) and Mr Mzwandile Modcay Masilela (the second respondent), as well as the costs of the inquiry that the Mpumalanga Division of the High Court held on the strength of rule 37A of the Uniform Rules of Court.[1] The appellants unsuccessfully sought leave to appeal the order of the full court which was specially constituted by the Judge President of the high court for the inquiry. The appeal is with special leave of this Court.

[1] Supreme Court Act 59 of 1959 - Rule 37A of the Uniform Rules of Court provides for judicial case management which includes settlement of all or some of the issues.

[2] The two cases of the first and second respondents, case numbers 3242/2019 and 7141/2019, were consolidated by the high court[2] for the purposes of holding an inquiry into the costs which were incurred as a result of the last-minute settlement of the two claims. The second appellant, the Chief Executive Officer of the Road Accident Fund (the CEO), and the third appellant, the Board of the Road Accident Fund (the Board), were ordered to pay the costs in their personal capacities. The CEO was also ordered to bring the judgment of the full court to the attention of the Minister of Transport, as well as the Board, within the period stipulated in the order.

[3] The first and second respondents opposed the appeal on the limited basis that the Road Accident Fund (the RAF) should be ordered to pay the costs of the inquiry, which took place at the instance of the full court. They, however, did not support an order of costs *de boniis propriis* against the second and third appellants. The remaining cited respondents did not participate in this appeal. The mere fact that the appeal centres solely on the issue of costs does not preclude this Court from dealing with it.[3] In any event, none of the respondents seek to impugn the jurisdiction of this Court in this regard.

[4] The RAF is a juristic person established in terms of s 2 of the Road Accident Fund Act 56 of 1996 (the RAF Act). The CEO of the RAF was appointed by the Minister of Transport on the recommendation of the Board in terms of s 12(1)*(a)* of the RAF Act. The Board has been duly constituted in terms of s 10 of the RAF Act. Section 4(1)*(b)* of the RAF Act provides that:

'[t]he powers and functions of the Fund shall include the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, has been established.'

The first and second respondents are claimants as envisaged in s 17(1)*(a)* of the RAF Act.

---

[2] For ease of reference, 'the high court' in these proceedings refers to proceedings before a single judge, while 'the full court' refers to the proceedings before a specially constituted court of three judges.

[3] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (*Public Protector*).

Factual background

[5] The following undisputed facts triggered these proceedings. The first and second respondent instituted separate delictual claims against the RAF arising out of the alleged negligent driving of motor vehicles in separate incidents. A few days before the dates of the hearing of both claims, the respondents and the RAF settled the claims.

The claim of the first respondent

[6] On 28 March 2018, the RAF acknowledged receipt of a third-party claim of the first respondent. The RAF has no proof of any formal rejection of the validity of the claim of the first respondent. On 10 September 2019, the first respondent instituted an action against the RAF. It appears that, after the close of the pleadings, the RAF was notified of the rule 37(1) conference and the rule 37A judicial case management hearing, but it did not appear at these sittings. The trial was set down for hearing on 7 March 2022.

[7] A day before the trial, the RAF made an offer to the first respondent's attorneys, which offer was accepted on the day of the trial. This settlement of the claim on the day of the trial prompted the high court to hold an inquiry into the issue of costs, which is the subject of this appeal.

The claim of the second respondent

[8] The second respondent instituted a direct claim against the RAF which was registered by the RAF on 12 January 2018. Since the RAF did not object to the validity of the claim as envisaged in s 24(5) of the RAF Act, the claim was deemed to be valid. On 27 March 2018, the RAF requested the second respondent to submit his hospital/clinical records. The second respondent did not furnish the requested documentation but opted to issue a summons instead. The RAF instructed a firm of attorneys to defend the matter. The pleadings were duly exchanged but the hospital/clinical records were only furnished in August 2019.

[9] The second respondent's attorneys then delivered the rule 37 conference and 37A judicial case management meeting notices to the RAF's previous panel of attorneys. The RAF's attorneys failed to respond to the rule 37 notice or appear at the

case management hearing. Although the second respondent claimed for loss of earnings, his rule 37 minute, compiled by his attorneys, indicated that the expert reports of the occupational therapist, the industrial psychologist and the actuary were still outstanding.

