**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 15876/2020**

| DELETE WHICHEVER IS NOT APPLICABLE |
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| (1) REPORTABLE: NO. |
| (2) OF INTEREST TO OTHER JUDGES: YES. |
| (3) REVISED. |
| DATE: 30 APRIL 2020 |
| SIGNATURE: Electronically signed |

In the matter between:

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| **MABUNDA INCORPORATED** | 1st Applicant |
| **KEKANA HLATSWAYO HADEBE INCORPORATED** | 2nd Applicant |
| **NOKO MAIMELA INCORPORATE** | 3rd Applicant |
| **MAPONYA INCORPORATED** | 4th Applicant |
| **T M CHAUKE INCORPORATED** | 5th Applicant |
| **NINGIZA MOOSA INCORPORATED** | 6th Applicant |
| **TASNEEM MOOSA INCORPORATED** | 7th Applicant |
| **BORMAN DUMA ZITHA ATTORNEYS** | 8th Applicant |
| **MKHONTO AND NGWENYA INCORPORATED** | 9th Applicant |
| **MADUBA ATTORNEYS INCORPORATED** | 10th Applicant |
| **IQBAL MAHOMED INCORPORATED** | 11th Applicant |

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| **TKN INCORPORATED** | 12th Applicant |
| **DEV HAHARAJ AND ASSOCIATES** | 13th Applicant |
| **SARAS SAGATHEVAN ATTORNEYS** | 14th Applicant |
| **SHEREEN MEERSINGH AND ASSOCIATES** | 15th Applicant |
| **SMITH TABATA ATTORNEYS** | 16th Applicant |
| **PULE INCORPORATED** | 17th Applicant |
| **BRIAN RAMABOA ATTORNEYS** | 18th Applicant |
| **GOVINDASAMI NZINGIZI GOVENDER INCORPORATED** | 19th Applicant |
| **HAMMA – MOOSA INCORPORATED** | 20th Applicant |
| **MATHOPO RAMBAU SOGOGO ATTORNEYS** | 21st Applicant |
| **MAYAT NURICK LANGA INCORPORATED** | 22nd Applicant |
| **SC MDHLULI ATTORNEYS INCORPORATED** | 23rd Applicant |
| **HAJRA PATEL INC** | 24th Applicant |
| **Z & Z NGOGODO INC** | 25th Applicant |
| **TWALA ATTORNEYS** | 26th Applicant |
| **SANGHAM INCORPORATED** | 27th Applicant |
| **RACHOENE ATTORNEYS** | 28th Applicant |
| **ZUBEDAK K SEEDAT & CO INCORPORATED** | 29th Applicant |
| **DUDZILE HLEBELA INC** | 30th Applicant |
| **MOCHE INCORPORATED ATTORNEYS** | 31st Applicant |
| **MARIVATE ATTORNEYS** | 32ndApplicant |
| **MGWESHE NGQELENI INC** | 33rd Applicant |

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| **LUKHU PILSON ATTORNEYS INC** | 34th Applicant |
| **AK ESSACK, MORGAN NAIDOO & COMPANY** | 35th Applicant |
| **MOLABA ATTOENRYS** | 36th Applicant |
| **NAIDOO MAHARAJ INC** | 37th Applicant |
| **HARKOO BRIJLAL & REDDY INC** | 38th Applicant |
| **MATHIPANE TSEBANE ATTORNEYS** | 39th Applicant |
| **MORARE THOBEJANE INCORPORATED ATTORNEYS** | 40th Applicant |
| **NOMPULELO HADEBE INC** | 41st Applicant |
| **MBOWENI AND PARTNERS INC** | 42nd Applicant |

and

**ROAD ACCIDENT FUND** Respondent

and

**THE LAW SOCIETY OF SOUTH AFRICA** First Amicus Curiae

and

**BLACK LAWYERS ASSOCIATION** Second Amicus Curiae

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**CASE NO: 18239/2020**

**DIALE MOGASHOA INC** Applicant

and

**ROAD ACCIDENT FUND** Respondent

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**J U D G M E N T (LEAVE TO APPEAL)**

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**DAVIS, J**

[1] Introduction

1.1 On 27 March 2020 this court handed down a judgment in the consolidated urgent applications in Case No 15876/2020 (the "Mabunda Application") and in Case No 18239/2020 (the "Diale Mogashoa Application").

1.2 The Road Accident Fund (the "RAF") was the respondent in both applications.

1.3 The Law Society of South Africa ("LSSA") and the Black Lawyers Association ("BLA") had been joined as amici curiae in the consolidated applications.

