

IN THE REPUBLIC OF SOUTH AFRICA



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

CASE NO: 65454/2018

DOH: 12 May 2022

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

.....
SIGNATURE

.....
DATE

R[...] S[...]

PLAINTIFF

And

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH OF THE GAUTENG
PROVINCIAL GOVERNMENT**

DEFENDANT

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 17 MAY 2022

MALI J

INTRODUCTION

1. This is a settlement agreement to be made an order of court as agreed between the parties, nevertheless there are two issues the parties do not agree upon. The first issue of divergence is whether the proceeds of capital amount, after deduction of the Plaintiff's attorney and **own** client costs and interest on unpaid disbursements shall be **taxed**. (own emphasis) The second issue of disagreement is the number of the trustees to be appointed to administer the Trust assets.

SUMMARY OF BACKGROUND FACTS

2. Plaintiff is the mother to the minor child, who became blind because of the defendant's negligence during the birth of the minor child. As a result, the plaintiff lodged the claim for damages. The trial was set for the determination of quantum before this court, for a period 5 weeks.
3. Pursuant to fruitful discussions resulting in extensive and informative argument by both Counsel a draft order narrowing the issues, which took into the account the best interests of the minor child as stipulated in the Children's Act 38 of 2005 was presented before the court. As alluded in the introduction the remaining issues relate to costs and its number of Trustees. The court is indebted to both Counsel and their respective teams.
4. Plaintiff's background per her curriculum vitae attached in the pleadings reveals that she is a 39-year-old single parent. Her highest standard of education is grade 11. Her working experience included having been an operator for 3 (three) years in hair salon. She also worked as a volunteer in two Primary schools for a period of two years where she was involved in cleaning and catering services. It transpired during the arguments that she has other children, she stays with including the minor child.

TAXATION OR NOT OF PLAINTIFF'S ATTORNEY AND OWN CLIENT COSTS

5. Plaintiff's attorney 's submission is that costs between the attorney and own client should not be taxed. Submission on behalf of the defendants are otherwise principally the concern is that the untaxed attorney and own client fees might deplete the proceeds of the capital amount to the detriment of the minor child.

6. It is trite law that the issue of costs is within the discretion of the court. The common law position with regard to those fees which an attorney charges his client for professional services rendered, is that such fees form part of the scale of costs referred to as attorney and own client costs,¹ which is the scale of costs that is envisaged in the definition of normal fees in section 1 of the Contingency Fees Act 66 of 1997. The law regarding attorney and own client costs is relatively well settled. In *Mkuyana v Road Accident Fund*² (4000/2017) [2020] ZAECGHC 73; [2020] 3 All SA 834 (ECG); 2020 (6) SA 405 (ECG) (2 July 2020) the following is stated:

“The point of departure of any enquiry into the enforceability of an agreed contingency fee is therefore the base fee, which the Act requires to be the attorney's normal fee that must be set out in the agreement. What the normal fee is, is clearly defined in section 1 of the Act. It reads as follows: “normal fees’, in relation to work performed by a legal practitioner in connection with proceedings, means the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney and own client basis, in the absence of a contingency fees agreement.”

¹ Coetzee v Taxing Master, South Gauteng High Court 2013 (1) SA 74 (GSJ) at para [12].

² (4000/2017) [2020] ZAECGHC 73; [2020] 3 All SA 834 (ECG); 2020 (6) SA 405 (ECG) (2 July 2020)

On a reading of section 2 and the definition of “normal fees”, in section 1 it is clear that the base fee must be a fee that is reasonable for the services of the legal practitioner. Consistent with the common law position, it establishes “reasonableness” as the standard by which the base fee must be judged. The question is, how is the reasonableness of the fee to be assessed? A reasonable fee is a fee that is fair. A fee is fair if it is appropriate for the work performed by the practitioner and falls within a range of fees that is usually charged for the same work. On a reading of the definition of “normal fees” in section 1 of the Act, this is exactly what the legislature had in mind.”