[10] The RAF contends that when the second respondent set the matter down for the case management meeting, the case was not ripe for hearing as there were expert reports outstanding. Nevertheless, this case was certified trial ready on 25 January 2022 and was enrolled for hearing on 14 March 2022.

[11] The RAF tendered an offer in respect of the merits, future medical expenses and general damages on 9 March 2022.The second respondent accepted the offer on the same day. Due to the outstanding issue of loss of earnings, the claim was thus partially settled. The partial settlement, like the settlement in the first respondent's claim, was also concluded a day before the hearing.

[12] The high court refused to make the settlement agreements orders of the court. The late settlement of the claims prompted the Judge President to constitute a full court to inquire into the reasons for the delay and late settlement of the claims. In pursuance of its decision to conduct the inquiry, the full court issued various directives, which were primarily aimed at the officials of the RAF.

[13] Although the questions raised by the full court in the directives were couched in general terms and not necessarily fact specific, they essentially sought to explore: (a) the reasons for the settlement or partial settlement of claims close to the date of trial;(b) the failure of the RAF to hold meaningful pre-trial conferences and to attend case management hearings;(c) the failure of its officers to attend court on the trial dates; the roles and duties of the claims officers;(d) the reasons why the officers of the RAF should not be ordered to pay costs out of their own pockets;(e) how the RAF dealt with the claims.

[14] The full court also invited the Legal Practice Council (LPC) and the General Council of the Bar of South Africa (the GCB) to participate as friends of the court. The GCB was also invited by the court to collate information from other divisions regarding

the issues raised by it. The Pretoria Society of Advocates also intervened in the proceedings and filed a report.

[15] On 24 January 2023, the full court handed down judgment and granted the following order:

'1. The CEO (Mr. Letsoalo) and the Board are hereby directed to pay out of their own pockets, jointly and severally the one paying the other to be absolved, the costs connected to and occasioned by the late settlement in each matter. (Emphasis by the full court.)

2. The costs referred to in paragraph 1 (above) shall include the costs to date connected to or associated with the enquiry proceedings herein.

3. The costs occasioned by or connected to the late settlements herein shall include costs of two counsels where applicable.

4. The Chief Executive Officer of the Fund, Mr. Letsoalo, is hereby directed to bring this judgment to the attention of the Minister of Transport and the Board by not later than Thursday 26 January 2023, and confirm to the Registrar of this court by not later than Friday 27 January 2023 that same has been done.

. . . .

. . . .'

[16] On 7 February 2023, acting in terms of rule 42[4], the full court varied its order to hold the RAF liable for the costs of the first and second respondents, jointly and severally with the CEO and the Board. The full court's judgment is comprehensive comprising some 97 pages and traverses many issues. In my view, it is unnecessary to deal with all the issues considered by the full court since the following issues are dispositive of this appeal:(a) whether it was appropriate for the Judge President to refer the first and second respondents claims to the full court for an inquiry; if so, whether a case has been made for the orders granted;(b) the non-joinder of the Board

---

[4] Rule 42 provides:
Variation and rescission of orders
(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(a) an order or judgment in which there exists an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.
(c) …
2…
3…

to the proceedings;(c) whether costs should have been granted against the CEO and the Board, in the light of s 15(3) of the RAF Act. I consequently only deal with these issues.

Was it competent or proper for the Judge President to refer the two fee inquiries to the full court?

[17] The high court has inherent powers to regulate its own processes by virtue of s 173 of the Constitution.[5] In this regard, they, from time to time, promulgate practice directives applicable to their divisions. In *Ex parte National Director of Public Prosecutions*,[6] this Court explained that the practice directives, in essence, deal with the day-to-day functioning of the courts and are geared to supplement the rules.[7] They are, for this reason, not meant to substitute the rules. In case of any conflict, the rules would prevail. However, they have the same force and effect as the rules.[8]

[18] The Chief Justice also published the Norms and Standards for the Performance of Judicial Functions,[9] which, inter alia, seek to 'ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts'.[10] To this end, judicial officers are enjoined to take control of the management of cases from an early stage and actively take responsibility for the speedy finalisation of cases from initiation until their conclusion.