1.4 Parts A of the notices of motion in both applications dealt with interim relief pending the finalization of review applications in terms of Parts B of the notices of motion.

1.5 The interim relief sought in Parts A was refused. This relief was aimed at preventing the RAF from demanding the return of their files from the Applicants, all being "panel attorneys" of the RAF in terms of extended Service Level Agreements ("SLA's") which all expire through the effluxion of time on 31 May 2020.

1.6 In the instance of the Diale Mogashoa Application, a counter-application by the RAF was granted to the effect that Diale Mogashoa Inc was ordered to return the RAF's files as demanded by them. Certain costs orders were also granted.

1.7 The Applicants now seek leave to appeal against the abovementioned judgment and orders.

1.8 The LSSA has delivered a notice to abide and took no part in the applications for leave to appeal. Similarly, the BLA has filed a notice indicating that their further participation would be limited to Parts B of the notices of motion.

1.9 The review applications in terms of Parts B of the notices of motion, dealing with the RAF's plans to move away from its current litigious model of handling claims and no longer utilizing a panel of attorneys for that purpose, are apparently to be consolidated with other similar review applications which, it is envisaged, would all come before this court in the first week of May 2020.

1.10 The urgent applications, which came before me while doing duty in the urgent court, involved in total 46 parties and, due to the nature of the applications, were attended by so many people that a larger courtroom had to be requisitioned. This was prior to the "lockdown" imposed as a result of the Covid-19 pandemic. The applications for leave to appeal were, despite my indication that they could be accommodated in open court under strict conditions, at the insistence of counsel in the Mabunda Application in particular, heard by way of remote virtual hearings. These were electronically attended by 19 people. In the circumstances where the urgent applications and the judgment enjoyed much social and other media coverage but the applications for leave to appeal had a more limited audience but still generated widespread interest, I deem it in the interest of justice and transparency that a full judgment be rendered, contrary to the somewhat curtailed judgments one often finds in applications for leave to appeal.

[2] Appealability

2.1 Relying heavily on the interim nature of the relief sought in Parts A of the notices of motion, the RAF, with reliance on, inter alia, ITAC v Scaw SA (Pty) Ltd 2012 (4) SA 618 (CC) at [47] – [50], argued that the orders I granted are not appealable.

2.2 It is trite that the test for appealability is to determine whether the order sought to be appealed against is final in effect, cannot be altered by the court which granted it and must be definitive of the rights of the parties by having the effect of disposing at least a substantial portion of the relief claimed. See: Zweni v Minister of Law & Order 1993 (1) SA 532 (A).

2.3 Not only has the order dismissing Parts A of the Applicants' applications finally determined that portion of the relief claimed by them, but it also disposed of their claims for interim interdicts. Whilst interim relief, if granted, may be altered by the same court, the refusal of such relief cannot be reversed on the same facts. See: Van Niekerk v Van Niekerk 2008 (1) SA 76 (SCA) quoting from Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A). The judgment and orders therefore satisfy the test referred to above.

2.4 The granting of the counter-application was simply the other side of the coin of interdicting execution of the hand-over or return of the RAF's files. I therefore find that the refusal of the interdict is appealable which then renders the order in respect of the counter-application also appealable. The question to be decided is whether the Applicants have satisfied the requirements for leave to appeal as set out in Section 17(1)(a) of the Superior Courts Act 10 0f 2013, namely whether an appeal would have a

reasonable prospect of success or whether for some other compelling reason leave to appeal should be granted, such as conflicting judgments requiring uniformity by way of a judgment of an appeal court.

[3] The Mabunda Application

3.1 The grounds upon which the Applicants in the Mabunda Application rely for leave to appeal are set out in eleven paragraphs of their first notice of application for leave to appeal (I shall deal with the grounds set out in their supplementary notice of application for leave to appeal later).

3.2 Apart from the general averments in paragraphs 1 and 2 of the first notice that I should not have found against the Applicants, in paragraphs 3, 4 and 5 it is argued that I should have found that the RAF has insufficient "plans" in place on how to handle "unfinished files" and that this would compromise the administration of justice and prejudice the rights of plaintiffs. Laudable as the Applicants' concerns may be, these allegations are refuted by the evidence extracted from the affidavits and summarised in the judgment. The concerns for others also do not translate to a right of the Applicants for interim relief for themselves. Their arguments relating to the presence or absence of rationality for the RAF's exercise of executive authority remain a matter for consideration in the review applications. I therefore do not find the arguments raised in these paragraphs to constitute sufficient prospects of success of appeal in respect of the refusal for interim relief to the Applicants.