7. The purpose of incorporating into the enquiry the norms and principles applicable to the taxation or assessment of costs on an attorney and own client scale, is to achieve some measure of consistency and certainty of the amount of the normal fee. In that context, the role played by the principle that the court tariff provides a guide for the determination of the reasonableness of fees an attorney charges his client, can simply be stated as that it provides a yardstick against which the attorney’s normal fee in the contingency fee agreement is to be measured in an overall assessment of the reasonableness of that fee.
8. Without dwelling much on this subject the law as stated above is clear. Furthermore; plaintiff is not knowledgeable in the field of legal fees and legal issues. In the result the involvement of the taxing master as the only official clothed with the powers to enquire into reasonableness of fees is absolutely necessary.
9. Furthermore, at paragraph 5 of the plaintiff’s draft order dealing with non-taxation of costs as discussed above, there is a concerning issue. Paragraph 5 partly read as follows:

*“The proceeds of capital amount, after deduction of the Plaintiff’s attorney and own clients’ costs and **interest** on unpaid disbursements (“the remaining amount”)” own emphasis.*

10. There is a contingency fee agreement then it is not legally permissible, irrespective of what is contained in the agreement for the attorney to charge interest on disbursements. The facts of this case are that the plaintiff is impecunious and has no money. In order to charge interest, the attorney needs to be registered in terms of the National Credit Act 34 of 2005 because the particular term that the attorney relies on in order to get interest brings the agreement within the ambit of that Act. Since the plaintiff is impecunious, the granting of any credit then amounts to reckless lending and is then not enforceable.

THE NUMBER OF TRUSTEES

11. Plaintiff’s submission is that at least one independent professional Trustee who should be properly qualified to administer the Trust assets, and who should ideally be an accountant or an attorney should be appointed. The minor’s guardian should also participate as a co –trustee unless it is undesirable. The basis for this submission is that appointing more than 2 trustees will deplete the award of the minor child as the plaintiff had already indicated that she would like to use the funds also for the benefit of the minor’s siblings.

12. Defendant’s submission is that three trustees should be appointed, one of them an independent professional Trustee qualified to administer the Trust assets, and who should be ideally an accountant or attorney, the minor’s guardian and another trustee. The basis for defendant’s Counsel’s submission in respect of the third trustee is that in the event of deadlock there shall be a neutral trustee.

13. As indicated above the plaintiff is not well educated and appears as if she is not currently working because she looks after the minor child. *In Dube NO v Road Accident Fund*³ my sister Fisher AJ, as she then was in the following paragraphs her order states as follows:

“4. The composition and voting rights of the trustees should such as to avoid deadlock.

7. The composition of the board of trustees and the structure of the voting rights of the trustees should be such that the independent trustee/s cannot be overruled or outvoted in relation to the management of the trust assets by any trustee who has a personal interest in the manner in which the trust is managed.

8. The trust should be stated to have the purposes of administering the funds in a manner which best takes account the interests of the child....”

14. One of the concerns raised by the plaintiff’s counsel was that plaintiff had indicated that she would use some of the award to also cater for the minor’s siblings for whom she is also responsible. Superficially this alone may seem to be a justification to exclude the plaintiff from the decision making process in regard to funds on this basis that this in the best interests of the minor child in respect of whom this litigation has been prosecuted.

15. However, sight must not be lost of the fact that the minor child, albeit having been injured and now entitled to an award which places his estate in a financial position vastly different to that of the rest of his family and indeed the community in which he lives, is still a member of that family and community. The plaintiff, notwithstanding her modest education, has at all times acted in the best interests of the minor child in ensuring that the present litigation was instituted and ultimately successfully prosecuted.

³ 2014(1) SA 577 (GSJ)

16. It would be a poor reflection on her and indeed her family and community were she to be placed in a situation where she would have to be the one to choose between financial comfort on the one hand for one of her children and discomfort or hardship for herself and her other children, all the while living under the same roof.
17. A family, and in particular, the plaintiff's family in the present case was not established or made based on the financial interests of its individual members and the change in financial circumstance for the injured minor has been brought about not through any windfall but rather as a result of tragic injury.
18. It would in the circumstances be wholly unfair for the plaintiff to be placed in such a position. The best interests of the minor child must necessarily be served in circumstances where his guardian is in a position, both emotionally as well as financially, to care for him and his siblings. Sight must not be lost of the fact that in the natural order of things, the plaintiff will predecease both the injured minor and his siblings and when that happens, all they will have is each other. Anything done, ostensibly in the best interests of the minor child but which may have the effect of alienating him from either the plaintiff or his siblings, or of placing anyone of them in a situation where they could be perceived as preferring one over the other should if at all possible be avoided.
19. I am accordingly of the view that it is in the best interests of the plaintiff and the minor that, if the plaintiff is to be a trustee, that 2 (two) other independent trustees be appointed so that any decision that is made, is made by a majority and there is no possibility of any deadlock.
20. Furthermore, having regard to what I have set out in paragraph 16 above, it is to be a specific term of the trust that the trustees must at all times, besides administering the trust property for the benefit of the minor child, do so taking into account the family circumstances in which the minor child lives.
21. In the result the following order ensues;