[19] Rule 37(9)*(a)* empowers a court to consider, and in certain circumstances, to make special orders as to costs against any party during the hearing of an action or their attorney, where the attorney had failed to attend the pre-trial conference or to a material degree failed to promote the effective disposal of the action. It is not in dispute that the RAF's attorneys had failed to attend the rule 37 conferences as well as the case management hearings having been duly notified. Rule 37A(1) recognises the

---

[5] Section 173 provides that '[t]he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.
[6] *Ex parte National Director of Public Prosecutions* [2018] ZASCA 86; 2018 (2) SACR (SCA) 176.
[7] Ibid para 31.
[8] *Rossiter v Nedbank Ltd* 2015 JDR 2629 (SCA); [2015] ZASCA 196 para 15.
[9] The Chief Justice issued the *Norms and Standards for the Performance of Judicial Functions (Norms and Standards)* in terms of s 8 of the Superior Courts Act 10 of 2013 read with s 165(5) of the Constitution and published in GN 147 in GG 37390 of 28 February 2014.
[10] See para 2 of the Norms and Standards.

power of the Judge President to issue practice notes or directives dealing with judicial management of cases. In this regard, the Judge President of the high court promulgated such practice directives to address, inter alia, the issue of the settlement of disputes on the date of the trial. Clause 14.1 of the Practice Directive[11] precludes any settlement of the matter on the day of the trial. In terms of the practice directives of the high court, where settlement is concluded on the day of the trial, the court may inquire into causes for the late settlement to determine which party should be saddled with costs, thereafter the case would be removed from the roll.[12]

[20] It is important to note that while the responsibility for the management of the case lies squarely in the hands of a judge ceased with a matter, rule 37A(2)*(c)* imposes the primary responsibility on the litigants and their legal representatives to prepare properly and comply with the rules and to ensure that the case is set down for hearing. At the case management hearing, the court may make any order as to costs including costs *de boniis propriis* against a party's legal representatives or any person whose conduct has contributed to frustrate the objectives of the case management directives.[13] If, during the case management hearing, an inquiry into costs had not been held as contemplated in rule 37A(12)(*h*), the trial court may at its discretion, as in this case, hold an inquiry into the issue of costs.[14]

[21] In the two matters before the full court, the parties had settled their disputes and agreed who must pay the costs. In awarding costs, however, the court exercises a wide discretion which must be judicially exercised. This discretion is retained by the court even in circumstances where the parties have reached an agreement on the issue of costs. While the court will recognise and respect the rights of the parties to

---

[11] Amended Practice Directive of 9 January 2020 for Mpumalanga Division of the High Court issued in terms of s 8(3) of the Superior Courts Act read with rule 37A(1) and (2) of Uniform Rules of Court.
[12] Clause 14.4 provides that '[a]ny matter that is settled on the date of the trial in its entirety, shall be removed from the trial roll . . .' Clause 14.5 provides that '[t]he recording of removal from the roll as contemplated in 14.4 above shall be preceded by summary inquiry and an order for costs as contemplated in paragraphs 4 and 5 of Form A3 . . . and any defaulting party or legal practitioner may be ordered to pay costs on a party and party scale or punitive scale and or out of own pocket, including forfeiture of appearance or day fee, all of which shall be guided by the nature of the default and explanation provided for settlement on the day of the trial'.
[13] See rule 37A(12)*(h)*.
[14] Rule 37A(13) provides that '[t]he record of the case management conference, including the minutes submitted by the parties to the case management judge, any directions issued by the judge and the judge's record of the issues to be tried in the action, but excluding any settlement discussions and others, shall be included in the court file to be placed before the trial judge'.

contract, it may interfere in the agreement on the issue of costs, should good cause exist.

[22] In *Intercontinental Exports (Pty) Ltd v Fowles*,[15] this Court explained the essence of this discretion as follows:

'The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court. (Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69, a decision which has consistently been followed). The court's discretion is a wide, unfettered and [an] equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done, as a mark of its displeasure at such party's conduct in relation to the litigation. Is it to be precluded by agreement from doings so? A court should not be obliged to give its imprimatur to an order of costs which, in the circumstances, it considers entirely inappropriate or undeserved. In my view, as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs.