3.3 In paragraphs 6 and 7 of their first notice, the Applicants complain about my finding of them being in breach of their contracts. They argue that, as a matter of public law on which they claim to rely, their non-compliance with the express hand-over terms of their SLA's should not amount to

breaches of contract. I see no prospect of success of appeal on this aspect: the SLA's embody commitments undertaken between service providers and their clients and the simple fact is that until such time as the agreements containing those commitments have been set aside or otherwise found to be unlawful, the factual position is that their terms have been breached.

3.4 In paragraph 8 of the notice the simple allegation is made that I had erred in having found that the Applicants currently have no rights which are being infringed nor would they have rights which would be infringed post 31 May 2020. This statement is not a correct reflection of the judgment. The finding was that the applicants have no rights to hold onto the RAF's files in view of the existing SLA's and their terms and, once the SLA's have expired due to effluxion of time, they would have even less right to hold onto those files. They cannot claim a right to represent the RAF as a client once the sole reason for a mandate to do so, derived from the SLA's, lapses. I find no reasonable prospect that another court could come to a different conclusion justifying the granting of leave to appeal on this score.

3.5 In paragraph 9 of their first notice, the Applicants again complain that, in their view, the RAF has insufficient plans in place to deal with files, plaintiff's claims and their own legal representation beyond 31 May 2020. This time the basis of the complaint is that such an absence or lack of plans should have lead to the balance of convenience being tilted against the RAF. This is a narrow view of the matter and completely ignores the whole basis of the RAF's attempt to change its current litigious model of claims handling to a more affordable one, with early settlement of claims being a feature, which would benefit plaintiffs and save them time and money. The acting CEO of the RAF has listed numerous proposed methods to achieve this end which have been or are being put in place by the RAF. These were

mentioned in the judgment. The consideration of balances of convenience involves a weighing-up of different interests and the totality of factors, including matters of public interest. Insofar as this consideration involves value judgments and the exercise of a discretion, it has not been alleged that the discretion which I had exercised, had been exercised irrationally, arbitrarily on capriciously. I therefore find no reasonable prospect of success for claiming interference by a court of appeal.

3.6 In paragraph 10 of the first notice, my acceptance of the fact that many panel attorneys have built their practice around RAF work, is acknowledged. This fact was not punted as a factor by the Applicants in their application, but it was one which I *mero motu* took into account as a relevant factor. Pouncing on this, the Applicants, in their notice, do no more than allege that on this basis I should have found against the RAF. This single factor is however insufficient to raise a reasonable prospect of success on appeal and should be seen as one of the multitude of factors considered regarding the granting or not of interim relief as also referred to in the previous two sub-paragraphs above and in the judgment itself.

3.7 In paragraph 11 of their first notice, the Applicants allege that I failed to appreciate that their application was not based on contract. Despite the authorities quoted in the judgement, they further allege that I erred in having found that, once a tender has been awarded, the relationship between the parties was based on contract (save perhaps for the issue of cancellation). In this case, the relationships were governed by the SLA's they had each concluded with the RAF. The issue of cancellation does not arise as the SLA's will simply run their courses until they expire. I am of the view that this court was bound by the precedent set by higher courts and find no prospect of success of appeal on this point.

3.8 Lastly, the Applicants in their first notice of application for leave to appeal contend that there were erroneous factual findings made in the judgment. The one listed in the notice was the acceptance that the RAF's Bid Adjudication Committee ("BAC"), authorized by its delegated power, had taken the decision to cancel the tender for prospective panel attorneys. In argument, this point was expanded – the Applicants contended that the acting CEO had sent an e-mail to the BAC, pre-dating its actual decision, with instructions regarding implementation of the decision. This, the Applicants contend, means that the BAC was merely rubberstamping the CEO's decision. Not only is this contention not supported by the evidence, but it principally forms part of the review application. Until such time as that which the applicants contend was a mere rubberstamping is set aside, it stands. Even if the BAC's decision were to be set aside, the consequence, on a best case scenario for the Applicants, would be the continuation of a tender process for a separate new panel of attorneys with new SLA's with their own terms. Again, such a scenario would not entitle a court at this stage to extend the validity period of the soon to be ending existing SLA's. To do so would be unconstitutional. I see no prospect of this point having any reasonable prospect of success on appeal and therefore no leave should be granted on this score.

[4] <u>The Diale Mogashoa Application</u>

4.1 Diale Mogashoa Inc principally based its application for leave to appeal on the contention that the judgment does not distinguish between its application and that of the Mabunda Application. It further contends that unwarranted and erroneous factual findings had been made against it.