ORDER

1. The Defendant is ordered to make payment to the Plaintiff, in her representative capacity as mother and natural guardian of the minor child, **A[...]** **R[...]** (“the minor”), of the capital amount of **R9 000 000.00 (NINE MILLION, RANDS)** (“the capital amount”).
2. The interim payment in the sum of **R1 500 000.00 (ONE MILLION FIVE HUNDRED THOUSAND RANDS)** (“the interim payment”) which was made by the defendant in terms of an order of this Court dated 13 August 2021 shall be deducted from the capital amount, thereby resulting in a net capital amount of **R7 500 000.00 (SEVEN MILLION FIVE HUNDRED THOUSAND RANDS)** (“the net capital amount”).
3. The defendant shall pay net capital amount into the Plaintiff’s attorneys’ trust account within 60 days from the date of this order, the details of which account are as follows:

Account holder	[...]
Bank	[...], JOHANNESBURG
Account number	[...]
Branch	[...]
Ref	[...]

4. The net capital amount will not bear interest unless the defendant fails to effect payment thereof within 60 days of the date of this order. In the event of such failure, the net capital amount will bear interest at the *mora* rate of 7.75% per annum (that is 3.5% above the current repo rate of 4.25%, in accordance

with the provisions of the Prescribed Rate of Interest Act, 55 of 1975 as amended by the Judicial Matters Amendment Act, 24 of 2015) calculated from and including the 61st day after the date of this order, up to and including the date of payment thereof.

5. The proceeds of capital amount after deduction of the Plaintiff's taxed attorney and own client costs and unpaid disbursements which will not bear interest ("*the remaining amount*") shall be payable by the Plaintiff's attorney to a trust to be created within 6 (six) months of the date of this order, in terms of the Trust Property Control Act, No. 57 of 1998, as amended.
6. The Trust will have, as its main objective, the control and administering of the remaining amount on behalf of the minor. The Trust instrument shall *inter alia* make provision for the following:
 - 6.1 The minor to be the sole capital and income beneficiary of the Trust;
 - 6.2 The Trust Property to be excluded from any community of property or accrual arising from any valid marriage concluded by the minor;
 - 6.3 The sole purpose of the Trust is to administer the funds in a manner which best takes account of the minor's personal, social and other interests;
 - 6.4 The number of Trustees for the purpose of transacting the business of the Trust shall be three (3) and such number shall not be exceeded or reduced;
 - 6.5 The appointment of at least one (1) independent professional Trustee who should be properly qualified to administer the Trust assets, and who should ideally be an accountant or an attorney. The minor child's guardian should participate as a co-trustee unless it is undesirable;

6.6 The composition of the Board of Trustees and the structure of the voting rights of the Trustee to be such that:

- 6.6.1 The calling and holding of meetings is specified;
- 6.6.2 The taking of all resolutions is properly regulated and recorded in writing;
- 6.6.3 An adequate procedure is specified to resolve disputes between the Trustees;
- 6.6.4 The independent Trustee/s cannot be overruled or outvoted in relation to the management of the Trust assets by any Trustee who has a personal interest in the manner in which the Trust is managed;
- 6.6.5 The remaining Trustees are prevented and/or precluded from acting otherwise than to achieve the appointment of a replacement Trustee, in the event of their number being reduced below that prescribed;
- 6.6.6 To act in a tax efficient way at all times including but not limited to making investments and/or recovering their remuneration and/or costs;
- 6.6.7 No charge should be made by any Trustee in relation to the receipt of the initial payment to the Trust of the proceeds of the litigation.
- 6.6.8 The trust is to account to and to provide a report to the Master of the High Court, Pretoria, on a yearly basis.

6.7 The powers of the Trustee to be exercised with specific reference to the circumstances of the minor child and such to include but not be limited to:

- 6.7.1 The right to purchase, sell and mortgage immovable property, invest and reinvest the Trust capital and/or income; and
- 6.7.2 To pay out so much of the income and/or capital as is reasonably required to maintain the minor, having due regard to the obligations of any person having a duty to support the minor, the minor's requirements, and the purpose of the award of damages.

6.8 The trust shall only be dissolved upon the death of the minor or on order of the court.

7. The trustees shall call for an appropriate taxation of the attorney and own client fees and disbursements to be recovered by the Plaintiff's attorneys.

8. Should the aforementioned trust not be created within the period of 6 (six) months from the date of this order, the Plaintiffs' attorney of record is directed to approach this Court within 1 (one) month thereafter, in order to obtain further directives in respect of the manner in which the remaining amount is to be utilized and preserved in favor of the minor.

9. Until such time as the professional trustee is able to take control of the remaining amount and to deal with it in terms of the Trust Deed, the Plaintiff's attorney of record:

9.1 is authorized to invest the remaining amount in an interest-bearing account with a registered banking institution in terms of Section 86(4) of the Legal Practice Act, for the benefit of the minor, pending the finalization of the creation of the Trust;

9.2 shall be prohibited from dealing with the remaining amount in any other manner unless specifically authorized thereto by the Court, subject to the provisions of sub-paragraph 5.3 hereunder; and

9.3 is authorized and ordered to make any reasonable payment to satisfy any of the minor's needs that may arise and that are required, in the interim, for treatment, therapy, care, equipment or related expenses, from the remaining amount.

10. The appointment of any professional trustee to the trust is subject thereto that the professional trustee furnishes security to the satisfaction of the Master of the High Court.

11. The defendant is ordered to pay to the plaintiff her party and party *quantum* costs on the High Court scale up to 03 May 2022, such costs to also include but will not thereby be limited to the following taxed or agreed costs:

11.1 the costs attendant upon the obtaining of payment of the net capital amount referred to in paragraph 2 above;

11.2 the reasonable costs consequent upon obtaining this order;

11.3 the reasonable costs of the expert reports and addenda reports in respect of which the plaintiff gave notice in terms of Rules 36(9) (a) and (b), namely:

11.3.1 **Dr M Lippert** (Paediatric Neurologist);

11.3.2 **Dr M Vorster** (Psychiatrist);

11.3.3 **Ms E Bubb** (Educational Psychologist);

11.3.4 **Ms M Venter** (Audiologist);

11.3.5 **Ms E van der Merwe** (Speech Therapist);

11.3.6 **Dr L Maron** (ENT Surgeon);

11.3.7 **Dr C van Zyl** (Ophthalmologist);

11.3.8 **Ms J Bainbridge** (Occupational Therapist);

11.3.9 **Ms P Jackson** (Physiotherapist);

11.3.10 **Ms R Rich** (Mobility Consultant);

11.3.11 **Prof D Strauss** (Life Expectancy Expert);

11.3.12 **Ms B Donaldson** (Industrial Psychologist);

11.3.13 **Dr G Versfeld** (Orthopaedic Surgeon);

11.3.14 **Mr L Eybers** (Architect);

11.3.15 **Mr S Sirmon** (Quantity Surveyor);

11.3.16 **Sunninghill Radiology** (Radiologist);

11.3.17 **Ms L Brink** (Actuary);

11.3.18 **Mr G Whittaker** (Actuary);

11.3.19 **Ms G Pagel** (Trust Expert);

11.3.20 **Prof A van den Heever** (Economist)

11.4 the costs of preparing for and securing joint minutes;

11.5 the reasonable costs consequent upon the employment of two counsel, one of whom is to be allowed on the scale of senior counsel, to be determined by the Taxing Master.

12. The costs referred to in sub-paragraphs 11.1, 11.2, 11.3, 11.4 and 11.5 above, shall be paid into the trust account of the Plaintiff's attorneys, Joseph's Incorporated, referred to in paragraph 3 above.

13. The defendant is not liable for the payment of any of the plaintiff's costs incurred in relation to the expert, Dr A Keshave.

14. There is a valid contingency fees agreement.

N P MALI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

REPRESENTANTIVES:

COUNSEL FOR PLAINTIFF:

ADV S FARRELL SC

ADV Y NTLOKO

Instructed by Joseph's Incorporated

COUNSEL FOR DEFENDANT:

ADV M BOFILATOS SC

ADV R LATIB

Instructed by The State Attorney, Pretoria.