

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

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

16 November 2022

Case no: 30152/2021

In the matter between:

**ABSA TRUST LTD N.O. OBO
FX MBENZE TRUST**

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

Judgment

KHWINANA AJ

INTRODUCTION

- [1] This is an application for costs incurred by the trust in respect of the bond of security for the period 2020 – 2021 and annual trust administration fees for the

period 2012-2020 incurred in terms of section 17(4) (a) undertaking certificate read with paragraph 3 of the court order dated 15 December 2016.

- [2] That interest at a rate of 7% per annum be paid until date of payment and costs at attorney and client scale.
- [3] The issue to be determined is whether the applicant is entitled to costs as the court order does not specify costs.

BACKGROUND

- [4] The Beneficiary was involved in a motor collision on this the 23rd day of January 2012 wherein the beneficiary incurred serious injuries and action was instituted for compensation. The matter was finalised on the 15th day of December 2016 with the following orders:

1.The defendant is to pay the plaintiff the capital amount of R 5 384 5050.00 within three months of this order.

2.The net proceeds of the payments referred to herein as well as the Plaintiff's taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff's attorney legal costs (the capital amount) shall be payable to a Trust, to be established within two months of the date of this order.

3. The Defendant is to provide the Plaintiff with a written undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996.

4. The Plaintiff's attorneys of record (Thomas Mohole Attorneys) shall attend to the creation of an inter vivos trust in order to protect the awarded funds for the exclusive benefit of the claimant.

5. The Plaintiff's attorneys (Thomas Mohole Attorneys) shall keep the monies received as referred to in clause 1 of this order in an interest-bearing trust account for the benefit of the claimant and shall pay over such monies to the trustee of the trust to be created in terms of clause 4 of this order, immediately once the Master of High Court has issued the trustee with the necessary letters of authority.

6. The defendant is to pay the Plaintiff's taxed or agreed party and party costs shall, inter alia, include:-

6.1 the costs consequent upon the obtaining of all medico-legal reports of the Plaintiff's experts, namely:-

Dr Shamley (Neurologist)

Ms N Doorsasamy (Occupational Therapist)

Ms M Adam (Neuropsychologist)

Dr AC Strydom (Industrial Psychologist)

Dr A Mazwai (Neurosurgeon)

Mr Ivan Kramer CC (Actuaries)

6.2 The reasonable and necessary preparation, qualifying and reservation fees, which will inter alia, include the fees in respect of meetings between the Plaintiff's attorneys and the abovementioned experts, excluding the experts, excluding the expert mentioned in paragraph 6.1 above:

6.3 The costs of appointment of the curator ad litem;

6.4 The reasonable fees of the curator ad litem.

[5] A deed of trust was issued which the applicant submits obliges the Respondent to pay the costs of the trustee to render services or supply goods to the beneficiary arising out of the injuries sustained as well as the costs necessary to establish the trust. It is also for costs of the bond of security for the period 2020 – 2021 and annual trust administration fees for the period 2019 to 2020 the invoices being R 92 473.08.

[6] The costs for the trust are R 30 963.75 for the period 2020 – 2021 and the costs for the administration of the trust are recorded as R 61 509.99. A letter of demand was sent to the Respondent on the 27th day of December 2020 after the claims had been lodged without response on the 26th day of November 2020. The Respondent had not paid the Applicant as of the date of the hearing of this matter.

[7] The applicant is applying for a punitive costs order due to the Respondent's failure to comply with the court order and has now forced the trust to litigate.

LEGAL MATRIX

[8] Section 17(4) (a) of the Road Accident Fund, Act 56 of 1996 provides that: "Where a claim for compensation under sub-section (1)- (a) includes a claim for the costs of the future accommodation of any person in hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her the fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the fund or the agent to furnish such undertaking to compensate - (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof or (ii) the provider of such service or treatment directly, notwithstanding Section '19(c) or (d), in accordance with the tariff contemplated in sub-section (4)(b)".

[9] The deed of trust at paragraph 8.2 states as follows that:

REMUNERATION

8.1 The trustee shall be entitled to the costs of the creation of the trust, the appointment of a trustee and the trustee's costs in administration of the Estates Act, no. 66 of 1965, as amended, limited to the prescribed tariff applicable to a curator bonis, as reflected in Government Notice R 1602 of July 1991, specifically paragraph 3(a) and (b) of the Schedule thereto and in Section 77 of the Administration of Estates Act.

