REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 2022/039100

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

18/05/2023

SIGNATURE DATE

In the matter between:

THE NATIONAL COUNCIL OF AND FOR PERSONS WITH DISABILITIES	First applicant
LAW SOCIETY OF SOUTH AFRICA	Second applicant
and	
THE MINISTER OF TRANSPORT	First respondent
THE ROAD ACCIDENT FUND	Second respondent
THE MINISTER OF HEALTH	Third respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 18 May 2023

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application to compel the second respondent (*the RAF*) to produce documents the applicants contend they need to prosecute Part B of the main application.

[2] The documents sought are listed in the notice in terms of Uniform Rules 35(11), (12), (13) and (14) (*the documents sought*), transmitted by the applicants to the RAF on 15 March 2023 (*the final notice*)[1].

[3] The application to compel is a prelude to Part B of the main application, which is a review of the medical tariffs promulgated by the first respondent (*the Minister of Transport*) on 19 August 2022 in GN R2395 *GG* 46747 (*the impugned tariffs*), which purport to limit the liability of the RAF (to the fees in the impugned tariffs) to pay the private medical costs of road-accident victims.

[4] It is the applicants' case in Part B that the impugned tariffs are unlawful because they are so low that road-accident victims will no longer be able to obtain the care they need in the private sector. They contend that given that the public sector cannot provide this care, either at all or at a sufficient quality or urgency, the result of the impugned tariffs (if they are implemented) will be that many thousands of road-accident victims will die or be permanently disabled. This, so the argument goes,

[1] It was accepted during argument that the notice at Caselines 31-4, which I have termed 'the final notice', lists all the documents sought. It was also accepted that the applicants have satisfied the procedural requirements relating to the filing of rule 30A notices.

renders the impugned tariffs irrational, unreasonable and an unjustified limitation of the rights of access to healthcare and bodily integrity.

[5] The main application is split into a Part A and a Part B: Part A was granted on 15 December 2022 by Tolmay J and has suspended the operation of the impugned tariffs pending the final determination of Part B. In Part B, the applicants seek that the impugned tariffs be reviewed, declared unlawful, and set aside. Part B is pending.

[6] Part B was allocated to me as a special motion for hearing on 11 and 12 May 2023. On 3 April 2023 I posted a widely shared note on the Caselines platform reminding the practitioners of their obligations to file a joint practice note and requesting this to occur as soon as practicable and preferably by 26 April 2023.

[7] On 6 April 2023 ENS, the applicants' attorneys of record, addressed correspondence to my office emphasising that the application is of national importance and outlined the issues broadly. By way of background, I was informed that the matter had previously been case managed by Madam Justice Tlhapi, now retired, and that case management meetings were held on 17 November 2022, 23 November 2022 and 28 November 2022. On 23 November 2022 express undertakings were given and directives were issued in regard to the Rule 53 record for purposes of Part B of the application (the review): the Minister of Transport undertook to file the Rule 53 record by no later than 1 December 2022 (which was done); the applicants undertook to file their request for outstanding documents from the Rule 53 record, if so needed, by no later than 8 December 2022 (which was done); the Minister of Transport undertook to supplement the Rule 53 record, if so required by not later than 15 December 2022 (which was not done timeously but was done on 10 March 2023). I was also informed that Part B was set down by special allocation for an expedited hearing on 11 and 12 May 2023.

[8] ENS requested that a case-management meeting be convened which I convened for 13 April 2023. By agreement between the parties, I granted the following order:

1. Part B of the main application is removed from the roll *sine die*.
2. The applicants shall file their application to compel arising from their Rule-30A notices dated 20 February 2023 and 4 April 2023 ('the application to compel') by 17 April 2023.
3. The applicants' filing of the application to compel before the expiry of the ten-day period stipulated in Uniform Rule 30A(1) in respect of the Rule-30A notice dated 4 April 2023 is condoned.
4. The respondents shall indicate whether they intend opposing the application to compel by 19 April 2023.
5. If any of the respondents oppose the application to compel: 5.1 The respondent(s) shall file its/his/their answering affidavit by 21 April 2023. 5.2 The applicants shall file their replying affidavit, if any, by 25 April 2023. 5.3 The applicants shall file their heads of argument by 28 April 2023. 5.4 The respondent(s) shall file its/his/their heads of argument by 12h00 on 4 May 2023.
6. If none of the respondents oppose the application to compel, the applicants shall file their heads of argument on the date specified in paragraph 5 above.
7. The application to compel is set down for a virtual hearing on 11 May 2023.
8. The parties are released from their obligation to file further papers in Part B of the main application pending the determination of the application to compel.
9. Within five days of the determination of the application to compel, the parties shall attempt to agree to a proposed timetable for the determination of Part B of the main application. If the parties fail to agree, they shall approach this Court for a directive setting out the timetable for the determination of Part B of the main application.
10. It recorded that the second respondent shall indicate by 17h00 on Friday, 14 April 2023 whether it is going to provide the applicants with the documents sought in terms of the applicants' notices in paragraph 2 above.