Because a court exercises its discretion judicially, not capriciously, it would normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist, depending upon the particular circumstances, for following a different course. This might result, on a proper exercise of discretion, in a party being deprived of agreed costs, or being awarded something less in the way of costs than that agreed upon.'

[23] Over and above this, it was within the prerogative of the Judge President, acting in terms of s 14(1)(*a*) of the Superior Courts Act to constitute a full court.[16] The high court was entitled, in terms of its practice directives, the empowering rule 37A(13) as well as the wide discretion it has in the award of costs, to hold this inquiry when the two cases were brought before it for the purpose of making the settlement agreements

---

[15] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA); [1999] 2 All SA 304 (A) paras 25-26.

[16] Section14(1)(a) of the Superior Courts Act 10 of 2013 provides: 'Save as provided in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that the matter may be heard by a court of not more than three judges as he or she may determine.'

orders of court. It was thus competent and proper for it, to refer the two cases to the full court to inquire into the question of wasted costs.

Was it proper for the full court to order costs de boniis propriis against the RAF, the Board and the CEO?

[24] The full court dealt extensively with the connection between the conduct of the CEO, the Board and the late settlement of the two claims. The full court further considered the contractual relationship between the RAF and its panel of attorneys which would have terminated on 31 May 2020. In response to some of the questions directed to him, the CEO penned a letter which he claims was written in his personal capacity. Contrary to established practice of communicating with the court by notifying and including all parties involved in litigation, the CEO addressed the letter to the Judge President without such notification. The relevant parts of that letter read as follows:

'1. What is the nature of these proceedings before the full bench? Is it an enquiry and, if it is, under what provision of the court rules is it held? What is intended to be achieved or determined in these proceedings?

2. Except for Hlatshwayo, Masilela and the RAF, who are parties to these proceedings? What is the role of each party and how did they join these proceedings? How were these parties selected to join these proceedings and invited to these proceedings? Are there any examples of proceedings of this nature held in the past, in any high court division, that one can refer to, where this kind of proceedings were held?

3.What is my role, personally in these proceedings? What is expected of me and how and how do I participate in these proceedings? I ask this question given what happened, during these proceedings on 22 June 2022 when the legal representative of the RAF, Advocate Cedric Puckrin, SC, informed the court of my presence and that I requested to address the court on matters to my personal knowledge and this was denied. An instruction was then issued to the effect that I must instruct Advocate Puckrin, who is the legal representative of the RAF. This is notwithstanding me being personally invited by the court to attend the proceedings.

4. What is the procedure in this kind of proceedings? I am asking, this in the context of where RAF was asked to address the court first and about 17 questions were asked to be addressed, questions which were mostly generic and did not form part of the papers. I was also asked to present myself personally at these proceedings, only for RAF legal representative, Advocate

Puckrin, to be instructed to take instruction from me without him being appointed my legal representative. I believe that I have a right to a legal representative of my choice. A right I don't intend to forgo.

5. Some of questions are in relation to matters that are active various court cases and proceedings, serving in divisions of the high courts and the Supreme Court of Appeal. This includes matters in reference to Section 13 of the RAF Act, regarding RAF's Annual Report. How am I or any of the parties expected to answer those questions? It is also not clear how I and any of the parties expected to answer the questions which are the questions which are subject matters in the province of these courts.

. . . .

7. Lastly, who usually pays for costs associated with these kinds of proceedings.'

[25] The Judge President declined to respond to the letter but dealt with it extensively in the judgment. The view taken by the Judge President not to respond directly to the CEO is correct as the CEO as the author of the letter was at the time acting in his capacity as the CEO of a party, the RAF, which was legally represented before the pending proceedings in court. The assertion by the CEO that the letter was written in his personal capacity is perplexing and does not bear scrutiny as he signed same in his capacity as the CEO of the RAF.

[26] The letter is based on the CEO's own misunderstanding of the procedure the full court followed in the cost inquiry. However, the letter did little to avert the imminent disagreement between the CEO and the full court which found that neither the CEO, nor its Board or Management had capacity to demand the files from panel attorneys and deal with them in cases which were still pending in courts. Thus, the demand was, according to the full court, unreasonable and unfair.

[27] The full court found that there was a causal connection between the demand to remove the files from the panel attorneys and the delay in the late settlement of the claims. It held that ". . . 'it was manifestly inappropriate' of the CEO, the Board and the Fund to demand the return of all the files from panel attorneys, when the Fund did not have the capacity to deal with such pending matters in our courts." The two cases were the subject of such demands. The full court then, inter alia, found that the

appellants were personally liable for the costs in respect of these two claims and for the costs of the inquiry.

[28] It is settled law that those who occupy public office and who act in a representative capacity may be mulcted with costs out of their own pockets in certain circumstances.[17] These costs orders, *de boniis propriis,* are not easily granted but only in exceptional circumstances.[18] In *Public Protector*,[19] the Constitutional Court stated it thus:

'In *Black Sash II*, this Court held that the common law rules regarding the granting of personal costs orders are well grounded and buttressed by the Constitution. The traditional common law tests of bad faith and gross negligence must be infused by the Constitution. Froneman J said that the question whether the conduct of a public official justifies the imposition of liability for personal costs can be answered by having regard to institutional competence and constitutional obligations. He went on to explain:

"From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will an overlap."'[20] (Foot notes omitted)

Non joinder of the Board

[29] In dealing with the issue of personal costs against the CEO and the Board, it is perhaps convenient to start with the order against the Board. The order of the full court was assailed on the basis that there was a material non-joinder of the Board. It is trite that joinder of a party is required where such a party may have direct and substantial interest in the subject matter of the action. In *Snyders and Others v De Jager and Others* [21] the Constitutional Court held as follows:

'A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights

---

[17] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) paras 7-14. See also *Public Protector* para 153.

[18] *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) paras 68 and 69.

[19] See fn 2.

[20] See fn 2 para 154.

[21] *Snyders and Others v De Jager and Others* [2016] ZACC 54; 2017 (5) BCLR 606 (CC).

or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.'[22]

[30] Neither the Board nor any of its members were before the full court. The fact that the CEO 'serves at the pleasure of the . . . Board,' as held by the full court, is no justification to mulct it with costs as it is common cause that the Board was not part of the proceedings from the time the inquiry commenced until it ended.

[31] The full court issued numerous directives calling on different functionaries of the RAF to provide explanatory affidavits and in some instances, calling for relevant people to appear before it in person during these proceedings, but such an invitation was never extended to the Board. The full court was fully aware that the Board and/or any of its members were not before it, hence it also directed the CEO to bring its judgment and order to the attention of the Board. The full court ordered personal costs orders against the Board without affording it the opportunity to be heard. There is no explanation or reasons advanced in the judgment why the Board has been mulcted with costs. Such an order goes against the notion of procedural fairness and cannot stand.

[32] The full court found that the system which was implemented by the RAF after the disposal of the panel attorneys and the challenges thereof appears to be the real problem for the 'failure by the Fund to participate effectively in the pre-trial procedures and failure to attend court on the dates of the trial'. The full court held the following:
'I understand the claim-officers who had deposed to affidavits in these two matters to say in terms of the policy or directive issued to them and to which they are obliged to comply therewith, they are not permitted to ask for information and seek to settle at an earlier stage of the pre-trial and judicial case management conferences. They are only allowed to resort to seeking to settle at a very late stage when matters are enrolled for trial. This cannot be in the best interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases as contemplated in rule 37A(2)*(a)*. In fact, this

[22] Ibid para 9.

procedure to which the claim-officers are obliged to comply with, fails to a material degree to promote the effective disposal of the litigation as contemplated in rule 37(9)*(a)*(ii). It is also a procedure that can be categorised as offending against the principles and requirements of rule 37A, seen in the context of sub-rule 16 referred to earlier in this judgment. The procedure can only serve to conduce unreasonably to frustrate the objectives of the judicial case management process as contemplated in sub-rule 12(h) of rule 37A. . .'[23]

[33] What the full court had to decide, was the issue relating to the costs pertaining to pre-trial conferences. In *Road Accident Fund v Taylor*,[24] this Court observed that:
'. . . [A] court has no general duty or power to exercise oversight over the expenditure of public funds. This is so for three reasons. The first is the constitutional principle of separation of powers. The second is that the exercise of such a duty or power would infringe the constitutional rights of ordinary citizens to equality and to a fair public hearing. The third principle that the law constrains a court to decide only issues that the parties have raised for decision. . .'[25]
When the court inquired into the internal workings of the RAF as it did, it encroached into the domain of the executive. The order is fundamentally flawed and should not be allowed to stand.

Whether the costs should have been granted against the CEO and the Board in light of s 15(3) of the RAF Act

[34] The CEO and the Board's liability for costs must be considered in the light of the indemnity provided in terms of s 15(3) of the RAF Act. The CEO, the Board and any of its members enjoy indemnity in terms of s 15(3) of the RAF Act. This section provides that:
'No member of the Board or officer or employee of the Fund, or other person performing work for the Fund, shall be liable for anything done in good faith in the exercise of his or her powers or the performance of his or her functions or duties under or in terms of this Act.'

[35] The contention by the appellants is that the full court did not properly consider and apply the facts to the issue of whether 'malice' can be imputed to them, and consequently, whether s 15(3) found application. The full court made findings on

[23] *Hlatshwayo and Another v Road Accident Fund* [2023] ZAMPMBHC 2 para 56.
[24] *Road Accident Fund v Taylor* [2023] ZASCA 64; 2023(5) SA 147(SCA).
[25] Ibid para 31.

issues that were not properly before it, in finding that the conduct of the CEO, the Board and/or management of the Fund put the Fund 'under extreme pressure' and that the said conduct was taken in bad faith and found no protection under s 15(3).

[36] Section 15(3) envisages that the functionaries who act in bad faith in the exercise of their powers or the performance of their functions or duties towards the RAF should be mulct with costs. In *Public Protector*, the court had occasion to deal with the question of 'bad faith'. In the minority judgment the court said the following:
'A proper starting point is in my view to remind ourselves of what the ordinary meaning of bad faith is. A dictionary meaning is "[i] intent to deceive." The meaning of bad faith or malicious intent is generally accepted as extending to fraudulent, dishonest or perverse conduct; it is also known to extend to gross illegality. Here too the perverse, seriously dishonest or malicious conduct must link up, not merely with the seniority of the person or high office occupied, but also with the seriousness of the actual or reasonably foreseeable consequences of that conduct.

…

The correct approach to determining the existence of bad faith is therefore one that recognises that bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed. This is so because the mischief sought to be rooted out by rendering bad faith so severely punishable, particularly within the public sector space, is to curb abuse of office which invariably has prejudicial consequences for others. Abuse of office undermines the efficacy of State machinery and denies justice and fairness to all people and institutions.'[26]

[37] In the context of this case, for the full court to make a finding of bad faith, the issue of the demand for the files from the panel attorneys ought to have been an issue for adjudication before it. The explanatory affidavits of the claims handlers would not have assisted the full court in this determination. That decision was taken by the Board. The Board was not a party to these proceedings. The claims handlers do not serve on the Board. The CEO, who might have provided insight into the decision of the Board, declined to be drawn into the issue of the panel attorneys as he held the

[26] See fn 2 paras 71-72.

view that the said issue was subject to litigation in other forums. There was no evidence before the full court to arrive at the finding of bad faith by the appellants, either based on malicious intent or even 'gross recklessness that reveals a breakdown of the ordinary exercise of authority.' This finding is dispositive of the issue relating to the CEO and the Board's liability.

[38] This brings us to the issue of whether the RAF should bear the costs of the inquiry. As stated, the general rule in cases of this nature is that the award of costs lies within the discretion of the court. An appellate court's interference with a court's discretion is permissible on restricted grounds only. In *Fine v Society of Advocates of SA (Witwatersrand Division)*[27] this Court held:

'The Appeal Court will only interfere with the exercise of his discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make.'[28]

[39] In this appeal, there is no dispute that the RAF is liable for costs in the litigation between itself and the respondents. The respondents did not contend for an award of personal costs against the second and third appellants. However, both respondents contend that the RAF should be liable for the costs of the inquiry. The only issue thus remaining is whether the RAF should be mulcted with costs in respect of the inquiry as envisaged in paragraph 14.5[29] read with clause 5 of Form A3[30] of the court a quo's Practice Directives.

[40] The full court imputed blame for the late settlement of the claims on the RAF on two grounds. First, it found that the system that was implemented by the RAF after the termination of the panel of attorneys' mandate resulted in the 'failure by the Fund

---

[27] *Fine v Society of Advocates of SA (Witwatersrand Division)* 1983 (3) SA 488(A)
[28] Ibid at 494H-495.
[29] The recording of removal from the roll as contemplated in 14.4 above shall be preceded by summary inquiry and an order for costs *as contemplated in paragraphs 4 and 5 of Form A3 or paragraph 3.6 of Form B or any other similar Form and any defaulting party or attorney may be ordered to pay costs on a punitive scale and or out of own pocket, including forfeiture of appearance or day fee*, all of which shall be guided by the nature of the default and explanation provided for settlement on the date of trial. (Emphasis in the text)
[30] Clause 5 of Form A3 provides: It is hereby recorded that should this matter be settled on the date of trial, parties run the risk of punitive cost order and/or forfeiture of a day fee, against any person responsible for the late settlement of the matter and any such costs order may include payment out of pocket by whoever is responsible for the late settlement including claim handlers and or attorneys of parties. 9 Emphasis in the text).

to participate effectively in the pre-trial procedures and failure to attend court on the dates of the trial'. Second, the high court found that the problems experienced by the RAF 'were actually caused by lack of planning at the time when the files were demanded from the panel [of] attorneys.'

[41] The full court, in scrutinising the conduct of the RAF after its contracts with its panel of attorneys had terminated, found that the RAF did little to expedite the finalisation of the claims before litigation. It is submitted on behalf of the RAF and the Board that the inquiry by the full court into the issue of the termination of the agreement of the panel of attorneys was designed to excoriate the decisions which the Board took in 2020. These decisions culminated in the cancellation of the tender for a new panel of attorneys and the request to the old panel of attorneys to hand over the files of the RAF. The decision of the RAF was successfully challenged in the matter of *FourieFismer Inc. and Two Others v Road Accident Fund*.[31] That was three years before the two claims were enrolled for hearing in the Mpumalanga High Court. However, this Court, on appeal in *RAF v Mabunda Incorporated and Others: Minister of Transport v Road Accident Fund and Others (Mabunda)*[32]overturned the judgment of the court of the first instance and ruled in favour of the RAF.

[42] I agree with the submission by counsel for the RAF that the decisions in respect of the old panel of attorneys and the evidence which led to their undertaking, were not before the full court. It is undesirable for courts to decide issues which are not correctly before them. The nature of the proceedings in our courts is that parties bring particular issues or disputes before the courts upon which they ask for adjudication. It is thus generally not permissible for the court to create, raise and decide issues which the parties do not wish to be adjudicated upon. In *National Director of Public Prosecutions v Zuma* (*NDPP v Zuma*),[33] this Court held, inter alia, that in 'exercising [their] judicial function judges are themselves constrained by the law'.[34] This Court further held that the judicial function of a judicial officer is to confine the judgment to the issues before

[31] *Fourie Fismer Inc. and Two Others v Road Accident Fund* [2020] ZAGPPHC 183; [2020] 3 All SA 460 (GP); 2020 (5) SA 465 (GP).
[32] *RAF and Others v Mabunda Incorporated and Others; Minister of Transport v Road Accident Fund and Others* [2022] ZASCA 169; [2023] 1 All SA 595 (SCA).
[33] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All 243 (SCA).
[34] Ibid para 15.

it; by deciding matters that are germane and relevant; by not creating new factual issues.[35]

[43] This rule of practice is, however, not cast in stone as the court may, in certain circumstances*, mero motu* raise and decide issues, usually legal in nature, even in circumstances where same have not been raised on the papers before it. These are issues such as questions of jurisdiction, *locus standi*, condonation and non-compliance with the court rules. The override to this trite principle is that the parties must have been alerted that the issues will be raised, and they must have been granted the opportunity to address the court on them, which are to be included same in their heads of argument in preparation of their case. This evidently did not happen.

[44] The full court found that the problems at the RAF 'w[ere] actually caused by lack of planning at the time when the files were demanded from the panel attorneys'. The full court dismissed any intimation by the counsel of the RAF and the Board on the issue of budgetary and lack of funding constraints. This issue was correctly rejected as the CEO did not raise it as a defence for failure by the RAF to attend pre-trial conferences. It is, however, not in dispute that the RAF has been in financial woes for the longest of time.