4.2 The most prominent of the findings and one which Diale Mogashoa had also raised in correspondence to the Judge President (and which circulated

widely on social media) was the following: prior to the appointment of the current acting CEO of the RAF, the RAF had in July 2019 called for preparation for the hand-over of its files by panel attorneys. This was done in terms of clause 14 of the SLA's then in place. This aspect was addressed in paragraph 83 of the RAF's answering affidavit in the urgent application. Diale Mogashoa Inc's response thereto in its replying affidavit was that this aspect was not in dispute but was irrelevant. During the debate of the urgent applications, counsel for Diale Mogasoha Inc indicated that Diale Mogashoa Inc had indeed responded to this notice, which response had prompted a flurry of correspondence between it and the RAF before the then proposed hand-over was suspended in September 2019. In my judgment I had erroneously in paragraph 3.11 thereof (and in paragraph 6.6) stated that none of the Applicants had done anything in respect of this historical demand for return of the RAF's files. The relevant paragraph/s of the judgment should have read: "*... save for Diale Mogashoa Inc, who had engaged with the RAF in a flurry of correspondence ...*". Nothing turns on this as it in any event deals with a situation prior to the extension of the SLA's and prior to the cancellation of the advertised tender. The point still remains that no file was ever returned by any of the Applicants. In my view, this omission had no impact on the remainder of the judgment and definitely not on the conclusions reached or the orders granted. There is definitely no reasonable prospect that another court would, on the basis of this omission, overturn the judgment or come to a different conclusion as a result thereof.

4.3 Furthermore, Diale Mogashoa Inc contends that it was improperly lumped together with the Mabunda Applicants in the finding that all the Applicants were in breach of the extended SLA's in respect of all of their failures or refusals to hand over the RAF's files pursuant to notices issued in February

2020 calling for such hand-over .This, Diale Mogoshoa Inc argues, is prejudicial to its interests. Its counsel contended that this might result in the firm being blacklisted in respect of the allocation of government work. This contention, which has not been canvassed in the papers, is insufficient for distinguishing between Diale Mogoshoa Inc and the other Applicants. I have dealt with the issue of breaches of the SLA's in paragraph 3.3 above. The comments made there are equally applicable to Diale Mogashoa Inc. Whether the Applicants (all of them) are in breach or whether Diale Mogoshoa Inc, on its unilateral construction of the extended SLA and by reason of its belatedly alleged unlawfulness, deems itself not bound by the terms thereof, it would still not be entitled to interim relief. Diale Mogashoa Inc, would remain obligated to return the RAF's files as ordered in terms of its counter-application. This point therefore does not constitute a basis upon which leave to appeal against the orders made should be granted. Insofar as a finding of a breach of contract formed part of the reasoning to arrive at the court's decision, that is not in itself appealable. See: Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd 1948(3) SA 353 (AD) to which the RAF's counsel had referred me to.

4.4 On behalf of Diale Mogashoa Inc it was further argued that its application differed in its slant of attack on the extended SLA's from that of the Mabunda Application. The argument is that this slant, primarily the contention that the extended SLA's were "unlawful" and therefore, all calls by the RAF for return of its files could not be enforced, was not sufficiently separately dealt with in the judgment or considered by the court. The factual chronology of events as set out in the judgment has not been attacked. I find that on the facts, whatever angle or slant they are looked at, there is no reasonable prospect of success on appeal available to Diale Mogashoa Inc, whether treated separately or jointly with the other

Applicants. The point which I had dealt with in paragraphs 5.4 to 5.6 of the judgment still has no answer. The reasoning set out in paragraph 4.3 above again illustrates this: whether the files are to be returned in terms of the SLA's, or whether the files are to be returned once the SLA's lapse through the effluxion of time or whether the SLA's are, as contended by Diale Mogoshoa Inc unlawful, Diale Mogoshoa Inc has no right to refuse to hand the RAF's files back to it. There is no scope for a finding of a reasonable prospect of success of an appeal against this inevitability, whatever the slant put on the facts.

4.5 In respect of the counter-application, Diale Mogashoa Inc contended that the order requiring the return of all files within 7 days was contrary to what the RAF had demanded. This is not entirely correct. The RAF had in its counter-application demanded compliance with its hand-over notice whereby the return of files was staggered in tranches at certain dates and only in respect of the first tranche, it demanded delivery within seven days, having regard to the time already elapsed since its notice dated 20 February 2020. In the letter of demand itself however, the first tranche's dates, referring to cases with trial dates from 1 June 2020 to 31 December 2020, were from 21 February 2020 to 13 March 2020. The order which I granted on 27 February 2020 ordered Diale Mogashoa Inc "*to comply with the RAF's hand-over notice of 20 February 2020 and, insofar as any time period mentioned therein may already have expired, then within seven days from date of this order*". It was therefore only the first tranche's inception date which could notionally have been affected by the order, but the expiry date thereof of 13 March 2020 remained unaffected. There is therefore no merit in this point.