(*the 13 April order*)

[9] Wednesday, 19 April 2023 passed without the RAF indicating whether it would be opposing the application to compel. The RAF has never filed a notice of intention to oppose. The following day (Thursday, 20 April 2023), the applicants wrote to the RAF stating that the RAF had failed to indicate whether it would be opposing by the deadline, calling on the RAF to file its answering papers on time if it intended opposing, if the RAF intended not to oppose, calling on the RAF to confirm this and to provide the documents sought and warning the RAF that the applicants would seek a punitive costs order if the RAF continued to fail to comply with the timelines set in the 13 April order.

[10] The following day (Friday, 21 April 2023), the RAF's attorneys responded with a holding letter, stating that they were *'await[ing] client's instructions'* and would *'revert accordingly'*. The RAF (and its attorneys) never reverted. Friday, 21 April 2023 was the deadline for filing answering papers. The RAF failed to file.

[11] On Tuesday, 25 April 2023, the applicants wrote to the RAF reminding the RAF that it was in contempt of the 13 April order; putting the RAF on notice in terms of Rule 30A(1) to indicate whether it would be opposing and to file answering papers by 17h00 that day (25 April 2023); and again notifying the RAF that if it failed to comply, a punitive costs order would be sought against it. This letter was accompanied by a formal Rule 30A notice.

[12] The RAF never responded. Instead, it stayed quiet until it served and filed its answering papers at 16h45 on Monday, 8 May 2023 without warning, without filing a notice of intention to oppose, seventeen days late, three days before the hearing and without a formal application for condonation.

[13] The following day (Tuesday, 9 May 2023), the RAF uploaded its heads of argument to Caselines, without serving them on the applicants, five days after the deadline for filing heads and without a condonation application.

[14] Mr M du Plessis SC, representing the applicants in this application, emphasized the obligation on organs of state to fully explain the reasons for their delay and that the bar has been set higher for such litigants when considering granting condonation.[2]

[15] The RAF has failed dismally in seeking and substantiating condonation. To my mind, the common cause facts summarised herein leading up to the 13 April order and those facts relating to the non-compliance of the 13 April order and the blatant disregard of its terms, warrant a punitive costs order. Whether the costs order should be laid at the feet of the CEO of the RAF and at the feet of the chairperson of the board of the RAF, is something which should be considered by the court seized with the hearing of Part B and after further submissions are received which the order I intend granting, will cater for[3]. In my view, the senior office bearers of an important statutory body, should demonstrate a genuine and exemplary commitment to the rule of law, for it is the law that has elevated them to the positions of trust in which they find themselves and it is the law, not any individual, to which they must answer.

[16] I deal with this matter as though condonation was sought and granted. I make it plain that I do so to move this matter forward in the public interest.

The documents sought and their relevance

[17] All the documents sought in the final notice are either specifically referred to in annexure AA1 to the RAF's answering affidavit in Part A, or their existence can be readily deduced from that annexure. Annexure AA1 is a memorandum from the Acting

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[2] *Competition Commission v Yara South Africa (Pty) Ltd and Others* (CCT 81/11) [2021] (9) BCLR 923 (CC) at paragraph 29

[3] *MEC for Health, Gauteng v Lushaba*, 2017 (1) SA 106 (CC) at paras [17] to [19]

Director-General of the Department of Transport to the Minister, of August 2022, requesting that the Minister promulgate the impugned tariffs, and explaining how the tariffs were derived (*the DoT memorandum*).

[18] The DoT memorandum makes it clear that the impugned tariffs were formulated by the RAF with the assistance of various consultants. The tariffs are asserted to have been based on the tariffs of the three largest medical schemes in South Africa (Discovery, the Government Employees Medical Scheme (*GEMS*) and Bonitas). The Minister appears to have approved and promulgated the impugned tariffs having had regard to the DoT memorandum. The RAF, as its central defence to the litigation to date, has claimed that the impugned tariffs are not too low because they are based on the average of the medical schemes' tariffs.

[19] During argument it was suggested that relevance cannot yet be determined as the applicants still need to file a supplementary founding affidavit and the respondents have yet to file an answering affidavit. It was also contended that the RAF is not the author of the decision which is sought to be reviewed and set aside, that the RAF is not the custodian of the record of the decision sought to be reviewed and set aside and that this application has thus been brought against the wrong party.

[20] I deal with these arguments in turn.

Is it premature to determine relevance?

[21] The RAF's answering affidavit in Part A claimed repeatedly that the impugned tariffs are not unlawful because (a) they are the average of the tariffs of Discovery, GEMS and Bonitas and (b) they therefore cannot be insufficient, given that if the private sector is happy to accept these tariffs from medical aids, it should be happy to accept them from the RAF. That was the RAF's argument for why the *prima facie* right claimed by the applicants in Part A – as grounding their case for an interdict to suspend

the regulations pending Part B – did not exist. So, the RAF's case in Part A, is already part of its case in respect of Part B, and centrally so.

[22] Crucially, the claim that the documents sought are not relevant does not apply to the applicants' cause of action based on Rule 53. Part B is a review application of an administrative decision, brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) *alternatively* the principle of legality, to which Rule 53 is applicable.

[23] The content of the Rule 53 record includes *'every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially'*[4] or, put slightly differently:

> '[T]he record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker.'[5]

[24] The RAF's interpretation is contrary to the purpose of Rule 53, which is to effect open, transparent government and the right of access to Courts. As the Supreme Court of Appeal held in *DA v ANDPP*:

> 'In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. … It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair

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[4] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 185.

[5] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC).

> public hearing before a court with all the issues being ventilated, would be infringed.'[6]

[25] The purpose of Rule 53 is to enable the parties to put before the Court all information that is relevant to the lawfulness of the impugned decision. Of importance to the RAF's conduct in this case, are the firm views expressed by the Supreme Court of Appeal in *Kalil v Mangaung*:[7]

> '[W]here, as here, the legality of the actions of [the relevant officials] is at stake it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.'

[26] The documents sought all plainly *'[throw] light on the decision-making process'*. They would explain how the impugned tariffs were apparently derived from the tariffs of Discovery, GEMS and Bonitas, and how they were updated by Deloitte, the Health Monitory Company, and the RAF itself. Documents in the Rule 53 record do not have to be relevant to an issue between the parties – they merely have to shed light on the decision-making process. This must be so as the issues between the parties have not crystalised at the stage of filing the Rule 53 record for at this stage there is still the post-record part of the founding affidavit to be filed, the answering affidavit and the replying affidavit. Differently put, pleadings have not yet closed. Nonetheless it is relevance (in the 'cast light on' sense mentioned above) *to the decision under review*, rather than relevance *to an issue between the parties*, that is the test to be applied in

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[6] *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) paras 37.

[7] *Kalil NO v Mangaung Metropolitan Municipality* [2014] ZASCA 90; 2014 (5) SA 123 (SCA) at para 30.

Rule 53 proceedings, as the following authority demonstrates: In *HSF v JSC*[8]*,* the Constitutional Court held that relevance is *'assessed as it relates to the decision sought to be reviewed'*.[9] The Constitutional Court explained the difference between the determination of relevance under Rule 35 and Rule 53. It said:

> 'It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.'

[27] A Rule 53 record relates not only to the substance of a decision, but it also relates to the process by which it was arrived at. The DoT memorandum and the documents related thereto, formed part of the process of arriving at the decision in issue. That finding forms the basis for what is to be disclosed and hence which may be compelled at this stage in the litigation.

[28] Significantly, it was not suggested that the documents sought would not shed light on the reasoning (perhaps inseparable from the process of such reasoning) behind the tariffs.

[29] The RAF claims that *Johannesburg City Council*[10] is authority for the proposition that the Rule 53 record includes only the documents that served before

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[8] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC). *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26 at paras 35 to 36. The Constitutional Court quoted the above paragraph from its judgment in *HSF v JSC* with approval.

[9] *Id* para 26.

[10] *Johannesburg City Council v The Administrator Transvaal* 1970 (2) SA 89 (T).

the decision-maker. The claim is incorrect. *Johannesburg City Council* expresses a more nuanced proposition:

> '[The Rule-53 record] does, however, include all the documents before the Executive Committee [the decision-maker] **as well as all documents which are by reference incorporated in the file before it**. Thus the previous decision of the Administrator, and the documents pertaining to the merits of that decision, could not have been otherwise than present to the mind of the Administrator-in-Executive-Committee at the time he made the second decision. If they were not, he could not have brought his mind to bear properly on this issue before him, which is of course denied by the respondents.'[11] (emphasis provided)

[30] Even if it is accepted that it is only the then Minister of Transport who is the decision-maker in this case, all the documents sought are referred to in the DoT memorandum, which was addressed to the Minister of Transport and which was signed by him. *Johannesburg City Council,* in the passage quoted, is thus express authority for the proposition that the documents sought fall within the Rule 53 record.

The claim that the RAF is not in possession of any of the documents

[31] The RAF makes the following claim in its heads of argument (without reference to the answering affidavit).

> 'The Fund is not in possession of the documents which are sought to be produced except the revised tariff, which is the tariff in dispute and it already forms part of the papers filed of record.'

[32] It must thus be taken to be a claim by counsel, apparently on instructions. But it is a submission that appears to have been incautiously advanced (which is understandable but not excusable given the pressure placed on counsel to file heads of argument at the eleventh hour). The claim that the RAF does not possess any of the documents sought is not borne out in the papers: In the RAF's response to the

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[11] *Id* at 92

final notice the RAF asserted that there was only one category of documents that was not in its possession: the *'input'* received by Deloitte *'from various stakeholders, including [GEMS], Bonitas and Discovery'* referred to in para 4 thereof. The RAF expressly *did not claim* that it was not in possession of any of the other documents sought. In the answering affidavit, the RAF confirmed the letter and the letter limits the category of documents not in the RAF's possession to the input documents. Mr Letsoalo, the RAF's CEO, twice stated that *'[the RAF] is not in possession of the documents which it has already said it is not in possession of '*, and later that it *'stands by that response'*.

[33] The documents sought are the only documents that the applicants are aware of that would show how the impugned tariffs are supposed to have been derived from tariffs of the three large medical aids. Without these documents, the applicants (and this Court) cannot interrogate the proposition. The applicants and this Court would be assessing the lawfulness of the impugned tariffs in the dark without the foundation documents which the RAF says it relied on in building the new tariff.

Entitlement to the documents in terms of rule 35 of the Uniform Rules of Court

[34] I have already found that the applicants are entitled to all the documents in terms of rule 53, save for those listed in paragraph 4 which are not in the possession of the RAF. It is thus unnecessary to consider whether the applicants are also entitled to the documents under rule 35 and I need say no more about this.

Section 173 power

[35] If it were assumed that rule 53 can only require the person whose signature appears on the relevant instrument to produce the record, then Rule 53 is not the only empowering legal instrument upon which the Court can rely in exercising a power to compel production of relevant (in the sense discussed above) documents. This Court

relies on its inherent power under section 173 of the Constitution to regulate its own processes to require the RAF to disclose documents that unquestionably form part of the Rule 53 record, and which happen to be in the hands of the RAF. These documents may show that the impugned tariffs have a rational relationship to the tariffs of the three large medical aids, which relationship is, so far, the primary defence to the review. In Part B, the applicants seek relief on a final basis that is of public importance: the reviewing and setting aside of the impugned tariffs, which the applicants assert pose a danger to the health and lives of impecunious road-accident victims. It is thus important for this Court to be properly appraised of the basis for the tariffs. In Part A, the applicants satisfied Tolmay J that they have *prima facie* prospects of success in the review. That appears to have been a decision justifiably arrived at. Tolmay J further refused leave to appeal, on the basis that there were no prospects of success. In the light of the above Part B cannot be said to be frivolous or without foundation.

Conclusion

[36] The applicants' document request is specific and well-directed. It seeks specified categories of documents that are either referred to in the DoT memorandum, or the existence of which can be deduced from the memorandum. The RAF will have a full opportunity to respond in its answering papers in Part B. The RAF is an organ of state which is bound by constitutional values of openness and transparency and must produce the documents which underpin the decision.