[45] This Court in *Mabunda*, commenting on the fact that the RAF had been technically insolvent, said that 'the repeated deficits have seemingly been exacerbated by the mounting legal fees which the RAF has been obliged to meet; both those of the attorneys on the panel and those of attorneys and counsel representing claimants.'[36] The CEO painted a picture by the Board, of attempting to re-evaluate existing processes and implementation of more efficient and effective approaches. In this regard, the RAF has implemented three departments, namely, the settlement hub department, the short-term trial department and the long-term trial department. It appears that at the core of this reorganisation is the need to encourage efficiency through teamwork. It is hoped that plans like these will bear fruit shortly and the

[35] Ibid para 15.
[36] Ibid para 27.

settlement of claims will happen in shorter periods, thus reducing costs and benefit claimants for whom the scheme is meant.

[46] The inquiry into costs was not initiated by any of the parties. While it is trite that a court is empowered to order such an inquiry *mero motu,* it must be borne in mind that the purpose of judicial case flow management is essentially to curb unnecessary delays in litigation, by inter alia, narrowing the issues and facilitating the settlement of disputes. It is also meant to reduce the costs of litigation.

[47] The inquiry at the behest of the full court went against the grain of avoiding delays and curbing the costs of litigation. The costs, in the uncomplicated claims of the respondents which had been settled, resulted in extensive and unnecessary costly investigation into systemic problems caused by the decision taken years before the claims were instituted. The matters were settled around March 2022. Both matters were enrolled for hearing during the same month. It was in March 2022 when the high court sent out directives which were directed to the officials of the RAF about the issue of costs. The whole exercise lasted for about nine months, with no less than ten counsel involved. It defeated the very purpose of avoiding delays in litigating and cutting costs.

[48] In the case of the second respondent the pre-trial minute filed by his attorneys five days before the trial, states that the reports of three experts were outstanding. An assertion is made in the minute that 'plaintiff will request an offer on the issue of [p]ast [l]oss of [e]arnings and [f]uture [l]oss of [e]arnings upon receipt of outstanding expert's reports.' On this basis, one can safely conclude, as contended by the RAF, that when the case was certified trial-ready and enrolled, it was not ripe for hearing. The full court does not refer to the fact that the case was pre-maturely set down for hearing by the second respondent's attorneys or even still, on the possible instructions of the second respondent.

[49] I am acutely aware that the inquiry was not brought about at the request of the RAF. With this in mind, however, it failed to validate the claims as required by s 24(5) of the RAF Act. It also failed to attend the rule 37 and judicial case management hearings which ultimately caused the high court to hold the inquiry into costs. It was

to blame for the holding of the inquiry. The case management procedures including hearings relating to costs, necessarily form part and parcel of litigation. It is thus in the interests of justice that the RAF be held liable for the costs of the inquiry as the first and second respondents were not responsible in anyway.

[50] I accordingly make the following order:

1 The appeal against the first appellant is dismissed.

2 The appeal is upheld in respect of the second and third appellants.

3 The first appellant shall pay the first and second respondents' costs of the appeal, including the costs of two counsel, where so employed.

4 The order of the high court is set aside and replaced by the following order:
'The defendant is ordered to pay the plaintiffs' costs of suit, including the costs of the inquiry and of two counsel in the inquiry, where so employed.'

_____

P E MOLITSOANE
ACTING JUDGE OF APPEAL

Appearances

For the first and third appellants:	C Puckrin SC with R Schoeman and P Nyapholi
Instructed by:	Mpoyana Ledwaba Inc, Pretoria
	Modisenyane Attorneys, Bloemfontein
For the second appellant:	J G Cilliers SC with M T Shepherd and H A Mukhavela
Instructed by:	Mpoyana Ledwaba, Pretoria
	Modisenyana Ledwaba Inc. Pretoria
For the first respondent:	B P Geach SC with A Frosch and F H H Kerrhahn
Instructed by:	Pieter Nel Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For the second respondent:	P J Vermeulen SC with M Pienaar
Instructed by:	P Mahlalela Attorneys, Pretoria
	Hill McHardy & Herbst Inc.