IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NUMBER: 1587612

In the application of:

MABUNDA INCORPORATED and 47 others	1st to 48th Applicants
and	
ROAD ACCIDENT FUND and 433 others	1st to 434 Respondents
and	
THE LAW SOCIETY OF SOUTH AFRICA	1st *Amicus Curiae*
BLACK LAWYERS ASSOCIATION OF SOUTH AFRICA	2nd *Amicus Curiae*

LAW SOCIETY OF SOUTH AFRICA'S REPLYING AFFIDAVIT

I, the undersigned,

JOHANNES CORNELIS JANSE VAN RENSBURG

do hereby make oath and state that:

1. I am the Vice-President of the Law Society of South Africa ("***the LSSA***"), which has been joined as *amicus curiae* in this matter. I was the deponent to the founding affidavit delivered by the LSSA in this matter.

2. The facts contained in this affidavit, save where expressly stated or where the context indicates otherwise, fall within my own personal knowledge and are, to the best of my knowledge and belief, both true and correct.

3. I have read the answering affidavit of Collins Phutjane Letsoalo ("***Letsoalo***"), and set out the LSSA's reply herein. Any allegations that are not directly addressed are not admitted and should be taken to be denied.

INTRODUCTION

Procedural background

4. The procedural background to this matter is somewhat convoluted, and for such reason I consider it prudent, for the benefit of this Honourable Court, to briefly set out the LSSA's involvement in the present proceedings and to contextualize this replying affidavit.

5. In the urgent court week of 17 March 2020, two urgent applications for interim relief were heard before the Honourable Justice Davis. The first was brought by Mabunda Incorporated, under the above case number ("***the Mabunda urgent***

application"). The second was brought by Diale Mogashoa Incorporated under case number 18239/2020 ("***the Diale Mogashoa urgent application***").

6. Both the Mabunda and the Diale Mogashoa urgent applications sought, in Part A thereof, interim interdictory relief pending the finalization of the review applications in Part B ("***the Mabunda review application***" and "***the Diale Mogashoa review application***", respectively).

7. The LSSA and the Black Lawyers Association ("***the BLA***") were admitted as *amici curiae* at the hearing of the Mabunda urgent application, pursuant to their applications to be joined as such. The Mabunda urgent application and Diale Mogashoa urgent application were consolidated for the purposes of judgment by Judge Davis.

8. I might add that because the issues raised in the Mabunda and Diale Mogashoa urgent and review applications affected such a broad cross-section of stakeholders in the legal industry, as well as the public more broadly, the LSSA was well-placed to assist the Court as *amicus*.

9. At around the same time as the above matters were filed, Fourie Fismer Incorporated, and two other applicants, filed an urgent application under case number 17518/20, seeking to review the same decisions which were the subject-matter of the Mabunda and Diale Mogashoa review applications ("***the FourieFismer review application***"). The FourieFismer review application did not include a Part A application for interim relief.

10. Maponya Incorporated, which was the fourth applicant in the Mabunda applications, withdrew therefrom and brought a separate application for leave to

intervene as an applicant in the FourieFismer review application ("***the Maponya intervention application***").

11. The Mabunda and FourieFismer applicants proceeded to file supplementary founding affidavits in their respective review applications. Diale Mogoshoa did not supplement its founding affidavit and relies on its founding affidavit filed in its urgent and review application.

12. Maponya Incorporated has included its substantive grounds of review in its intervention application. The *amici*, being the LSSA and the Black Lawyers Association of South Africa, did not supplement their founding papers in the review application. The LSSA relies upon its founding affidavit previously filed in the Mabunda urgent application. It is unclear whether the BLA will participate further.

13. The RAF has filed a single all-embracing answering affidavit addressing the founding and supplementary founding affidavits in all three of the review applications. It has also incorporated therein the contents of its affidavits in the Mabunda and Diale Mogashoa urgent applications.

14. All of the above review applications, together with an urgent application for interim relief brought by the RAF, are being heard together on 5 May 2020, by agreement.

15. The LSSA considers it prudent to bring to this Honourable Court's attention matters which may well affect the public interest in the review applications. These are not intended to promote the interests of any particular party in the review applications. It accordingly files this reply in response to the RAF's answering

affidavit, only insofar as the answer raises issues which the LSSA believes it is obliged to address in its role as *amicus* in the Mabunda review application.

Summary of the LSSA's submissions in reply

16. This replying affidavit primarily addresses the flawed premise, which is integral to the RAF's new policy direction and its answering affidavit that the services of panel attorneys can be dispensed with given the RAF's declared intent to settle the vast majority of cases directly. The RAF contends that the services of attorneys will only be required in very limited circumstances and that in these circumstances it can rely on its corporate attorneys or the State Attorney.

17. This premise is fundamental to the RAF's case. If it is irrational, the decisions under review cannot be defended.

18. On this score, the RAF has stated as follows:

> ***"First, the cancelation of the tender was in pursuance of the Fund's new policy direction to do away with the current highly litigious model and replace it with a model where litigation is significantly reduced."*** [para 10 of the answering affidavit]

> ***"The Fund has put up statistics showing that in 2018, 99.65 % of claims against the Fund were settled at Court. This means, they ought not to have even reached Court in the first place."*** [para 14]

> ***"Given these statistics, and the fact that it is the Fund that gives an instruction to settle anyway, it makes sense that the Fund should settle those matters itself before they reach Court."*** [para 15]

> ***"Management indicated that where block settlement failed, mediation would ensue. Only as a last resort would the corporate panel be used."*** [para 73]

"I have already indicated that the Fund will litigate only a small number of matters that cannot be settled and only in cases where mediation is unsuccessful. Litigation is the last resort. In this regard, the Fund envisages that the State Attorneys' office will be used for the said litigation." [para 107]

"Second, the Fund is embarking on a model in terms of which claims will be investigated and settle, failing which, they will be mediated. Therefore, it is only a small number of matters that will be litigated." [para 147]

"Second, the Fund seeks to avoid litigation of its matters by trying to settle and mediating before litigation becomes necessary. The contention that the Fund will not be represented at trial presupposes that these matters will be litigated in the majority. This is not the case." [para 171]

"Third, if the Fund does settle these matters before trial and way before the issuing of summons, then it begs the question, why keep panel attorneys? Lastly, there will be a new panel appointed after vetting in accordance with the tender that the Fund intends advertising once approved by the Board." [Para 197]

"I have consistently maintained that the Fund intends settling matters first. Only if settlement fails will they be referred to mediation and only if that also fails will they be referred to litigation either through the office of the State Attorney or corporate panel. In settling matters as aforesaid, the Fund has decided to start with long outstanding matters. Once these are completed, it will then focus on newer matters and target to settle them within 120 days." [para 201]

"The Fund seeks to avoid for matters to reach the stage of litigation. For those that do, the State Attorney will handle them. The corporate panel will also be utilized should there be a need. And state attorneys are there." [para 258]

"I submit that the Fund is embarking on a model that can be described as: Investigate and settle. Mediate the rest and only litigate if it becomes necessary." [para 306]

19. These extracts reveal the following misplaced assumptions:

19.1. The fact that a matter eventually settles at court means that it ought not to have reached court in the first place, and that it could have and should have been settled without reaching court (i.e. without any litigation activity at all).