4.6 Based on Diale Mogashoa Inc's incorrect interpretation of the order, it was argued that it was impossible to hand over all of the RAF's files within seven days of the order and moreover impossible to obtain expert opinions within seven days. As already indicated, only files in respect of the trials enrolled for the second half of the year had to be handed over by 13 March 2020. Although the SLA's required the panel attorneys to furnish the RAF with their opinions as to merits (and quantum), the RAF did not contend that the attorneys had to obtain opinions of experts within the hand-over dates if they had not yet done so previously. In respect of files where those opinions had not yet been obtained, the panel attorneys could simply inform their client (the RAF) thereof, in the same fashion as any other attorney would do when a client asks for return of his file. This aspect has definitively been dealt with in paragraph 6.2 of the judgment and does not raise such a prospect of success on appeal that leave to appeal should be granted. The lack of substance of this point is further illustrated by the fact that where files had been returned to the RAF in response to their demand notice, by attorneys who were not applicants in these applications, those matters had become settled by the RAF.

4.7 Diale Mogashoa Inc, both in its notice of application for leave to appeal and in heads of argument filed on its behalf complained about the fact that I had used the word "nonsense" when referring to the contention that it was not possible for the attorneys to return the RAF's files to it. This aspect was dealt with in paragraph 6.6 of the judgment were I made reference to the conduct which any client might expect from a responsible attorney. In the written heads of argument, reference was made to certain Namibian judgments, the references of which are not relevant, which held that words of similar nature should not be used in court papers. These findings where however made in the context where in answering affidavits in those cases

"*various epithets such as 'malicious'…*"; "*dishonourable conduct*"; "*fraud*"; "*nonsense*" and "*foolishness*" without supporting evidence have been gratuitously used by a deponent. Whilst I agree with those sentiments, they are a far cry from the present instance. Our appeal courts have, when appropriate, used the word "nonsense" to describe a version or argument which has insufficient foundation. See, for example Nkabinde v S [2017] 4 All SA 305 (SCA) at [20]; Hall v Welz (4960/94) [1996] ZASCA 147 (27 September 1996) where the court of appeal even described a contention as "patent nonsense" and Gihwala v Grancy Property (Pty) Ltd [2016] 2 All SA 649 (SCA) at [89] where a contention was described as "palpable nonsense". In any event, even if another court might use a different word, I am of the view that neither the usage of the word nor the contention it referred to is of such a nature that it would satisfy the requirements for the granting of leave to appeal.

4.8 Diale Mogashoa Inc in argument reiterated their rights to a fair tender process. These have been considered in the judgment and neither those rights, which would arise once such a tender process resumes should the review of the cancellation of the tender be successful, nor the right of review itself have been compromised by the absence of an interim interdict in the terms claimed. I am of the view that there are insufficient prospects of success on appeal for a contrary view.

[5] Recusal?

5.1 Almost three weeks after their initial notice of application for leave to appeal and scant four days prior to the hearing of the applications for leave to appeal, the Mabunda Applicants delivered "Supplementary Grounds of Appeal" by way of a further notice.

5.2 In this supplementary notice, the allegation was made that I had during April 2019 attended a meeting with the RAF at its invitation. It was further alleged that at the meeting I had expressed views prejudicial to the panel attorneys and support for the RAF's intended restructuring "and/or perceived model of costs containment". Further complaints were raised regarding my attendance at a meeting with the RAF's acting CEO in September 2019. Based on these allegations, the Mabunda Applicants contended that, had I disclosed my attendance at the April 2019 meeting, a recusal application would have followed. The Mabunda Applicants further contended in the notice that I had been "legally disqualified from presiding" over the urgent applications.

5.3 The RAF complained bitterly about the fact that the above allegations were not made under oath, nor made by way of a formal application for recusal. This denied the RAF from the opportunity to deal with these allegations.

5.4 Mr Mokhari SC, who appeared together with Ms Lithole for the Mabunda Applicants, despite relying on the above grounds set out in his clients supplementary notice, conceded that he had not engaged with his clients on the issue nor enquired from them which of them had also attended the April 2019 Meeting.