8.2 The trustee(s) shall be authorised to recover the remuneration of, and costs incurred by the trustee(s), in administering the undertaking in terms of section 17(4) of the Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Road Accident Fund.

REGISTRATION OF THE TRUST

9. The trustee undertakes to register this trust deed at the office of the Master of the High Court under the Trust Property Control Act 1988 as amended and shall be entitled to settle the costs payable in respect of such registration, out of the income and if necessary out of the capital trust. The costs thereof shall be recoverable in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Road Accident Fund.

ANALYSIS

- [10] The deed of trust was made a court order which is clear and concise in so far as the costs. The costs for the creation of a trust shall be paid by the Respondent under section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
- [11] The administration of the trust is payable from the undertaking certificate provided for by the Respondent as alluded to supra at 8.2 of the deed of trust. The costs incurred have been agreed upon and those of the bond are consequent to the establishment of the trust.
- [12] I must say I agree that the victims of Road Accident Fund matters must not be put out of pocket considering that the fund that has been paid over to them are in relation to injuries sustained. Counsel for the Applicant has referred me to the matter by Yende AJ¹ wherein he says “‘rendering of service or supplying of goods’ cannot be confined only to the admitted liability of the Road Accident Fund for ‘rendering of services’ the provision of which is regulated by a tariff promulgated in terms of the National Health Act. As mentioned above the words ‘rendering of service’ is and/or wide enough to include the rendering of service by a domestic assistant, a curatrix bonis and the establishment and administration of the trust on behalf of the road accident victims. Thus expenses incurred as the consequent thereof are claimable in terms of the

¹ Rabie N.O obo TA Olifant Trust v RAF 40543/2019 [2021 ZAGPPHC 312 (13 May 2021)]

Section 17 (4)(a) Undertaking Certificate issued by the Road Accident Fund and such expenses should be reasonable in the circumstances.

[13] I acquiescence with what has been said in the matter of Rabie, however, the matter before me differs in that the deed of trust succinctly alluded to the costs, and that same falls within the ambit of section 17(4) (a) and that the Respondent must pay the said costs.

COSTS

[14] I have also considered what has been stated by the counsel for the applicant that the Respondent forces the Applicant to litigate in order to enforce the benefits and rights of the undertaking certificate which does not only constitute a financial loss for the Trust but also a total disregard for a court order.

[15] The Respondent has indeed disregarded the court order and ignored the Applicant. As of the date of the hearing the Respondent had not paid nor engaged the Applicant. This court frowns at the conduct of the Respondent which seriously prejudices the victims of road accidents. I have therefore considered the manner in which the matter has been handled and I am persuaded to agree with the Applicant that a punitive cost order is appropriate under the circumstances.

In the result I make the following order:-

1. That the Respondent shall pay the Applicant the sum of R 92 473.08;
2. Interest at 7% per annum
3. Costs of application at attorney and client scale

E.N.B. KHWINANA
ACTING JUDGE OF GAUTENG DIVISION,
PRETORIA

Counsel for Applicant: Attorney K.E Modiba

Attorneys for Applicant: VZLR INC

Date of Hearing: 9th September 2022

Date of Judgment: 16 November 2022

(GAUTENG DIVISION, PRETORIA)

Case No:

BEFORE THE HONOURABLE JUSTICE KHWINANA AJ

On the 12 September 2022 Court 4F

Roll No. 9

In the matter between:

ABSA TRUST LTD N.O FX MBENZE TRUST

APPLICANT

And

THE ROAD ACCIDENT FUND

RESPONDENT

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court, and is submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her secretary. The date of this order is deemed to be 12 SEPTEMBER 2022.

DRAFT ORDER

After considering submission made by Counsel on behalf of the Applicant and reading the papers filed on record an order is granted in the following terms: 0

1. That the Respondent makes payment of R 92 473.08 to the Applicant for costs incurred by the Trust in respect of the bond of security for period 2020 – 2021 and annual trust administration fees for period 2019 - 2020, incurred in terms of the Applicant's Section 17(4)(a) undertaking certificate read with paragraph 3 of the court order dated 15 December 2016, within 10 (TEN) days from date of service of this order.
2. Cost of the Application on an attorney and client scale.

BY ORDER

For the Applicant: Mr. KE Modiba

An attorney with right of appearance appearing as counsel for the Applicant

076 745 0315 / admin@kmodibaattorneys.co.za

Attorneys for Applicant: VZLR INC

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For the Respondent: Unrepresented