19.2. Litigation should be the last resort, when attempts at settlement and mediation have failed.

19.3. Litigation and settlement are two separate, unrelated approaches to dispute resolution.

19.4. The need to resort to litigation will be so reduced by the RAF's new model that the services of panel attorneys can be dispensed with.

20. In support of its argument that these assumptions are flawed, the LSSA will demonstrate the following:

20.1. The RAF, like all insurers, has an incentive to drive a hard bargain. This is because it must save money, and moderate the expectations of future plaintiffs. Harder bargaining strategies result in fewer settlements. With respect to the RAF, it cannot be assumed that the RAF will compensate plaintiffs appropriately when it has no incentive to do so.

20.2. In these circumstances, the adversarial approach is necessary to protect the rights of plaintiffs – particularly given the unequal resources of the litigants and the RAF's interest in driving a hard bargain. Settlements are unlikely, because plaintiff attorneys will fight for better outcomes for their

clients, as they should. Plaintiff's attorneys will not capitulate to hard bargains without at least some litigation activity.

20.3. It is usually the pressures and tools of litigation that result in *appropriate* settlements, which adequately compensate plaintiffs and protect plaintiffs' rights. Settlement negotiations break down when parties do not know enough about one another's cases to decide on an appropriate amount to offer or accept. The tools of litigation are unmatched in forcing parties to frame their case, disclose evidence, and engage with the relevant law.

20.4. Accordingly, litigation processes can just as easily be understood as mechanisms for effecting settlements. Filing a summons does not mean that a matter must go to trial – but it does ensure that parties properly formulate and substantiate their cases.

20.5. Road accident matters, in particular, benefit from adversarial litigation processes.

20.6. If the inevitability of litigation activity is accepted, so too must the role of lawyers.

20.7. A less efficient, costlier and more chaotic system will be the result of the RAF's new model, particularly having regard to the manner in which it is proposed to be implemented.

21. The above conclusions are supported by academic literature on the topic of settlement, as well as the experiences of plaintiff attorneys. The LSSA considers both in this affidavit.

THE RELATIONSHIP BETWEEN SETTLEMENT AND LITIGATION

22. The RAF sees settlement and litigation as two distinct processes. They are not. Litigation is *inter alia* a tool for effecting appropriate settlements.

23. There is an extensive body of academic literature, in the fields of law, economics, and game theory, about the relationship between litigation and settlement. The LSSA's entitlement to produce this research as evidence shall be addressed in argument.

24. In this section, I review some of the literature as well as make some observations of my own, under the following headings.

    24.1. The "positive risk" of trial; hard bargaining strategies and repeat litigators (such as insurers); the effect of statutory schemes incentivizing compromise; the effect of the South African cost's regime.

    24.2. The nature of road accident cases;

    24.3. The importance of the discovery process in addressing information asymmetries.

    24.4. The importance of other steps in the litigation process in facilitating settlements.

25. While I do not profess to be an expert in the fields of economics or game theory, the conclusions I extract from the articles discussed below are intuitive, largely self-evident, and supported by the views of plaintiff attorneys canvassed later in the affidavit. They all acknowledge the simple point that an adversarial system is

essential to a fair relationship between the RAF and plaintiffs. Once this is conceded, the role of lawyers cannot be wished away.

The "positive risk" of trial; hard bargaining strategies and repeat litigators (such as insurers); the effect of statutory schemes incentivizing compromise; the effect of different costs regimes

26. In "*Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*"[1] (annexure "***LSSA1***"), the authors characterize pre-trial bargaining as a game with two possible outcomes: settlement through bargaining, and trial, which represents a bargaining breakdown. From an economic viewpoint, bargaining is successful where an efficient solution to the dispute is found at little cost.[2]

27. The authors seek to make predictions about the relationship between certain variables, and the frequency of trials and the likelihood of settlements.[3]

28. Bargaining in the shadow of the law (i.e. settlement negotiations) can be characterized as a bargaining game. This is where it is up to the players to find a division of the stakes acceptable to both of them. Skilful bargainers try to manoeuvre their opponents into accepting an unfavourable distribution of the

---

[1] Robert Cooter, Stephen Marks and Robert Mnookin, The Journal of Legal Studies, Vol. 11, No. 2 (Jun., 1982), pp 225-251.

[2] P 225.

[3] P 226 – 227.

stakes, and convince their opponents that it is in their best interest to do what is in his best interest.[4]

29. In settlement negotiations, everyone has an interest in avoiding a trial. The benefits of avoiding trials include saving on legal costs and not delaying the resolution of the dispute. However, the plaintiff and defendant disagree on how to divide the stakes. There is thus a problem of efficiency and of distribution.[5]

30. If litigants negotiate too aggressively (pursue a "*hard*" strategy), the dispute will be resolved by trial. Therefore, the optimal strategy is to trade off a larger share of the stakes against a higher probability of trial.[6]

31. The authors describe their model in some detail, as well as certain predictions. Of particular relevance is the prediction that repeat litigators, such as insurance companies, will adopt harder negotiation strategies when litigating against parties who are not repeat litigators (such as road accident victims). This is because the repeat litigator must take into account the fact that adopting a harder strategy today will cause its future opponents to adopt softer strategies. In other words, a repeat litigator has an incentive in influencing the expectations of future litigants.[7]

32. The authors also discuss statutory offers to compromise (akin to section 17(3)(b) of the Road Accident Fund Act). They state that their model suggests that such

---

[4] P 228.

[5] P 228.

[6] P 231.

[7] P 241.

schemes reduce the frequency with which suits end in trial, because they effectively tax hard bargaining strategies and subsidise soft strategies.[8]

33. The authors conclude as follows:

> ***"In our model of bargaining in the shadow of the law, a dispute arises over the division of an asset or liability. If the parties can agree on a division of the stakes, then the cost of settling the dispute is low. If the parties cannot agree, then a costly trial will be held which destroys part of the stakes and distributes the remainder. A rational bargainer will trade off the gain from demanding more against the higher risk of a trial. The optimal strategy involves a positive risk of trial. In equilibrium expectations are rational in the sense that no player is surprised by the frequency with which trials occur. Biased expectations, however, are easily incorporated into the model.***
>
> ***...***
>
> ***Our model also has implications for the analysis of institutions for reallocating the payoffs from trial. The institution of offers to compromise creates a subsidy for generous offers and a tax on high demands, thereby increasing the frequency of settlement. If each party bears his own legal fees (American rule), then trial is less risky than it would be if the loser paid the legal fees of both parties. If the expectations of litigants are rational, rather than optimistic, then more trials will occur when trials are less risky (American rule). If the expectations of litigants are optimistic, then more trials will occur when the loser has to pay the winner's legal fees (British rule), provided that litigants are not too risk averse."***[9]

34. This research supports the following propositions:

34.1. The risk of trials drives settlements. The possibility of a trial forces litigants to trade off some of the possible gains of demanding more, against the risks of the trial.