Costs

[37] The RAF has refused to disclose relevant documents that it has a clear obligation to disclose. A pattern emerges from the conduct of the RAF: the RAF's default reaction to a letter or a notice appears to be to simply ignore it. It ignored the applicants' letter of 2 February 2023 requesting the remaining documents in the Rule-

53 record. It ignored the first Rule 30A notice. It ignored the Rule 35 notice until compelled to do so by the 13 April order. It responded that the RAF would provide the tariff as updated by the RAF's medical department requested in paragraph 7 of the Rule 35 notice and that it was attached to the letter, but it was not. It ignored the applicants' request to provide the one document it undertook to provide in its eventual response to the Rule 35 notice. It ignored the second Rule 30A notice. It has ignored a third Rule 30A notice issued on 25 April 2023 and after the compelling application was launched. Its conduct is not only discourteous and unprofessional, but also the very opposite of rule-abiding. This does not seem to be the fault of its attorneys who were awaiting instructions at times.

[38] It has violated the 13 April order in two ways: firstly, the RAF was required by paragraph 10 of the order to indicate whether it would be providing the documents requested by 17h00 on Friday, 14 April 2023. It only did so at 23h24. Secondly, the RAF was required by paragraph 4 of the 13 April order to indicate whether it would be opposing the application to compel by 19 April 2023. The RAF has never done this.

[39] The RAF is an organ of state with a special obligation to respect this Court's processes.[12] As the Supreme Court of Appeal has explained, per Plasket JA:

> 'As an organ of state, it is required to act ethically, and has failed dismally to do so in this matter. Litigation, said Harms DP in *Cadac (Pty) Ltd v Weber-Stephen Products Co & others*, *"is not a game"*; organs of state should act as role models of propriety; and they may not behave in an unconscionable manner.'[13]

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[12] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82. See also s 165(4) of the Constitution: *'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'*

[13] *Madibeng Local Municipality v Public Investment Corporation Ltd* [2020] ZASCA 157 para 48.

[40] The RAF's behaviour in this interlocutory application appears to be a continuation of its behaviour in Part A – which attracted a punitive costs order from Tolmay J and which she described as *'contemptuous'*.

[41] The RAF has been put on notice repeatedly that a punitive costs order would be sought if it did not meet its interlocutory obligations.[14] It has ignored these warnings.

Order

[42] I accordingly grant the following order:

1. The second respondent ('*the RAF*') shall within five days produce for the applicants' inspection and copying, the documents listed in the applicants' notice in terms of Uniform Rules 35(11), (12), (13) and (14) dated 15 March 2023 except for the category of documents referred to in paragraph 4 of that notice.
2. If the RAF fails to comply with the order in paragraph 1 hereof, the applicants, if so advised, are permitted, insofar as this court's leave is required, to approach this Court, on papers duly supplemented, for an appropriate order.
3. Subject to paragraph 4 hereof, the RAF shall pay the costs of this application as between attorney and client, including the costs of two counsel where so employed.
4. The Court determining Part B may order that the RAF's liability under paragraph 3 hereof shall be joint and/or several with the liability of Mr Collins Letsoalo (the CEO of the RAF) and/or Ms Thembelihle Msibi (the chairperson of the board of the RAF); Mr Letsoalo and Ms Msibi are

[14] Letter to RAF of 2 February 2023 p 31-48 para 10; first Rule-30A notice p 31-50; second Rule-30A notice p 31-53 para 3; third rule-30A notice p 32-2.

each invited to file an affidavit when the answering affidavits in Part B are filed explaining why they should not be held so personally liable and/or joined to these proceedings for this purpose.

5. The RAF's attorneys of record are to bring this order to the attention of Mr Letsoalo and Ms Msibi by no later than 26 May 2023.

I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicants: Adv du Plessis SC and Adv P Olivier
Instructed by: ENSAfrica – Mr D Band
Counsel for the first and third respondents: Not opposing
Instructed by: State Attorney, Pretoria
Counsel for the second respondent: Adv K Tsatsawane SC and Adv B Mkhize
Instructed by: Mpoyana Ledwaba Inc.
Date of hearing: 11 May 2023
Date of Judgment: 18 May 2023