*5.5* On behalf of Diale Mogashoa Inc, despite the fact that this ground had not been raised in a formal notice, Mr Tsatsawane SC who appeared together with Mr Tisani, submitted the following in their written submissions: *"Whilst the applicant (Diale Mogashoa Inc) has written to the Judge President to complain about Justice Davis' conduct, it has not brought an application for recusal ... Justice Davis is now fully aware of the complaints raised against him in the applicants' letter to the Judge*

*President. It is up to Justice Davis to decide if he is still of the view that he should preside over the matter …".*

5.6 It is unfortunate, if not improper, for a party to raise an issue as important as the alleged perceptions of bias as grounds for recusal of a presiding officer by way of notice only and not by way of a proper applications, supported by affidavits as they had been challenged to do. This creates the risk of incomplete or inaccurate allegations to remain up in the air whilst depriving other parties an opportunity to engage with the allegations, particularly where the factual basis for such perceptions may be in dispute.

5.7 Having said that though, the Constitutional Court in President of South Africa v SARFU 1999 (4) SA 147 (CC) reminded us (judges and litigants alike) that the apprehension of bias may impair confidence in proceedings before a particular judge. At paragraph [35] the Court held that "*a cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts …*".

5.8 After examination of quite a number of authorities, the Constitutional Court at [45] concluded that "*… the test for apprehended bias is objective and that the onus of establishing it rests on the applicant … . for the past two decades the approach is the one contained in a dissenting judgment by De Grandpré J in Committee for Justice and Liberty et al v National Energy Board (1976) 68 DLR (3rd) 716 at 735: '… the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information …'. An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The*

*apprehension of the reasonable person must be assessed in the light of the true facts ...*".

5.9 In similar fashion as in the SARFU – case above, the allegations relied on by the Applicants in the present applications for leave to appeal, were preceeded by correspondence. Not all the correspondence featured formally in the papers and only some were uploaded on the Caselines electronic format. All the parties and their legal practitioners were however aware of the correspondence and references were repeatedly made thereto during the debate of the matters. The correspondence also featured widely on social media and even found its way into the printed media (sometimes erroneously with reference to Dennis Davis, JP and not to me). Not only do the correspondence therefore fall in the category of being in the public domain and notorious among all reasonably well informed participants in the litigation and to persons interested therein, to the extent that judicial cognizance can be taken thereof, but where the Applicants were either the author of or recipients of the correspondence, they can suffer no prejudice if reference is made thereto. (See also in general Hoffman & Zeffert, The South African Law of Evidence, 4$^{th}$ ed, at 417 and further). In short, it would be facetious and contrary to the interests of justice to ignore letters which everyone involved in the applications either wrote or have received but in any event rely on, without referring thereto. In order to deal with the contentions referred to in paragraphs 5.2 and 5.5 above, I shall therefore refer to the correspondence in similar fashion as the Constitutional Court has done in the SARFU – case (above).

5.10 On 2 April 20202 Mabunda Inc addressed a letter to me, claiming the following:

"*The purpose of this letter is to draw to your attention that after the handing down of your judgment the Applicants received information that on the 17th April 2019 a meeting was held at the RAF's (first respondent) Centurion offices in which the first respondent invited the judiciary to attend. We understand that the subject matter that was discussed with the judges in attendance were the panel attorneys' role in the high legal costs incurred by the first respondent and the panel attorneys using the first respondent as a "gravy train" ... the said meeting was without doubt part and parcel of the RAF's attempts to restructure its model of litigation, which culminated in the RAF, per its acting CEO's decision to demand the handover of the files by the panel attorneys and cancellation of the advertised tender, decisions which are the subject of litigation ... . it is alleged that you were one of the judges who attended the said meeting. We understand that during the said meeting you allegedly also offered your views which were adverse and prejudicial to the panel attorneys. By attending the said meeting as alleged, you gained inside knowledge of the RAF's thinking and strategies on how it intends to deal with the panel attorneys ...*".

5.11 On 3 April 2020 the RAF's attorneys responded to this letter by inter alia stating the following:

"*The RAF, being one of the biggest litigants having the majority of matters on the trial rolls daily, in all courts within the Republic, has been part of the NEEC (National Efficiency Enhancement Committee) since its establishment and has*

*been part of the PEEC (Provincial Efficiency Enhancement Committee) since the launch, and continues to engage with all justice stakeholders at that level … . As evident from the agenda and minutes thereof, the meeting was convened by the RAF along the spirit of the engagements at PEEC and was meant to have a discussion on how best the RAF litigation can be pursued and improved taking into account judicial observations and concerns over time. The RAF, its Panel of Attorneys in Gauteng and some Provinces and members of the PTA High Court Judiciary led by Mlambo JP were present. We are instructed that at least all panel attorneys in Gauteng including your firm and some of the firms you now represent were invited to attend this meeting. At the time if RAF was led by Mrs L Xingwana – Jabavu who was the acting CEO. Our client denies that there was any discussion whatsoever about any possibility of a review of the RAF model. In the main and primarily was the need to improve the manner in which the RAF conducts its litigation much to the detriment of the public purse while simultaneously putting a strain on the administration of justice ... we are consequently instructed that your allegation that "the Applicants only received information about this meeting after the application was heard in devoid of any truth … we place on record that if it is your client's case so seek recusal of Judge Davis, this will be vehemently opposed. If those are your instructions, we invite you to bring such an application under oath to enable our client to deal with it instead of writing letters of this nature that invariably find themselves in social media …*".

5.12 On 4 April 2020 Diale Mogasoha Inc wrote a letter to the Judge President of this Division, Mlambo JP, inter alia raising the possibility of requesting "*a re-hearing of the whole matter before another judge*". This was premised on the following paragraphs contained in the letter:

> "*We have now confirmed the following from various sources who are prepared to confirm it under oath: on 17 April 2019, the Fund convened a meeting with its panel attorneys … . The aforesaid meeting was attended by, amongst others, some of the panel attorneys, your Lordship, Ledwaba DJP, Raulinga, J and Davis, J as well as the Fund's representatives. At the aforesaid meeting the aforesaid justices, including Justice Davis, strongly criticized unidentified panel attorneys and expressed the view that panel attorneys use the fund as a "gravy train" (whatever that means) and that from then onwards and in certain instances, costs orders will be awarded against panel attorneys and orders will be made to the effect that panel attorneys should not recover their fees form the Fund …*".

5.13 On 6 April 2020 the Judge President of this Division, Mlambo JP responded to all three abovementioned sets of attorneys in writing, stating, inter alia, the following:

> "*For quite some time even before 2019, the DJPs of the two Divisions have participated in and sometimes chaired numerous case management related meetings with legal practitioners, being members of the attorney's profession (representing panel and plaintiffs' attorneys), local attorneys*

*associations, advocates and their associations as well as RAF representatives. Sometimes the DJPs, especially in Pretoria also met with representatives of the Black Lawyers Association and the National Association of Democratic Lawyers Association. As the JP, I have also attended some of these meetings whenever I was available. Such meetings were also, more often than not, attended by Judges who serve on the Divisional case management committees. Judge Davis is one of those Judges. By nature of these meetings more often than not, no minutes are kept, it being a continuous engagement process. There are instances however, where minutes are kept as was the case with the meeting on 17 April 2019.*

*The meeting on 17 April 2019 is one of the meetings convened to discuss case management – related issues arising from RAF litigation in the Gauteng Divisions. I attended that meeting with DJP Ledwaba, then ADJP Raulinga and Judge Davis, which was convened by the RAF between its panel attorneys and the RAF panel manager and other staff. Minutes of this meeting, circulating on social media platforms, confirm that various aspects of case management were discussed. In particular, the issue of trial readiness certification featured.*

*I can confirm that the termination of the panel attorneys mandate was not discussed at this meeting nor does this issue appear in the circulating minutes. When panel attorneys started raising their concerns with their Service Level Agreements (SLAs), I specifically requested that the Judges*

*be excused from the meeting as this issue had nothing to do the Judiciary. The judiciary was then excused at that point and did not feature in that part of the meeting where those panel attorneys present debated their SLAs with the RAF personnel.*

*Pursuant to the above, and in line with the existing practice dating back some years in both Gauteng Divisions, case management directives were published by ADJP Raulinga for Pretoria. There were case management directives applicable in Johannesburg as well. This was followed by an extensive revision thereof after collaboration between Judges of both Gauteng Divisions. The JP then promulgated extensive case management directives in July 2019, and they are still in force.*

*I must mention for information purposes that in September 2019, the current acting CEO of the RAF arranged a meeting through the DJPs office in Pretoria, to introduce himself. I, the DPJ and Judges of the Pretoria High Court Case management committee, being Raulinga, Sardiwalla and Davis attended that meeting. The new acting CEO of the RAF was accompanied by other executives of the RAF. After the introduction of the incoming acting CEO, he mentioned, in passing that under his leadership, the RAF would be exploring new ways of handling claims but gave no details. This was a very short meeting and no minutes were kept.*

*I can also confirm that the termination of the panel attorneys' mandates was not discussed at this introductory meeting with the new acting RAF CEO.*

*I am cognizant of the current litigation presided over by Judge Davis. It is for this reason that I have taken the liberty to respond to the letters. Judge Davis advises me that Applications for leave to appeal have been files pursuant to the judgment he has handed down.*

*As to the demands and/or requests aimed at the further conduct of that litigation and nay applications ancillary thereto, the normal prescribed procedures in line with the rules of Court and/or other statutory rules should be followed.*

*I regard this response as sufficient and will not enter into any further correspondence regarding this matter. The matter must be ventilated in the correct forum as I state above and not through correspondence*".

5.14 Hereafter I indicated to the parties legal representatives in writing that I will not engage in further correspondence but will deal with whatever disputes arise at the hearing of the applications for leave to appeal.

5.15 In the SARFU – matter referred to above when the Constitutional Court was faced with a similar, but more substantive attack based on an apprehension of bias, the Court also relied on "statements of fact" by the learned Justices after having dealt with the correspondence exchanged.

5.16 As a statement of fact I shall restrict myself to the following: the first time the RAF's proposed "new model" came to my knowledge, was when I, as one of the judges on the particular week's urgent court roll, was faced with the Applicants' applications and the acting CEO's answering affidavits. The "gravy train" comment referred to by the Applicants, is erroneously ascribed to me. For the remainder, I make common cause with the facts stated by Mlambo, JP. I shall, following the example of the Constitutional Court, deal with the remainder of the issues in applying the test for examining the reasonableness of the apprehension of bias and the onus in respect thereof hereunder.

5.17 In applying the test, the weight of a judge's oath and the presumption of impartiality as part of the nature of judicial office is a factor to be taken into account *"... in deciding whether a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased"* (SARFU (above) at paragraph [41]). To this, the Constitutional Court added per Cameron AJ (as he then was) in SA Commercial Catering and Allied Workers Union v I & J Ltd 2000(3) SA 705(CC) at par [16] *"...mere apprehensiveness on the part of a litigant that a Judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable".*

5.18 When one examines the allegations made by the Mabunda Applicants in their supplementary notice and the oral arguments presented on their behalf as well as those contained in the correspondence of themselves and of Diale Mogashoa Inc, including the heads of argument filed on its behalf, the following emerges:

5.18.1 None of the Applicants, all being firms of officers of the court, were prepared to reduce their allegations to statements of oath, despite challenges to do so.

5.18.2 The impression created that I, as a judge, met with one of the parties to the litigation before me to the exclusion of the others, is false and devoid of a factual basis, and this was known to the Applicants.

5.18.3 The "new model" of the RAF, attempting to move away from a litigious model involving panel attorneys, was not on the cards in April 2019, and anything that the acting CEO's predecessor discussed with the panel attorneys at the meeting at that time, was to the exclusion of the judges mentioned, including myself.

5.18.4 On the Applicants' own version on their papers, the conduct of the RAF forming the subject matter of their applications, took place in November 2019 and February 2020.

5.18.5 Any reasonably informed litigant, particularly experienced trial lawyers such as the Applicants, could not have formed a *"reasonable apprehension or suspicion (as a) fair-minded and informed member of the public that the Judge was not impartial"* (in the words of Lord Browne–Wilkinson in R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)) [1999] 1 All ER 577 (HL) as quoted in the SARFU – judgment at paragraph [45].

5.19 In conclusion, I find that the Applicants would not have satisfied the onus on them had they brought a formal application for recusal. It must follow

that the analogous arguments raised by them in their supplementary notice and heads of argument respectively do not amount to grounds upon which leave to appeal should be granted.

[6] In the premises, the Applicants have not satisfied the requirements of Section 17(1)(a) of the Superior Courts Act referred to earlier regarding the prospects of success on appeal. There are no other compelling reasons for the granting of the leave applied for. Accordingly, the applications for leave to appeal cannot succeed and, having regard to the considerations set out above, I find no reason why costs should not follow the event.

[7] Order

The applications for leave to appeal are dismissed with costs, including the costs of two counsel.

Electronically signed
N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 24 April 2020 (by video conferencing)

Judgment delivered: 30 April 2020 (electronically)

APPEARANCES: CASE NO: 15876/2020

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|---|---|
| For the Applicants: | Adv W.R Mokhari SC with Adv C Lithole |
| Attorney for Applicants: | Mabunda Incorporated, Johannesburg<br>c/o Ramaselala MC Attorneys, Pretoria |

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| For the Respondent: | Adv J.A Motepe SC with Adv M Vimbi |
| Attorney for Respondent: | Van Greunen & Associates Inc., Pretoria |

Date of Hearing: 24 April 2020 (by video conferencing)

Judgment delivered: 30 April 2020 (electronically)

APPEARANCES: CASE NO: 18239/2020

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|---|---|
| For the Applicants: | Adv N.K Tsatsawane SC with Adv S Tisani |
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