---

[8] Pp 244 – 245.

[9] Pp 246 – 247.

34.2. Repeat litigators (and settlers), such as the RAF, are likely to drive a harder bargain because they have an interest in lowering the expectations of road accident victims.

34.3. Harder bargaining strategies are less likely to result in settlements.

34.4. Statutory schemes relating to offers to compromise are effective at incentivizing settlements, but they can only exist in the context of litigation – i.e. where lawyers are necessary.

34.5. Systems where the loser of a lawsuit pays the winner's costs, such as ours, will result in more trials where litigants are optimistic, and fewer trials (and more settlements) where litigants are pessimistic. As noted above, the RAF is likely to drive a hard bargain, because of the precedent which will be set if it does not. This will encourage plaintiffs to try their luck at trial (they will have relatively optimistic expectations of a trial), and scupper the chances of settlements.

The nature of road accident cases

35. In "*Determinants of in-court settlements: Empirical evidence from a German trial court*"[10] (annexure "***LSSA2***"), the authors attempt to identify factors that have a significant impact on settlement probability using 860 case records from a German trial court.[11]

---

[10] Michael Berlemann, Robin Christmann, Diskussionspapier, No. 155, Helmut-Schmidt-Universität - Universität der Bundeswehr Hamburg, Fächergruppe Volkswirtschaftslehre, Hamburg, (2014).

[11] P 3.

36. The authors considered –

36.1. case-specific factors, such as case complexity or the relevant field of law;

36.2. the judge's role in facilitating settlements, as well as the role of the gender of judges; and

36.3. how procedural aspects affected settlements.[12]

37. While the study is of limited relevance, because of the differences between the German legal system and our own, the authors' finding on traffic law cases is noteworthy. Among other variables, the authors looked at the fields of law in which the sample cases fell, being contract, torts, tenancy, traffic, and "*other*". Of particular relevance, is the finding that traffic law cases settled significantly less than the reference category of contract law. On this, the authors state as follows:

> ***"Because police reports, witnesses and expert opinions typically provide accurate evidence on traffic accidents, the righteous claimant may have comparatively little incentive to give in to a settlement offer."***[13]

38. This is likely to be borne out in the South African context. Road accident cases are not usually legally complicated. In legally complicated cases, litigants may be less certain about how a judge will interpret the law, and more inclined to hedge their bets through a settlement. In road accident cases, once the relevant evidence and expert opinions have been disclosed, the parties are often in a good position to assess the strength of their cases. However, it is nigh impossible to do this without any of the tools of litigation, such as discovery. This is addressed in the next section.

---

[12] P 4.

[13] P 14.

The importance of the discovery process in addressing information asymmetries

39. In "*Litigation and settlement under imperfect information*"[14] (annexure "***LSSA3***") the authors explore certain factors that determine the likelihood of settlement and the settlement amount. In particular, they focus on situations in which in informational asymmetry influences settlement decisions. The authors seek to analyze settlement decisions made with imperfect information using a model where parties are free to determine the size of their settlement offers (as opposed to previous bargaining models which were based on the assumption that parties were not free to determine the size of their settlement amounts, but must rather adopt an externally determined settlement amount).[15]

40. The authors develop a model to study both the settlement demand that a party will make under imperfect information and the likelihood that this demand will be accepted by the other party. In choosing a settlement demand a party will balance two considerations: on the one hand, increasing the demand will be beneficial if the demand is accepted; on the other hand, increasing the demand will reduce the likelihood that the demand will be accepted. The authors show that an informational asymmetry might be an important reason for parties' failure to settle.[16]

---

[14] Lucian Arye Bebchuk, Rand Journal of Economics, Vol. 15, No.3, Autumn 1984, pp 404 – 415.

[15] Pp 404 – 405.

[16] P 405.

41. The authors then use this model to identify how the likelihood of settlement and the settlement amount are shaped by various factors, such as the size of the amount at stake, the magnitude of the parties' litigation costs, and the nature of the parties' information. The authors also apply the model to examine how the likelihood of settlement is affected by various legal rules, such as those relating to the allocation of legal costs.[17]

42. The model developed by the authors assumes that one of the parties to the litigation has some private information about factual issues that is relevant to predicting the outcome of the trial. The authors assume, for the purposes of their study, that this is the defendant, but it could be either the defendant or the plaintiff.[18]

43. The model proposes the following form for bargaining over a settlement amount: The plaintiff chooses a settlement amount and offers it to the defendant on a take-it-or-leave-it basis. The defendant then decides whether to accept the offer. At this point the settlement negotiations end, with or without a settlement agreement. If the defendant has turned down the plaintiff's offer, the plaintiff will have to choose whether to litigate the case (and the model assumes that the plaintiff will do so).[19]

44. The authors then model various scenarios relating to the likelihood of settlement and settlement amounts, before concluding *inter alia* that an "*informational*

---

[17] Pp 405 – 406.

[18] P 406.

[19] Pp 406 – 407.

asymmetry is responsible for the possible failure of parties to settle".[20] This can be alleviated by the rules of discovery. In this regard, the authors state as follows:

> ***"Other legal rules. Turn now to the model's implications for the effects that discovery requirements have on the likelihood of settlement. The law often enables a party to a legal dispute to compel the other party to disclose some pertinent facts in his possession. Assume that the plaintiff in our model can compel the defendant to disclose certain information in his possession. Assume further that this is information that the defendant would not voluntarily disclose out of concern that it might hurt him in a trial. (Otherwise the discovery requirement would have no impact.) Thus, the discovery requirement will likely reduce the informational asymmetry between the parties, and consequently contract the range of the distribution of types. We have seen that a contraction of this distribution will raise the likelihood of settlement (Proposition 5). It thus follows that the discovery requirement will likely increase the probability of settlement.***
>
> ***Finally, the model has implications concerning the effects that changes in substantive legal rules will have on the likelihood of settlement. The model suggests that to assess the impact of a change in substantive law on the likelihood of settlement it is necessary to consider the effect that the change would have on the existence and magnitude of informational asymmetries. Consider, for example, a shift in a certain tort from a rule of strict liability to a rule of negligence; and assume that the only difference between the two rules is that the latter rule requires the plaintiff to prove an additional element - the defendant's negligence. Adopting the negligence rule would thus make the outcome of the trial depend on an additional element concerning which the defendant is likely to have some private information; hence, adopting the negligence rule might well increase the informational asymmetry between the parties, and consequently reduce the likelihood of settlement."***[21] (emphasis added)

45. Finally, the authors conclude as follows:

> ***"The main concern of this article has been the effects of an informational asymmetry on the likelihood of settlement and on the settlement amount. We have shown how the presence of such an asymmetry might influence parties' litigation and settlement decisions, and how it might lead to a failure to settle. Furthermore, legal rules and institutions that magnify the extent to which an informational asymmetry is present might well increase the likelihood of litigation."***[22]

---

[20] P 409.

[21] Pp 413 – 414.

[22] P 414.

46. Therefore, an imbalance of information between parties prejudices the likelihood of settling matters. Where one party has an incentive not to disclose information, the rules of discovery can assist and improve the likelihood of settlement. Discovery cannot take place outside of the context of litigation.

47. The provisions of Sections 19 and 22 of the Road Accident Fund Act, demonstrate the vital role of discovery (which usually only takes place after pleadings are closed) in addressing the information imbalance. Whilst this is the only way for litigants to address the information imbalance in many forms of litigation, the RAF Act has specific provisions aimed at levelling the playing fields early on.

48. This does not detract from the point that, depending on how long from the date of accident the claim is lodged, much relevant information may not yet be available during the 120 days. However, there is nothing to stop the RAF utilising the provisions of Rule 19, if it later emerges that there has not been full disclosure.

The importance of other steps in the litigation process in facilitating just settlements

49. Litigation and the Rules of Court afford litigants various other tools for arriving at a just settlement. Informal dispute resolution does not provide for this. This makes litigation particularly dynamic and suitable for protecting the rights of plaintiffs. For example –

    49.1. pleadings allow the parties to see how their opponents understand the case and the law;

49.2. interlocutory applications such as summary judgments or applications to separate issues allow parties to get a glimpse of the court's view of the case;

49.3. pre-trial conferences encourage parties to *inter alia* explore settlement at an appropriate time, when their cases are properly formulated.

50. In addition, I am advised that settlement agreements cannot be made an order of court if there has been no prior litigation between the parties. This means that where a matter was settled without any summons being filed, the agreement would not be made an order of court, and would not be subject to any judicial oversight. This fatally undermines the RAF's contention that the new system will be less vulnerable to collusion and corruption. The RAF has explicitly recognized the role of judges in rooting out fraud:

> ***"The court continued to state that it was unacceptable that public funds could be dealt with in such a manner by settling a matter without independently assessing the matter in order to determine the cogency of the plaintiff's evidence. Had it not been for the vigilance of the Court, to which I am grateful, the Fund would have incurred R4 600 000 from what is clearly a fraudulent or at best unmeritorious claim."*** [para 88 of the answering affidavit]

51. A further benefit of having a court order in hand is, of course, that it is quicker to enforce than having to sue on an agreement between the RAF and the plaintiff. Suing on an agreement only requires further costs and trouble on the part of the plaintiff.

52. Throughout these proceedings, the parties have referred to judgments which criticize the RAF. The RAF should not respond to this criticism by avoiding the

courts. It should instead welcome such vigilance by the courts, as it purports to do in the extract above, and improve its conduct.

53. Without judicial oversight and the rigours of litigation, the abuses which are unfortunately a feature of RAF litigation will only multiply.

54. I turn now to address the role of judicial oversight of settlements in more detail.

JUDICIAL OVERSIGHT OF SETTLEMENT AGREEMENTS

55. Judges are required to strictly scrutinize settlement agreements in personal injury cases. In this regard, I refer to the "*Directive in Respect of Settlement/Consent Draft Orders, Relating to Personal Injury Matters*", a directive issued in September 2019 by the Deputy Judge President of this court. The directive is attached as "***LSSA4***" but is quoted in full below:

*"**GENERAL***

1. ***No settlement/consent draft order shall be considered by a Judge unless this directive has been fully complied with.***

2. ***Every settlement/consent draft order presented would be interrogated by a Judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which the order is premised are justified in relation to the law, the facts, and the expert reports upon which they are based.***

3. ***Because no evidence is adduced under oath, as might have been presented on trial, the Court may further require that the submissions relied upon should be confirmed by affidavit or oral evidence as more fully stipulated hereunder.***

4. ***In order to facilitate a swift but nevertheless substantive consideration of the settlement consent/draft order and justification:***

4.1. ***Plaintiff and defendant's legal practitioners shall, jointly, prepare and sign a document, styled SUBMISSIONS IN SUPPORT OF SETTLEMENT/CONSENT DRAFT ORDER,***

in appropriate detail, indexed and paginated, where necessary, in which the facts and opinions upon which the agreements are premised, are set out, appropriately cross-referenced to the source documentation relied upon, and the connection demonstrated between the facts and the conclusions in the opinions/reports.

4.2. *Such SUBMISSIONS DOCUMENT, together with the draft order shall be delivered to a Registrar designated by the Deputy Judge President at least a day but not more than 5 days before the trial date for the smooth operation of the Roll Call Court and for the Judge to be satisfied before roll call that the order to be made is justified.*

4.3. *Note that in cases on the trial roll when the SUBMISSION DOCUMENTS are handed to the Court on the trial date, the matter may be removed from the roll and be postponed to a settlement roll for the matter to be finalised if the documents are in order.*

AS REGARDS THE FACTS RELIED UPON

5. *All factual material relied upon by the plaintiff and defendant to reach agreement on -*

5.1 *The liability of the defendant for the accident.*

5.2. *The apportionment of liability for the accident, if any.*

5.3. *The causal connection between the accident and injuries.*

5.4. *The causal connection between the injuries and the medical sequelae.*

5.5. *The causal connection between sequalae and a plaintiff inability to be economically active on the same basis as that plaintiff was prior to the accident.*

5.6. *The amount of the vouched for medical expenses.*

5.7. *The base-line data to provide a basis to compute.*

5. 7 .1 *past and future loss of earnings or earning capacity.*

5.7.2 *the quantum of support actually received from a deceased in respect of dependant's claim.*

Shall be set out in the SUBMISSION DOCUMENT or affidavit as the Court may require.

6. *Factual material and legal submissions made should be supported by the admissible and relevant document which is part of the court file.*

7. *Where disputes of fact have been resolved by agreement, these disputes must be pertinently recorded.*

8. *Regarding General Damages where a sum is agreed as general damages, both legal practitioners shall sign a SUBMISSIONS DOCUMENT in which the figure agreed upon is motivated by reference to the case law, which must be referred to and, where appropriate, copies attached.*

9. *PLEASE NOTE THAT in matters where the total agreed quantum exceeds R5 million the RAF legal officer and/or claims handler or any person duly authorised to give instructions shall in addition sign an affidavit stating that "he/she has personally applied his/her mind to the facts, records and [sic] circumstances of the case and is satisfied that the offer or settlement amount is rational and appropriate."*

AWARDS OF COSTS

10. *In cases where the issue of determination of quantum is separated from the other issues in the matter and those other issues are settled, no order will be granted in respect of the settled issues, unless persuasive submissions are recorded in the SUBMISSIONS DOCUMENT why costs should be awarded.*

11. *No costs on trial shall be allowed in respect of a separated issue becoming settled; costs on the presentation of settlement only may be granted unless there is a justification for such costs.*

12. *The costs of experts fall into two categories:*

    12.1. *The costs of a report shall only be allowed if the report was properly filed on time or if the parties make written submissions that the costs are justifiable.*

    12. 2. *The expert costs of reserving time to attend court to testify (a reservation fee) shall only be allowed, and the only to the extent expressly authorised by a judge, if an affidavit is presented, which affidavit shall contain the prescribed information and contain this declaration:*

    "I declare that I have held myself ready and available to give evidence on [date/s] in the following matters [a list setting out case numbers, parties names, attorneys names and counsels names] and the charge I intend to debit for the day in respect of each matter is [R __ _.]."

MANAGEMENT OF THIS DIRECTIVE

13. This directive may be amended from time to time on notice to the Legal Profession.

14. Legal Practitioners should ensure that they comply.

15. Personnel of the RAF who are held to be culpable for non-compliance shall be reported to the CEO of the RAF for consideration of disciplinary action.

16. Conduct which is held to be obstructive to the speedy resolution of the matter may attract punitive costs orders and also may result in a referral of the persons prima facie responsible therefore, to the appropriate regulatory bodies.

17. Nothing in this directive detracts from any provision of the Practice Manual, and, in particular, the efforts that should be made at the certification stage to settle matters and avoid them being enrolled on the trial roll call."

56. A similar directive exists for the Gauteng Local Division, Johannesburg, and is attached as "***LSSA5***".

57. Such strict scrutiny of settlement agreements serves a number of different purposes:

57.1. It protects against fraudulent or unmeritorious settlements.

57.2. It protects plaintiffs from under-settlements.

57.3. It protects attorneys, and the RAF, from professional negligence claims for under-settlement.

58. Professional negligence claims against attorneys and the RAF for under-settlement are common, particularly when the RAF settles directly with plaintiffs. This is another reason why the block settlements do not and will not work: plaintiff attorneys do not want to expose themselves to such claims. Settling a claim under the eyes of a judge (which now requires fully justifying the settlement)

protects the parties from professional negligence claims, and the plaintiff from under-settlement.

PLAINTIFFS' ATTORNEYS' VALID CONCERNS

59. The LSSA sets out hereinafter the experiences and concerns of members of its body who act in RAF matters on behalf of plaintiffs.

60. In this regard, FourieFismer have attached letters from several plaintiffs' and suppliers' attorney's firms at pages, at pages 269 - 284. To avoid prolixity, they are not reattached here, but I ask that they are incorporated as annexures to these papers.

61. The RAF has dismissed these letters as a "*rant*", but they are anything but. The letters record serious concerns about the block settlement process, which bear out my contentions above.

62. I summarize below some of the salient issues raised by the plaintiffs' attorneys:

    62.1. There are serious problems with recovering payments for plaintiffs from the RAF. In many matters, plaintiffs' attorneys must obtain writs and proceed to advertise a sale in execution date with the sheriff before payment is made. If this is the case when plaintiffs have a court order, it is likely to be even worse when there is no court order in hand because plaintiffs will have to then sue on an agreement, thus incurring even more costs. [**letter from Maritz Smith Inc., pp 269 – 270**]

62.2. Less than 10% of block settlements settle. The balance of matters settles only when panel attorneys become involved. [**letter from Podbielski Mhlambi Inc., pp 272 – 273**]

62.3. Claims handlers are not responsive, and the RAF's administration and organization of block settlement meetings is abysmal. Further, claims handlers are overly rigid in their approach to settlements, not making concessions where they should. Claims handlers are not open to negotiation or cognizant of relevant case law. [**letter from Kritzinger Attorneys, pp 274 – 276**]

63. On 17 March 2020, Spruyt Inc., a firm which acts on behalf of plaintiffs in numerous RAF matters, addressed a letter to *inter alia* the RAF and the Deputy Judge President, a copy of which is attached as "***LSSA6***". A letter in almost identical terms and indicating that it will be confirmed by way of a confirmatory affidavit deposed to once the national lockdown has ended, dated 24 April 2020, and is annexed hereto as "***LSSA7***". The letter records the following:

> *"1. We refer to the above matters, as well as the letters from the Road Accident Fund dated 18 February 2020, 26 February 2020 and 28 February 2020 respectively.*
>
> *2. We confirm that the contents hereof would have been made under oath, but due to the current lockdown restrictions, same has not been possible.*
>
> *3. We confirm having had sight of the various letters addressed to the Road Accident Fund by its current panel attorneys, as well as the urgent applications which are set down on 17 March 2020 and 21 April 2020 with case number 15876/2020 and 17518/2020.*
>
> *4. We have grave concerns over the manner in which the Road Accident Fund intends to handle all matters set down for trial from 1 June 2020 and wish to place the following on record:*

a. *We confirm that we will not allow our clients to be prejudiced by the irrational decision taken by the Acting CEO of the Road Accident Fund, Mr Letsoalo to remove all panel attorneys from 1 June 2020. We confirm that we will proceed to seek allocations on all of our trial matters, irrespective of whether the Road Accident Fund has legal representation or not.*

b. *We, further, confirm that we will seek punitive costs order against the individuals responsible for the delay in the finalization of matters.*

5. *With reference to the letter addressed to the Honourable Court by the Acting CEO, dated 28 February 2020, we wish to point out that the Road Accident Fund does not have the manpower to facilitate timeous finalization of trial matters. For several years now the bulk of matters have been finalized on the day of trial with many of these matters not having opposing experts and/or medico legal reports for the Defendant.*

6. *The Road Accident Fund has consistently shown that it is incapable of preparing for trial in advance.*

7. *The Road Accident Fund has for several years now refrained from appointing claims handlers with an appropriate legal qualification. This being said, the Honourable Court is with respect referred to its own Rules, Directives and the Legal Practice Act, which directs that only attorneys/advocates with right of appearance in the High Court are allowed to appear at the judicial management meetings and trials.*

8. *The Road Accident Fund's intention to make use of internal resources to finalize matters are ill-founded and illegal. The individuals with a relevant legal degree will not have right of appearance by the mere fact that they are not practising attorneys and will, therefore, not be allowed to represent the Road Accident Fund at the judicial management meetings, pre-trial meetings, applications and trials. The claims handlers will further not be allowed to brief counsel to attend to the aforementioned, as this would be contrary to the Legal Practice Act.*

9. *This per se will result in an unnecessary delay in bringing justice and relief to the distraught plaintiffs who have been waiting for several years to have their matter finalized and will result in those Plaintiff's constitutional right in terms of Section 34 being infringed.*

10. *The approach taken by the Road Accident, is in essence a ploy to enforce a blanket postponement by technicality and ambush, by forcing a blanket postponement on the bulk of the matters set down for trial from 1 June 2020. This action will not be entertained and will be vehemently opposed by ourselves on behalf of our clients.*

11. *Plaintiffs who claim compensation from the Road Accident Fund on average wait between 3 – 5 years to have their matter heard in court.*

12. *The Road Accident Fund has made a deliberate election to dispose of its legal representation and cannot at a later stage cry foul due to not being properly prepared to meet its obligation, or being duly represented at trials, pre-trials etc.*

13. *We would lastly like to record our concern with regards to the Road Accident Fund approaching the judiciary without Plaintiff/Plaintiff's Attorneys and/or Counsel being present or notified. This has been confirmed under oath by the Acting CEO, Mr Letsoalo in paragraph 51 of his Answering Affidavit dated 10 March 2020 under case number 15876/2020."*

64. The LSSA has furthermore obtained a letter from Gwabeni Inc., a firm which acts on behalf of plaintiffs in numerous RAF matters, dated 23 April 2020, a copy of which is attached as "***LSSA8***". This will be confirmed in a confirmatory affidavit deposed to once the national lockdown has ended. The letter records the following:

"2. *What the Fund proposes as a new model which will result in them settling offers sooner and avoid protracted litigation which eventually settles on the date of trial is good news we would welcome that. However the proposal and belief that RAF will settle claims within 120 days before summons could be issued in (sic) highly improbable and I will illustrate this with the process that needs to be followed before an offer of settlement can be made by the fund.*

3. *CLAIM LODGMENT AND CONCESSION OF MERITS*

3.1. *The minimum requirements in the applicable regulations for lodgement of a claim are; RAF 1 Form with a medical section completed by a doctor, clinical notes and records, ID copy of claimant, section 19 affidavit and (OAR) Officers accident Report.*

3.2 For RAF to concede merits, extra requirements are needed. They require sketch plan, maps and measurements of the scene, photographs if they were taken and SAPS must have done thorough investigation including obtaining witness statements. SAPS by law do not give out copies of dockets until investigations are complete and until NPA has made a decision if they intend to prosecute anyone in relation to the motor vehicle collision. With lots of pestering, lots of emails, phone calls and several physical attendance to SAPS for investigation to be completed, one would be lucky to get access to full docket contents within 6 months of contact with SAPS for these documents.

3.3 The earliest possible opportunity therefore for RAF to consider to settle Merits in claims could be when full dockets contents are made available which in the scenario above is estimated to be 6 months. In the meantime as Plaintiff attorneys nothing preclude us from issuing and serving summons at 120 days. RAF therefore cannot issue offers at this stage until they are in possession of full docket contents. This at earliest can be about 7-8 months after lodgement and possibly after the Plea must have been entered.

3.4. Any prospects therefore that merits can be settled within 120 days of lodgement are very slim.

2. (sic) QUANTUM. We usually investigate quantum simultaneously with merits in passenger claims. To be able to solicit offers on quantum, the following with estimated times frames must have occurred.

2.1. Medical experts require minimum of 9 months from date of the accident from which they are agree to see a claimant to do a medicolegal report. The Maximum Medical Improvement (MMI) must be reached and some experts require full 12 months. The process from making an appointment, medical consultations, report writing and sending it to an attorney takes about 7-8 weeks. You need a first report from an Orthopaedic surgeon and another 6 weeks before securing an Occupational therapist report. Having obtained these two reports you will need another 7-8 weeks again to obtain an Industrial Psychologist report and it is after this process and time periods when you can approach the Fund for the envisaged Mediation or an offer of settlement. The cumulative time periods are about 16 months from date of lodgement and it is only then that you are able to talk about quantum offers. The RAF's

view that it can settle a claim in 120 days is literally impossible if at least 3 medicolegal reports are to be obtained.

3. *It must be noted that litigation in the meantime is in full swing. Notices are exchanged and pre-trial processes such as judicial management meetings, Pre-trial conferences are taking places and in Pretoria High court, about 120 judicial management meetings are held daily and are attended by attorneys who should sign pleadings and have Right of appearance in high courts.*

4. *CLAIMS FOR MINORS AND BIG QUANTUM MATTERS.*

   4.1. *Even in event of the envisaged new RAF Model, offers were to be made within 18 months of lodgement considering time periods mentioned above, a court endorsed settlement agreement is needed for various reasons. First to be able to issue writ of execution when payment is not forthcoming but also a court order is required to create a Trust for the injured person, invest funds with Guardians' Fund, establishment of curator bonis etc.*

   4.2. *Most Plaintiff attorneys do MVA claims on contingency agreements and would not be permissible to claim fees in terms of the contingency agreement if no much litigation took place and a claim was settled soon after close of pleadings. Matters are therefore likely to drag up to few days before trial with constant requests for counter increased offer if it has been offered.*

5. *RAF claim handlers hardly answer phone calls nor do they reply to emails. With RAF having panel attorneys lots of collegial indulgence is given to them when due to lack of co-operation from RAF they do not always comply with court rules and processes. If panel attorneys were to be removed, there will be lots of interlocutory applications that would be made and RAF will have lots of legal costs to pay.*

6. *The belief therefore that claims will settle at 120 days is certainly not practical and even whenever an offer has been made, plaintiff would not simply accept offers which would not be taken to court for a court endorsed settlement agreement. In this regard RAF will always need attorneys.*

7. *I trust the above will be assistive to the Powers That be at the Fund that their belief that claims will settle at 120 days is nearly impossible or that where offers are made plaintiffs will simply accept such offers and courts or attorneys for the Fund are no longer needed."*

65. Other members of the LSSA share these views. Therefore, the experiences of plaintiff attorneys mirror the findings of the academic literature referred to above, and give extra insight into the practical impossibility of settling RAF matters within 120 days.

66. In summary, litigation is an essential component of just settlements. This is particularly so where there is such an imbalance between the parties, and where the RAF has such a vested interest in driving down the value of settlements. In this context, the adversarial litigation process is essential to protecting the rights of plaintiffs. If this is the case, lawyers must always play a central role.

67. The reality is that the panel attorney model cannot be dispensed with. The RAF's relationship with, and need to retain, attorneys is on-going. For the new model to be rational one needs to be satisfied that the decision to dispense with panel attorneys will indeed result in the improved functioning of the RAF and save costs (as this is its stated objective). There is no evidence to this effect:

    67.1. Firstly, the RAF needs attorneys as a matter of law. It cannot conduct litigation without them. The RAF recognizes this, but contends that attorneys will seldom be needed (and when they are needed, the RAF has said that it will use the State Attorney or its corporate attorneys).

    67.2. Secondly, corporate attorneys are still "*panel attorneys*" – albeit presently engaged with different aspects of the RAF's functions. This immediately undermines the proposition that the problem is with the panel attorney model. In fact, the only difference between using the RAF's corporate attorneys and panel attorneys under the SLA are that corporate attorneys are far more expensive and less experienced at RAF litigation.

67.3. Thirdly, the problem with housing RAF attorneys at the State Attorney is that this plan was only first raised with the State Attorney on 3 March 2020 and requires much to be done before it is finally implemented. The prospect of the State Attorney employing 60 new attorneys in the short term is unrealistic. This would require interviews and assessment of potential candidates, besides the time it will take to prepare these attorneys to take over matters which are before the Courts. A large organ of state setting up a proxy attorney's office at the State Attorney is unlikely to be a quick and easy affair.

67.4. Fourthly, the State Attorney plan (such as it is) also involves the RAF paying the costs of offices, administration and all other related expenses. It is not rational to take on the costs of offices, administration and other related expenses when panel attorneys would ordinarily bear those costs.

68. There is therefore no rational link on the papers between dispensing with panel attorneys and the envisaged saving of costs and improving the functioning of the RAF (this appears from the 6 March 2020 letter sent by the RAF to the State Attorney). This is especially so when panel attorneys can simply be briefed less, or instructed to do what the RAF wants them to do under its new vision - at highly favourable rates, and without the capital and operating costs of running an office.

THE HANDOVER PROCESS IS NOT RATIONAL

69. As the decision to do away with panel attorneys is not rational, the decisions effecting that decision cannot be rational or lawful either. However, the handover decision is irrational in its own right.

70. Of concern to the LSSA is the demand that all files with trial dates from 1 June 2020 in the possession of all panel attorneys dealing with RAF matters be handed over. It affects every single matter (not set down before June) being litigated by the country's biggest litigant, many of which involve society's most vulnerable members.

71. To withstand scrutiny, there must be a rational relationship between the objects of the handover decision and the means selected to achieve them. The means selected to achieve the handover decision are a staggered handover of "*all unfinalized files*" which have trial dates from 1 June 2020. The proposed handover schedule was as follows:

72. DELIVERY PERIOD	73. FILES TO BE RETURNED
74. 21/02/2020 – 13/03/2020	75. Files with trial dates between 01/06/2020 and 31/12/2021
76. 16/03/2020 – 10/04/2020	77. Files with trial dates between 01/01/2021 and 31/12/2021
78. 13/04/2020 – 30/04/2020	79. All outstanding files

80. The RAF has stated that there are 6646 matters on the June to December 2020 roll, which it demanded were handed over in the three weeks between 21

February and 13 March. That is 6646 matters with looming trial dates which would require urgent and active attention as soon as they arrived. That is 6646 matters which previously occupied scores of attorneys' firms, each employing numerous people, each with institutional knowledge of the matters, and each with the administrative capabilities necessary to run an attorney's practice.

81. Clause 14.7 of the standard SLA which is concluded between the RAF and the panel attorneys envisages a future relationship with attorneys. Who would handle this tidal wave of legal work from 1 June 2020 at the RAF in their absence? Who would fill the vacuum? The RAF has given the court the following "update on its back-up plan":

"UPDATE ON THE BACK-UP PLAN

103. I had already indicated in the Fund's supplementary affidavit that SAMLA was appointed in three provinces. Dr Edeling has now confirmed that in all matters that SAMLA has attended to, have been successfully settled. The matters not only settled but settled at lower quantum than claimed by the claimants in those matters. I must mention also that one of the Directors of SAMLA is the retired Judge Claassen.

104. I can now confirm that the MOU I referred to in the Mabunda application has since been signed. In fact, had it not been for the lockdown, the pilot project would have commenced already. I note that the applicants in this review application have criticized the MOU as being a draft and that in any event, it is a pilot of 100. They allege that this would not be enough to deal with the sheer amount of matters on the roll on a monthly basis.

105. I can confirm that this being a pilot project, if successful will be rolled out to other provinces. I can confirm further that the Fund has received support from other mediation support services who have indicated their willingness to assist the Fund in its mandate. Further, the plaintiff attorneys are on board to assist the Fund in this regard. I attach hereto an email received from Mr. Jonathan Moss as annexure "CL12". He is willing to make himself available for mediation.

106. I have no doubt there will be teething problems with the change to the new model. Those however will be attended to with determination until the new model is fully functional and well-oiled.

Of importance is that the Fund will learn from the challenges and fix them in order to build a more sustainable Fund that works for those it is meant to support: the claimants. In this regard, neither the applicants nor the Courts can trench into the exclusive terrain of the executive in this regard and force the Fund to retain this costly litigious method.

107. *I have already indicated that the Fund will litigate only a small number of matters that cannot be settled and only in cases where mediation is unsuccessful. Litigation is the last resort. In this regard, the Fund envisages that the State Attorneys' office will be used for the said litigation. When I deposed to the answering affidavit in the applications mentioned above, the Fund had met with the senior attorneys in the office of the State Attorney.*

108. *Subsequent to the hearing of Part A in those applications, the Fund has made leeway and reached an agreement agreed with the newly appointed Solicitor General, Mr. Fhedzisani Ronald Pandelani ("the Solicitor General") that the Fund can use the State Attorney. A memorandum of agreement is in the process of being finalized for signature in this regard.*

109. *In this regard, the Minister of Justice and Constitutional Development, and the Minister of Transport were scheduled to meet on 16 April 2020 to discuss the agreement. It is envisaged that the Fund will employ 60 officials within the office of the State Attorney before 31 May 2020. The Fund's panel of employment agencies has curriculum vitae of various admitted attorneys. Interviews will be scheduled and concluded after the lockdown restrictions are lifted. These are not to be confused with the 255 employees sought to be employed within the Fund.*

110. *The Fund has also indicated that where there is limited litigation, the corporate panel may be used. I have also indicated that there are attorneys on the corporate panel that are on the panel that is the subject of this application and that expires on 31 May 2020. Maponya attaches the SLA for the corporate panel as annexure "BRR19".*

111. *The applicants have criticized this panel as being expensive and will defeat the purpose of the decision to dispense with panel attorneys and therefore irrational. I pause to mention that the Fund itself did not go out on tender for the corporate panel. The Fund participated in the contract through the South African Civil Aviation Authority in accordance with Regulation 16A.6.6 of the Treasury Regulations. This is the reason that the fees for the corporate panel are different to what the applicants charge. This is however offset by the fact that there will be substantially reduced litigation and they will therefore be used sparingly.*

> ***112. The SLA for the corporate panel ends in September 2020. There are therefore only five (5) months left on this contract. The Fund is busy with the advertisement of the tender for the new corporate panel. In this regard, the fee structure that will be set in that tender will be those currently charged by the applicants. This corporate panel will be increased to approximately 20 firms. The applicants are free to apply for this tender. The Fund will however insist on the vetting of all the firms appointed to that panel possibly by the State Security Agency to ensure that they have not involved themselves in inter alia fraud and corruption.***
>
> ***113. The advertisement of the tender for the corporate panel was submitted for consideration and approval by the Board but it has not yet placed it on its agenda."***

82. This boils down to very little, and is far from the "***detailed handover plan which could be substantiated and implemented***" which was demanded by the Board of the RAF on 27 February 2020. The RAF has attempted to downplay the chaos that will ensue on 1 June 2020, but if this is still the extent of its plan, the situation is truly alarming.

83. These matters will be left without the involvement of qualified attorneys, save for those that can be accommodated by the RAF's 8 corporate firms or the yet-to-be employed new attorneys. Inevitably, they will be under-settled, over-settled, postponed, or lost when they shouldn't be. It is unconscionable for this to befall the most vulnerable people in society, who have inevitably suffered great injury and trauma.

84. The proposed handover process therefore bears no relationship to its goal of facilitating a smooth handover. For starters, it is not a "handover" in the sense of handing over the files to new attorneys. It is a return of files to a client. In the absence of a feasible plan to instruct new attorneys, there is no court process or further steps in the litigation that could take place.

85. It would make far more sense to phase out panel attorneys as and when their matters run out, or to implement the handover in the opposite sequence: i.e. for matters set down further in the future or not yet set down to be handed over first. Instead, the RAF has demanded that the most numerous, urgent, and demanding category of files is handed over first, when the RAF is less prepared to deal with them than it ever will be. The explanation that the longest outstanding matters must be handed over first is not rational, because this entails causing the most disruption to the matters which are closest to trial. These matters can still be settled through the panel attorneys.

86. The breach notice sent to Panel Attorneys exacerbates the potential for a disastrous outcome. It is a perfect storm. The overwhelming number of Panel Attorneys has not adhered to the handover notices - understandably so given the foreseen catastrophic consequences of doing so. Instead they brought urgent applications to stay their effect.

87. I turn now to address any outstanding allegations in the RAF's answering affidavit, to the extent necessary and to the extent that they are relevant to the LSSA as *amicus*.

AD SERIATIM **REPLY**

88. Ad paragraph 10 - 11

88.1. The new policy is irrational because it will bring about results which are contrary to its intention – i.e. increased costs and dysfunction. It is also executed in an irrational manner. The LSSA has dealt with this aspect in detail in its papers in Part A.

88.2. The decision to cancel the tender falls foul of Regulation 13 of the PPFA regulations. The RAF cannot show that panel attorneys are no longer needed, for the reasons set out above and elsewhere in the parties' affidavits.

88.3. In fact, the stated aim that there will be a new panel of attorneys appointed after vetting in accordance with the tender that the RAF intends advertising once approved by the Board, indicates that there is still a need for the appointment of panel attorneys (albeit now described as "*corporate panel attorneys*"), and the cancellation of the tender cannot pass constitutional muster.

88.4. The second limb of Regulation 13 relied upon by the RAF – i.e. "*funds are no longer available to cover the total envisaged expenditure*" – also does not assist the RAF because the funds which are expended on panel attorneys is entirely within the discretion of the RAF. Panel attorneys are paid on an "as-and-when required" basis, and not on retainer.

88.5. The deponent states elsewhere that the minutes of 27 February 2020 are not yet finalized and approved by the Board. This is obviously self-serving, and seriously undermines the allegations contained in paragraph 11 regarding the Board's alleged discussion approving of the cancellation of the tender.

89. Ad paragraph 12

89.1. None of the complaints set out in this paragraph require dispensing with the services of panel attorneys. They require the RAF to properly

implement its vendor rotation system, instruct better attorneys, sanction bad attorneys, and generally manage attorneys more competently.

89.2. The notion that fraud, corruption and irregularities will *decrease* when settlements are being concluded without judicial oversight, is absurd.

90. Ad paragraph 13

90.1. The LSSA greatly encourages any attempt to root out corruption and other irregularities, and offers its assistance in any investigations. But it does not follow that the system is responsible.

90.2. If indeed there are specific panel attorneys who fail in their duties, the RAF has extensive contractual remedies available to it. Besides its contractual remedies the RAF could have brought the unlawful conduct of any particular panel attorney to the attention of the LSSA, which would have reacted immediately. It has not done so.

90.3. This is a deflection from and a deferment of the RAF's responsibility to get its own house in order.

91. Ad paragraph 14 - 16

91.1. It is denied that this is not a PAJA review. A cursory glance at the parties' notices of motion shows that PAJA has been invoked. The parties will argue at the hearing that the decisions constitute administrative action.

91.2. In any event, the decisions are manifestly irrational, for reasons which have been set out in detail.

91.3. The notion that matters which settle ought not to have reached court in the first place is deeply misguided, for reasons which have been set out above. It is the source of the irrationality. Litigation and settlement are intimately inter-related, and are not distinct and separate approaches to disputes.

91.4. 80 – 90% of matters will not settle, *without some litigation activity* – i.e. at least a summons. The statement that this will be achieved, without a resort to litigation is not supported by any evidence in the record produced by the RAF. If anything, many more attorneys than the RAF has estimated will be required. Once this is accepted, there is no rational reason for replacing experienced road accident attorneys, who work at extremely favourable rates, with inexperienced (in terms of road accident work) and expensive attorneys on the corporate panel, who have simply been appointed.

91.5. In regard to the corporate panel attorneys it appears that they were not appointed following the RAF's own procurement processes. They have been appointed by means of the fact that they were on the panel of the South African Civil Aviation Authority, in terms of Treasury Regulation 16A.6.6. They clearly have no experience or expertise in road accident matters.

91.6. According to the RAF new corporate panels will be appointed after vetting in accordance with the tender that the RAF intends advertising once approved by the Board. This completely detracts from the model to

dispense with the services of panel attorneys which underpins the new policy directive.

91.7. Similarly, it makes no sense to set up a proxy attorney's office with the state attorney, which is notoriously strained and disorganized, and to incur the capital costs of doing so too. This is reinventing the wheel.

92. Ad paragraphs 18 – 34

My understanding is that facts have largely overtaken the contents of these paragraphs. The matter is no longer set down during lockdown, and I understand that the RAF has agreed to it being heard on 5 May 2020, along with the related urgent application.

93. Ad paragraphs 35 – 81

93.1. The title of this section is revealing. The Board "supporting" and not reversing a decision to dispense with panel attorneys is not the same as a considered and formal decision by the Board.

93.2. These paragraphs confirm the concern which a perusal of the record highlighted and do not disclose any such decision by the Board to dispense with the services of panel attorneys. It furthermore conflates the decision to dispense with the services of panel attorneys and the decision to cancel the tender. Further legal argument will be presented in this regard at the hearing hereof.

94. Ad paragraphs 82 – 95

As noted above, the LSSA greatly encourages any attempt to root out corruption and other irregularities, and offers its assistance in any investigations. But it does not follow that the system is responsible. This is a deflection from and a postponement of the RAF's responsibility to get its own house in order. It is also a new point taken, that panel attorneys are the reason for losses sustained by the RAF based on fraud and corruption.

95. Ad paragraphs 96 – 102

The allegations of irregularities in the tender are belated and disingenuous. The decision to cancel the tender was clearly related to the decision to dispense with panel attorneys. If the latter is irrational the former must be too. In any event, although the decisions are related, they are formally separate. If there were irregularities in the tender, it could and should have been reissued.

96. Ad paragraphs 103 – 113

96.1. The LSSA notes the fluid nature of the "plans" described in these paragraphs. That the plans are evolving before the court's eyes, only serves to show that they could not have been adequately considered by the Board. The record produced by the RAF does nothing to dispel this concern.

97. The remainder of the allegations contained in the RAF's answering affidavit have been dealt with elsewhere, or addressed in the other applicants' affidavits, or will be addressed by the LSSA in argument.

CONCLUSION

98. For the reasons set out herein, the LSSA prays for the order set out in its notice of motion.

JOHANNES CORNELIS JANSE VAN RENSBURG

I certify, that this affidavit is signed and sworn to, before me, at _____ on this _____ day of **APRIL 2020**, the Deponent having acknowledged that he knows and understands the contents of this Affidavit, the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, having been complied with.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity: