REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 15651/2015

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

1/12/2023
DATE

SIGNATURE

In the matter between:

MM obo DM Plaintiff

and

ROAD ACCIDENT FUND Defendant

***Delivered**: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 1 December 2023.*

JUDGMENT

FLATELA, J

[1] The Plaintiff instituted a claim for damages against the Road Accident Fund ("the Defendant") for injuries sustained by DM, her minor child, in a motor vehicle-

pedestrian ("MVP") accident which occurred on 4 October 2013 as a result of the negligent driving of the insured driver. DM was three years old at the time. The Plaintiff instituted this action in her capacity as the mother and natural guardian of the minor child. She instructed Mr. Nico Brits ("Brits") of Brits & Beukes Inc (hereinafter, "the Plaintiff's attorneys") of Delmas to prosecute this claim on her behalf. Mr. Brits then instructed Savage Jooste & Adams Attorneys (hereinafter, "SJA" attorneys) of Pretoria to serve as correspondent attorneys.

[2] By agreement between the parties, the Defendant conceded merits 100% in favour of the Plaintiff's proven damages. The agreement was made an order of Court by Ledwaba DJP on 6 June 2016.

[3] Mr. Thomas Bell ("Bell") from the State Attorney's office appeared for the Defendant. The Plaintiff was represented by Adv. van Dyk with Mrs. Mariette Havemann ("Havemann") from SJA attorneys. I was informed that the loss of earnings claim was settled *inter-parties* in the amount of R 1 086 780.75 (one million, eighty-six thousand, seven-hundred and eighty rands, seventy-five cents). The settlement offer was accepted by SJA attorneys on Friday 24 February 2023.

[4] I was called to determine the quantum of general damages. The parties were unable to agree on what would be fair and reasonable compensation for general damages.

[5] From the settlement offer tendered, the Defendant also offered to settle general damages but the amount offered was rejected by the Plaintiff's attorneys on the basis that it was unreasonable. I was also informed by Van Dyk that the Defendant had increased the offer to R 800 000 (eight-hundred thousand rands), that offer was unacceptable too. Adv van Dyk submitted that an amount of R 1 250 000 (one million, two-hundred and fifty thousand rands) was a fair and reasonable compensation to the Plaintiff for general damages.

[6] An application for the admission of experts' evidence, in terms of Rule 38(2) of the Uniform Rules of Court, was made on behalf of the Plaintiff. I granted the application. I proceeded to hear submissions from counsel on general damages.

Factual Background

[7] The Plaintiff averred that on or about 4 October 2013, at 15h40, DM was walking towards a tuck shop near his home with his ten-year-old brother. He strayed away from his brother and went into the road where he was hit by a passing taxi. The Plaintiff found him lying on the road and bleeding profusely from the left leg and left foot.

[8] The insured driver took him to Bernice Samuel Hospital where he was seen, stabilized, and admitted for a night or two. DM sustained a degloving injury to his left heel. He was then transferred to Witbank Hospital where he had a skin graft to cover the defect. Witbank Hospital admitted him as an in-patient for approximately two months and one week. Whilst in Witbank, the Plaintiff presented DM to Dr. Alastair Lamont, a Plastic and Reconstructive Surgeon who performed over three operations involving debridement and skin grafting to the wound on his left ankle and left foot to treat the injury.

Injuries sustained by DM.

[9] According to Dr. Elmo van Wyk, an independent medical examiner who completed the RAF 4 Form, DM sustained a degloving injury to his left heel and his Whole Person Impairment (WPI) is 7%. The *sequelae* of his injuries are as follows:

9.1 A hypertrophic scar overlying the heel of the left foot.
9.2 Cosmetic scarring of the left foot and left thigh.
9.3 Shortening of the Achilles tendon and thus resulting in an abnormal gait.

The Medico-legal Reports

[10] DM was also examined by several other experts, including but not limited to, orthopedic surgeons, plastic and reconstructive surgeons, radiologists, a neurosurgeon, a clinical psychologist, an educational psychologist, and occupational therapist. His loss of earnings was assessed by an industrial psychologist and quantified by an Actuary.

[11] Save for the reports of Drs Lamont and Van Heerden, both of whom are plastic and reconstructive surgeons, and Dr. Hans B Enslin, the Plaintiff's orthopedic surgeon, none of the other reports from the various experts that examined DM are relevant to the issue before me. DM has already been compensated for the loss of his earning capacity.

[12] Whilst the reports of both Drs Lamont and Van Heerden are relevant, only the Report of Dr. Lamont is discussed. This I do without lessening the importance of Dr. Van Heerden's report, and neither elevating that of his counterpart. These reports are, for the most part, *ad idem,* save to highlight one or two points covered by the one and not the other report, it would be repetitive to discuss both reports. However, the report of Dr. Hans. B Enslin, the Plaintiff's orthopedic surgeon, I discuss in full.

Dr. Hans B. Enslin, an Orthopedic Surgeon

[13] Dr. Enslin noted a severe degloving injury to DM's left heel, which has caused a deformity of his hind foot. At the time of his Report, which was two years after the accident and due to the hardness of the scar and abnormal pressure on the heel, Dr. Enslin observed that the varus deformity of the left heel is already 10 degrees more than the right. He opined that the varus deformity of DM's heel will probably increase as he grows. Dr. Enslin's clinical examination results are as follows:

a. **Left foot and heel-** his gait is with a limp. A varus deformity of his heel is seen with forefoot in a neutral position.
b. **Cosmetic scarring**
    i. **Left heel** – a 6cm x 7cm scar with the extension of 7cm on the dorsum of the foot.
    ii. **Left thigh** – a scar measuring 12cm x 11cm over the anterior aspect of the thigh and four horizontal scars each measuring 4cm.
c. **Radiological examination**
    i. **Left foot –**
        - a 21° varus deformity of the os calcis in respect of the tibia on the left side compared to an 11° varus of the same bone.

- Broadening of the heel is seen.
- Subcutaneous tissue is seen, which is limited to a depth of 1cm on the axial view of the os calcis compared to a 2cm of soft tissue.
- The ankle joint appears normal on the lateral view of the left ankle.

d. Commentary – by Dr. Enslin

i. The nature and extent of the injury by the minor is a severe degloving injury of his left heel, which was accompanied by severe pain, which cannot be accurately verbalized by the patient.

i. The prolonged period of admission and resultant separation from his mother would have been traumatic coupled with the PTSD that would have been occasioned by the accident.

ii. Daily dressings were necessary after the initial debridement the day after the accident. A skin graft was performed, and the result thereof has not been successful. He has a covering of the bone with functions in the tendons of his foot, but he has a varus deformity of his heel and very little subcutaneous cover. He has the potential to develop degenerative changes in his subtalar joint if he is not correctly treated for the varus deformity of his heel.

iii. The Patient's Whole Person Impairment is 2% due to the injury to his left foot subtalar joint without narrowing, but with a varus deformity of the heel.

iv. If he develops arthritis in his subtalar joint, the impairment could increase to 2% of the lower extremity impairment converted to 9% of the whole person. His impairment is of importance because of the malfunction in his hind foot, which will, if he is left untreated, prevent him from performing prolonged standing or walking tasks.

Dr. Alastair Lamont - Plastic and Reconstructive Surgeon

[14] Upon examination, Dr. Alastair Lamont, a Plastic and Reconstructive Surgeon, noted the following scars and/or functional disabilities:

a. **Left thigh.** There is a widespread area of donor skin grafting on the left thigh. It appears as if two areas of grafts have been taken from this site encompassing an area measuring 12cm in a vertical dimension measuring approximately 11cm. These scarred areas represent typical donor sites caused by *"deep spilt"* skin grafts and not *"full thickness"*, as reported by Dr. Van Heerden.[1] These areas have at some time been hypertrophic/keloid, but at present, these scars appear to have softened and are stable.
b. **Left foot.** He has a very deep laceration below the ankle joint on the medial surface of the foot, measuring approximately 6cm in length surrounding suture marks.
c. **Left heel.** Over the back of the left heel is an area of 6cm x 5cm of darkly pigmented skin grafting. This area stretches from the posterior aspect of the weight-bearing part of the heel, up and backward, towards the area insertion of the Achilles tendon into the back of the Calcaneus.
d. **Achilles tendon.** The doctor says that although shortening of the Achilles tendon has been reported, this appears to be fairly limited in that the passive movements of the ankle joint are almost normal with a very slight flexion restriction of approximately 5 degrees. However, he will have a functional shortening of the Achilles tendon as he will tend to walk on the anterior section of his foot, avoiding injury or pressure to the sensitive skin grafting areas further posteriorly. Furthermore, within the skin-grafted area, some scars appear to result from injury to this grafted site, and his mother reports that, at times, this area does suffer light injuries.

[1] The two expert views in this respect are only on diagnosis description terms, leaning towards semantics and are of such immaterial difference that I go no further on them.

e. **Whole Person body Impairment,** as assessed from a plastic surgical point of view, Dr. Lamont finds the Plaintiff's WPI to be at approximately 15%.

[15] Regarding future treatment, Dr. Lamont said:

> "The weight-bearing organ covering the calcaneus on the heel of a normal foot is an extremely specialized organ that cannot be replaced by skin grafting. However, and fortunately, in the Plaintiff's case, not the entire area of the posterior calcaneal covering has been damaged, and due to the expected contraction seen in wounds treated by skin grafting, this area has reduced over time compared to the illustrations provided. Furthermore, as he has not lost the total weight-bearing part of his heel, he could withstand weight on the anterior part of his foot."

[16] He recommended that because of the slight mobility in the fixation of the skin to the calcaneus, it may be possible to bring the weight-bearing area backward by excising part of the pigmented scar. However, he warned that it is not advisable to mobilize the weight-bearing skin and, in so doing, reduce the connection to the inferior surface of the calcaneus. Furthermore, reducing this rather large, scarred area would need to be done with caution and circumspection. It is recommended that the procedure be delayed until DM is of age and can advocate for himself.

[17] In his report, Dr. Van Heerden also opined that the grafted area is amenable to surgical intervention. The scars, however, are permanent and not amenable to surgical intervention. He determined the Plaintiff's WPI to be 11%.

Discussion

[18] Moseneke DCJ in *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as amicus curiae)* [2] stated that:

> "...non-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of a highly personal legal interests that attaches to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak,

[2] 2006 (4) SA 230 (CC) at paras 39 and 41.

illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include "pain and suffering", "disfigurement", and "loss of amenities of life.

...it is important to recognise that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. Guided by the facts of each case and what is just and equitable, courts regularly assess and award to claimants' general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to the successful claimant's patrimony. After all, the primary object of general damages too, in the non–patrimonial sense, is to make good the loss; to amend the injury."

[19] Adv. van Dyk submitted that an amount of R 1 250 000 for general damages is reasonable, whereas the Defendant was only willing to offer R 800 000.

[20] Van Dyk submitted that DM's injury cannot merely be classified as scarring or disfigurement. It is a severe injury resulting in the minor having leg shortening and an ambulating limp. This, counsel argued, can be classified as a severe femur resulting in a leg length shortening together with severe scarring, disfigurement, and loss of proper functioning of the left foot. I do not agree. None of the Plaintiff's expert reports support this submission that the Plaintiff's orthopedic injuries being tantamount to him having suffered a leg shortening or "losing an organ" as counsel put it. According to Dr. Enslin, the Plaintiff's orthopedic surgeon, the injury sustained is a degloving injury of the left heel, leaving behind some severe disfigurement and resulting in DM walking with an abnormal gait.

[21] The Plaintiff's counsel also relied on the experts' consensus of DM's academic difficulties as motivation for the claimed sum. This claim falls within future loss of earning capacity, which DM has already been compensated for. The plaintiff's counsel referred to a number of judgements in support of his submissions none of which I found applicable in this matter[3].

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[3] *Abrahams v RAF* (2014) (-12-1) QOD 7(ECP),*Litseo v RAF* (5637/2016) [2019] ZAFSHC 52;*Morris v RAF* (99303/15) [2018] ZAGPPHC 486;*Roe v RAF* (2009/16157) [2010] ZAGPJHC 19;*Khumalo v RAF* 2006 JDR 0289 (W);*Pietersen v RAF* (08/19299) [2011] ZAGPHC 73*Anthony v RAF* (27454/ 2013) [2017] ZAGPPHC 161.

[22] In arriving at an appropriate award for general damages, the learned author JJ Gauntlett SC in Volume I: General Principles: *The Quantum of Damages in Bodily and Fatal Injury Cases* 4 ed (1995) at 5 referred to the case of *Sandler v Wholesale Coal Supplies Ltd*[4] where the learned Watermeyer JA stated:

> "... [I]t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money...there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations..."

[23] In arriving at the award, I make below, I have paid regard to the cases mentioned in *Mashigo v Road Accident Fund*[5] and the following cases:

Tobi v RAF[6] – general damages were awarded in the amount of R 450 000 (R 730 112.51 in 2023) to a Plaintiff that sustained some scarring to his legs which were unsightly. The Plaintiff was left, not only with scarring to his legs, but with a disfigured and swollen left leg which interfered with various lymphatic functions as well as scarring to his right knee. He received several skin grafts. The general damages awarded to him also considered that his ambulation was restricted, and he could no longer operate as a heavy vehicle driver. On some days, the swelling was so bad that he could not even put on or take off his pants.

Kobeqo v RAF[7] - in this matter a five-year-old girl was struck by a car resulting in a degloving injury of her right lower leg. She suffered loss of the right leg muscle bulk. And she had extensive scarring which she said made her feel "very sad" and "ugly". R 350 000 (R 567 865.28 in 2023) was awarded for general damages.

[24] In *NK v MEC for Health, Gauteng*[8] it was held:

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[4] 1941 AD 194 at 199.
[5] (2120/2014) [2018] ZAGPPHC 539.
[6] (868/2010) [2013] ZAECGHC 94.

[7] 2013 JDR 2270 (GNP).
[8] 2018 (4) SA 454 (SCA) at para 13.

"It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another, across the land. Consistency, predictability, and reliability are intrinsic to the rule of law. Apart from other considerations, the principles facilitate the settlement of disputes as to quantum."

[25] However, this dictum should be read with the principle laid down in *SA Eagle Insurance Co Ltd v Hartley*[9] where it was held that when assessing comparable awards, adjustments should be made to the monetary value of those awards so that they are reflected in present day currency values to recognize the ravages of inflation. But this too is subject to Eksteen J's cautionary note in *Ncama v Road Accident Fund*[10] where he cautioned against reckless inflation of awards by reckless application of the consumer price index. His words were that:

"The Court will generally be guided by awards previously made in comparable cases and will be alive to the tendency for awards to be higher in recent years than has previously been the case. In considering previous awards it is appropriate to have regard to the depreciating value of money due to the ravages of inflation. It would however be inappropriate to escalate such awards by a slavish application of the consumer price index. (See for example ***AA Onderlinge Assuransie Assosiasie Bpk v Sodoms*** 1980 (3) SA 134 (A).)".(Original emphasis)

[26] I have taken the following considerations into account:

a. DM walks with a limp. He wears special soft shoes to help alleviate the pain by providing inner support and comfort for when he is walking about. His regular conventional physical activities for a child of his age are severely limited by his left foot and ankle injury.

b. Physically, DM complains of pain in the left foot occurring a few times a week. He uses Paracetamol syrup three times a week to relieve the pain in his left foot. His walking endurance is limited. He can only run slowly. He does not want to wear shoes. He is self-conscious about the defect of the left foot and can no longer participate in any sporting activities with his friends, whether at home or at school. The intensity of his symptoms has not improved since the accident.

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[9] 1990 (4) SA 833 (A) at 841D – E.
[10] [2014] LNQD 19 (ECP) at para 26.

c. Drs Enslin and Lamont's respective reports each give to an anticipation of the minor experiencing future complications over the total of his lifespan because of the injuries sustained in the accident.

d. The difference in compensation of the sum offered by the Defendant from that which is sought by the Plaintiff is only R 450 000 (four hundred and fifty thousand rands).

e. Holmes J, in *Pitt v Economic Insurance Co Ltd,*[11] cautioned that "*[T]he court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.*"

[27] In the circumstances hereof, I find that an award of R 900 000. (Nine Hundred Thousand Rand) is fair and adequate compensation to the Plaintiff.

Original draft order (1) – 27th February 2023 and its evaluation

[28] Having argued for the above award, counsel for the Plaintiff presented a Draft Order to be made an order of Court. It was submitted that provisions were made for the establishment of a Trust to protect the minor child's award. Having considered the draft order and having engaged counsel for the Plaintiff on the financial implications of a Trust, counsel addressed my concerns. Importantly, he submitted that the establishment of a Trust will not diminish the value of the award as the Defendant will pay all the administration costs of establishing the Trust.

[29] The draft order also recorded that a contingency fee agreement was not applicable. I doubted that this was the case as the Plaintiff's counsel, in support of the establishment of the trust, referred me to the socio -economic circumstances of the minor child's parents, which were, that they are unemployed, indigent, and living in a shack. In the absence of a contingency fee agreement in a matter involving a minor child, I enquired from counsel about the fee agreement that governed the parties. The response was that in the absence of a contingency fee agreement, the parties would

[11] 1957 (3) SA 284 (N) at 287E.

obviously enter into a fee agreement. Van Dyk could not give me a clear answer but assumed that an attorney and own client fee agreement existed. I enquired whether his instructing attorney (who was present in Court) was able to confirm whether there was an attorney and own client fee agreement or not in the absence of a contingency fee agreement. Ms Havemann could not confirm either. She informed counsel that she had no knowledge of the existence of any fee agreement as her firm only served as correspondent attorneys for the Plaintiff's attorneys, Brits Beukes & Ingelyf Attorneys of Delmas.

[30] The Plaintiff's counsel had advised earlier that that the Plaintiff was present in Court and had no issues with the establishment of a Trust for her minor child. The plaintiff was sitting right at the back row with her minor child. I invited her to the witness box so that she could clear up the confusion a fee agreement that is applicable in this matter as both counsel and Ms Havemann had no knowledge regarding this issue, and the Plaintiff's attorney, Mr. Brits was not present in Court to give clear instructions . Counsel advised that the Plaintiff did not understand English, and that no interpreter had been organized for the proceedings. I enquired as to the language she speaks or understands. I was advised that she speaks IsiNdebele but understands IsiZulu. I advised that I was going to speak with the Plaintiff in Isizulu. There was no objection from the Plaintiff's counsel. He called the Plaintiff to the stand to give clarity on the issue.

[31] This invitation appeared to have angered an unknown individual who was sitting in the legal practitioners' row behind RAF's counsel. As the Plaintiff approached the witness stand, this unknown individual, whom I would later come to learn to be one of the Senior Counsel in this division, began talking with the Plaintiff's counsel Van Dyk, using hand gestures whilst the Court was in session. It was clear to me that he had apprehension about the Plaintiff being put on the witness stand, following my directive. On 21 November 2023 the said counsel apologised for his conduct and offered explanation, albeit late. It appeared that senior counsel had an interest in the matter as he was previously briefed and had prepared the heads of arguments. He became unavailable on trial date as he was to commence his duties as an acting judge of this division the following day. I shall shy away from making remarks on his conduct which appeared to be unprofessional.

[32] I adjourned the proceedings for Ms. Havemann to contact her instructing attorney Mr Brits to take clear instructions on the issue of the applicable fee agreement.

[33] When the proceedings resumed, the Plaintiff's counsel informed me that a Contingency Fee Agreement is applicable in this matter and that there was no attorney and client fee agreement in place. He explained that there was a mistake in how this issue was communicated. He apologised for the "mistake" which was recorded in the original draft order that the contingency fee is not applicable. An amended draft order reflecting the existence of the contingency fee agreement was then uploaded on CaseLines.

[34] It is perhaps prudent to explain why this line of enquiry was necessary. In its offer for the settlement, the Fund has caveat which reads as follows : "*This offer is subject to confirmation regarding the Contingency Fee Agreement concluded with the proof of compliance with sec 4 of CPA (Proof should be either two affidavits i.e by attorney and the affidavit by claimant o(not 1 affidavit but both affidavits , alternatively proof of submission of 2 affidavits with the Legal Practise Counsel or proof that both affidavits were filed with the Court and or where there is no Contingency Agreement Fee in place , it must be recorded in the court order. Alternatively, the attorney must submit an affidavit to confirm that there is no Contingency Fee Agreement confirmation regarding the Contingency Fee Agreement concluded with the proof of compliance with sec 4 of the Contingency Fee Agreement Act".*

[35] The consequences which flow from the Fund's insistence to recording of a) applicability of a contingency fees agreement; or b) express exclusion of it; and in either scenario to be so endorsed by a Court. It is common cause that in the first scenario where the contingency fee is applicable, the contingency fee agreement is uploaded on CaseLines or is handed in order for the court to satisfy itself that the agreement complies with the requirements of the Act. On scenario (b) where Contingency Fee Agreement is not applicable this begs the question, whether the Court is then supposed to be satisfied with submission from the legal practitioner

regarding the non-applicability or the invalidity agreement contingency fees' agreement? I think not. I think that the court must satisfy itself that the contingency fee is indeed not applicable, or it is indeed invalid. Ordinarily, where a draft order expressly excludes applicability of a contingency fee agreement, the logical assumption of the Court, in better circumstances where ethical integrity prevailed, as assumed of this noble profession, would have been that an attorney and own client fee agreement applies, and thus no need of further enquiry. Save for the assumption of which I resist to infer, the same declaration of exclusion of a contingency fee agreement was expressly recorded in the draft order of this case too.

[36] It bears to be borne in mind that the majority of RAF Plaintiff are indigent, illiterate and the most vulnerable persons of our society who wholly rely on the ethical integrity of their attorneys to have their best interested represented, This trust, and so has the case law and reasons giving to the statistics of attorneys being either suspended or struck of the roll, has unfortunately now become a coin flipped on its head.

[37] In the first event, wherein it is stated that a contingency fees agreement is not applicable, and for the Fund's comfort, excluded by order of Court, the SCA has held in several judgements that where the parties have agreed on an attorneys and own client fee agreement, the Court has no business in subjecting private contract to a judicial enquiry.[12] The SCA says, unlike in a contingency fees' agreement, an attorney and own client fee agreement is a private affair between the attorney and the client.[13] Furthermore, in the event of the latter taking issue about fees of the former, the Plaintiff has recourse to the Taxing Master if the issue is about fees,[14] or if it is on any other issue, then the Legal Practise Council, as the case may be.

[38] I am bound by the decisions of the Supreme Court of Appeal. I must mention that the facts in this matter are distinguishable from the facts in Majope and Others v The Road Accident Fund and other cases referred in that whilst the counsel for the

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[12] See *Majope and Others v The Road Accident Fund* (663/2022) [2023] ZASCA, para 13 (endorsing T*he Road Accident Fund v Taylor and other matters* (1136- 1140/2021) [2023] ZASCA 64, para 13)
[13] Ibid, para 13
[14] Ibid,

plaintiff informed me that the contingency fee agreement was not applicable, it appeared that the contingency fee agreement not the attorney and client fee agreement was applicable.

[39] On 3 March 2023, Mr Tjaart Nicolaas Brits of Brits & Beukes Attorneys in Delmas, the Plaintiff's attorney of record, filed an affidavit explaining that the contingency fee agreement was applicable and affirmed that it had been explained to the Plaintiff in IsiZulu by Monica Masango and Maria Elizabeth Sibanyoni, both employed in their firm. He stated further that he was previously instructed by the Plaintiff's husband, Jomo Mthimunye to prosecute his RAF claim following a motor vehicle accident that happened on 14 May 2008. Mr Brits was then instructed by Mr Mthimunye to prosecute this claim on 21 May 2008. This claim was successfully prosecuted. He stated that the Plaintiff's husband was aware of the contingency fee agreement as he consulted them both in this matter. Supporting affidavits of the Plaintiff, Mr Mthimunye and that of Ms Monica Masango and Ms Sibanyoni, who purportedly and verbally translated and explained the terms of the Contingency Fee Agreement at the time of signing, were filed on CaseLines in support of the Plaintiff's attorney's explanation.

[40] In her affidavit, the Plaintiff further stated that she was in Court on 14 June 2018 when the merits were settled and the outcomes of the hearing were explained by Mr Buda, the Court's interpreter in IsiZulu. A copy of Mr Buda's invoice was annexed to the Plaintiff's confirmatory affidavit.

[41] I must state that it is concerning that at the trial, there was no interpreter and yet throughout the process, there was an interpreter who was always available to assist the Plaintiff in the translation of the agreements and court proceedings. Not even Ms Masango or Sibanyoni were present on the day of the trial to assist with translation. In any event, what the Plaintiff's attorney did after the fact was what I needed to know from the Plaintiff's counsel during trial. Therefore, this issue should have been noncontentious.

[42] Having reserved judgment, I noticed that the matter had a plethora of issues regarding costs orders that were sought in the draft orders, and these concerned me. I issued several directives to parties' legal address on these issues.

[43] The Plaintiff's counsel submitted that the Contingency Fee agreement was in compliance with the Contingency Fees Act[15] and was valid. I now consider whether the Contingency Fee Agreement complied with the Act.

The Contingency Fees Agreement

[44] In her confirmatory affidavit, the Plaintiff states that Ms Masango explained the whole RAF claims process to her in IsiZulu, her language of choice. Ms Masango further explained that she should not worry about paying the attorney money because he takes money at the end of the case, and only upon him being successful in the prosecution of the claim. She stated that she was happy about the fact that she did not need to worry about paying the attorney because she did not have money to prosecute the claim with her own ability. She was happy to pay the attorney his fees at the end of the trial. The Plaintiff attached the contingency fee agreement annexed as **"MM2"**. She stated that she understood that the attorneys can only take a maximum of 25% of the claim or lesser amount depending on the fees payable.

[45] I have now considered the Contingency Fee Agreement entered into between the Plaintiff and Mr Nico Brits. I find that that the contingency agreement is not in compliance with the provisions of the Act and is, as I shall demonstrate hereunder, invalid, and unenforceable.

[46] Attorneys(not the attorneys in this matter) have expressed in Court that the Contingency Fee Agreement is a complicated contract to understand, and for some obscure reason, of which has also been argued before me with no particular clarity or understanding why, they argue that judgment of Mojapelo J in Masango v Road Accident Fund 2016 (6) SA 508 (GJ) is the source of this complication and/or that the confusion which lies patent to their understanding of the CFA, is attributable to it.

[15] Act 66 of 1977.

Hence then, they favour attorney and own client fee agreements. Others take a softer stance; they say that attorneys and client and own fee agreement are more favourable to the clients' than Contingency Fee Agreements. If one goes further in reasoning, it becomes apparent that this too is also based on a gross misunderstanding of the Contingency Fees Act. I propose to deal first with the legal framework of the Contingency Fee Agreement.

Legal Principles

The Act

[47] The purpose of the Contingency Fees Act was considered by the Supreme Court of Appeal in *Price Waterhouse Coopers Inc. & Others v National Potato Co-operative Ltd.*[16] Southwood AJA neatly summarised the purpose of the Act as follows:

> "The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a "no win, no fees" agreement (s 2(1)(a)) and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)). The Act has detailed requirements for the agreement (s 3), the procedure to be followed when a matter is settled (s 4) and gives the client a right of review (s 5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s 6) and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal. What is of significance, however, is that by permitting "no win, no fees" agreements the Legislature has made speculative litigation possible. And by

[16] 2004 (6) SA 66 (SCA) at para 41.

permitting increased fee agreements the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action."

[48] The dictum in *Price Waterhouse Coopers Inc* has been followed in a number of cases[17] and I need not repeat same. However, I will briefly discuss those principles relevant to this matter.

[49] In *Mfengwana v Road Accident Fund*[18] the court held that:

"Section 2 of the Act is the core of the Act. It makes provision for contingency fee agreements and for the higher-than-normal fee that an attorney may charge to 'offset' the risk of earning no fee in the event of him or her not concluding a case successfully. It provides:

> '(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-
> (a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;
> (b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.
>
> (2) Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.'"

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[17] See: *Mkuyana v RAF* 2020 (6) SA 405 (ECG) and the cases referred to therein.
[18] 2017 (5) SA 445 (ECG) at para 11.

[50] In *Majope and Another v RAF;*[19] Roelofse AJ (as he then was) stated that:

"The Act legalizes services rendered by legal practitioners (i.e., attorneys and counsel) on a contingency basis. Prior to the Act services rendered by legal practitioners on contingency, the common law forebodes. In order for legal services to be rendered on a contingency basis to be legal and enforceable, it must be in terms of a contingency fee agreement that must comply with section 3 of the Act - if not, an agreement to render services on a contingency basis is null and void and unenforceable."

[51] Section 3 of the Act deals with the prescribed form and content of the agreement. It provides:

"(1) *(a)* A contingency fees agreement shall be in writing *and in the form prescribed by the Minister of Justice*, which shall be published in the Gazette, after consultation with the advocates' and attorneys' professions.

(b) The Minister of Justice shall cause a copy of the form referred to in paragraph *(a)* to be tabled in Parliament before such form is put into operation.

(2) A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement.

(3) A contingency fees agreement shall state—

(a) the proceedings to which the agreement relates;

(b) that, before the agreement was entered into, the client –

(i) was advised of any other ways of financing the litigation and of their respective implications;

(ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;

(iii) was informed that he, she, or it will also be liable to pay the success fee in the event of success; and

(iv) understood the meaning and purport of the agreement;

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[19] (308/2021,1309/20) [2022] ZAMPMBHC 37 at para 33.

(c) what will be regarded by the parties to the agreement as constituting success or partial success;

(d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;

(e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;

(f) either the amounts payable or the method to be used in calculating the amounts payable;

(g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;

(h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and

(i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.

(4) A copy of any contingency fees agreement shall be delivered to the client concerned upon the date on which such agreement is signed."

[52] Section 4 of the Act, which deals with settlement and acceptance of settlement offers, provides as follows:

"(1) ***Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court*** **(my emphasis),** or has filed an affidavit with the professional controlling body, if the matter is not before court, stating—

(a) the full terms of settlement;

(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;

(c) an estimate of the chances of success or failure at trial;

(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
(e) the reasons why the settlement is recommended;
(f) that the matters contemplated in paragraphs *(a)* to *(e)* were explained to the client, and the steps taken to ensure that the client understands the explanation; and
(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating—

(a) that he or she was notified in writing of the terms of the settlement;
(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and
(c) his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.' (my emphasis)

Analysis of the Terms of the Contingency Fee's agreement concluded between the Plaintiff and Nico Brits of Brits & Beukes Inc

[53] In this matter, the contingency fee agreement is not drafted in terms of the prescribed form, instead, it is incorporated in a Special Power of Attorney. In this Special Power of Attorney Incorporating the Contingency Fee Agreement, the Plaintiff authorizes and grants power of attorney to Nico Brits of Brits & Beukes Inc "*to prosecute a claim against the Road Accident Fund on her behalf and/or on behalf of minor son. The claim arises from a motor vehicle pedestrian (MVP) accident which took place at Delmas on 04/10/13 to recover and receive on her behalf the capital and "party and party costs" from the defendant in respect of the claim; and deduct the fees and disbursements from the capital amount of the claim before payment of the balance to her.*

[54] As I shall demonstrate hereunder, the incorporation the Contingency Fee Agreement into a special power of attorney as well as the clauses concerning the

Contingency Fee itself, are all together, problematic, invalid and unenforceable. The latter two (invalidity and unenforceability) are not uncommon. Many a times, Contingency Fee Agreements are set aside by courts for this or that other invalid clause which then renders the whole agreement null and void.

[55] Below are the relevant clauses:

"Special Power of Attorney incorporating (Contingency Fee Agreement)

On costs it says:

Costs

3. *The difference between party and party costs and attorney and own client costs has been explained to me.*

4. *I agree to pay fees in respect of the work done by the nominees and / or such person delegated and / or instructed by the firm at the tariff set out herein below.*

And the contingency agreement stipulates

5. Contingency fee agreement.

I will be bound to a ***contingency fee agreement****, the terms of which are as follows:*

5.1. *It is recorded that in the opinion of the nominees there are reasonable prospects that I / we may be successful in the proceedings mentioned hereunder and the nominees therefore undertake to recover no fees from me/ us unless:*

5.1.1. I / we am/are successful in such proceedings; or

5.1.2. The nominees, as set out hereunder, become entitled to a fee in the event of partial success in such proceedings.

5.2. *It is further recorded that before the signing of this agreement I / we was / were:*

5.2.1. Advised of other ways of financing the litigation and of their respective implications, namely normal payment on account as set out in paragraph ***5.5.1 [to] 5.5.12*** *below;* ***(My emphasis)***

=

5.2.3. Informed that I / we will be liable to pay the success fee to the nominees in the event of success. (My emphasis)

5.4. The nominees hereby warrant that the normal fees on an attorney and own client basis to perform work in connection

with the aforementioned proceedings as set out in paragraph 5.10 below. (My emphasis)

5.5. *I / we agree with the nominees that if I / we am / are successful in the aforementioned proceedings:*

5.5.1 An amount shall be payable to the nominees calculated according to the following method:

25% of the amount of money paid out in settlement of the claim subject to the following minimum and maximum parameters whichever is the lesser amount:

- ***A maximum fee of double the nominees' normal charge-out rate plus VAT*** *as set out in paragraphs 5.5.1 -5.5.11 below.* ***(My emphasis)***

5.5.2. ***The parties agree that in the event of*** *the premature termination of the contingency agreement for any reason or* ***the contingency agreement <u>not being enforceable</u> for any reason I / we shall owe the attorney an amount to be calculated according to the fees as calculated as per paragraph 5.5.1-5.5.11 below plus disbursements. (My emphasis)***

And on the computation of fees it said,

FEES

5.5.6 Costing of the work [is / will be] on the following basis:

5.5.7. I agree to fees being charge to me for all work done and attendances including traveling time by a partner or <u>professional assistant of three years or more experience</u> *of the nominees or any other such person delegated or instructed by them at the rate of R925.00 per quarter hour or part there of thereon.* ***(<u>My emphasis</u>)***

5.5.8. *All work done and attendances including travelling time by a candidate attorney at the rate of R375.00 per quarter hour or part thereof thereon;*

5.5.9. I agree that in the event of my mandate to my nominees exceeding 1 (one) year the costs structure per each item set out above, shall increase by <u>12.5% (TWELVE AND A HALF PERCENT)</u> on each anniversary of the date of the power of attorney. (My emphasis)

5.5.10. Any administrative personnel / professional assistant <u>or para-legal assistant</u> will be charged at R300.00 per quarter hour or part thereof thereon. (My emphasis)

and then on disbursements

6. <u>DISBURSEMENTS</u>

***6.1**. Disbursements by the nominees relating to the matter made or incurred on behalf of me / us shall be payable on the presentation of the nominees' account or the presentation of the suppliers' account.*

6.2. I / we agree further that the nominees will be entitled to charge interest <u>at two times the current overdraft interest</u> rate per annum** as levied by the nominees to the nominees' banker from time to time on amounts disbursed by the nominees on my/ our behalf and that interest will be calculated from the time when the payment of disbursements is made until payment by me / us of such amounts. **(My emphasis)

8. Furthermore, and as security for my indebtedness to the nominees** which may arise in respect of the said fees and disbursements, **<u>I hereby cede</u> to the nominees all right, title and interest in and <u>to any proceeds of any claim amount or entitlement paid out or to be paid out by the defendant or the Road Accident Fund</u> which may arise in the prosecution of my / our claim. (My emphasis)

15. I hereby further agree that in the event that a correspondent will be used, in Pretoria or any other place, that I will be liable for all costs and fees incurred on Attorney–client scale**. In the event that a bill of costs is drawn on a attorney-client scale, such bill is to be deducted from any other party-and-party bill that is drawn on to recover the costs and disbursements, between myself and the Road Accident Fund, in the event that this matter is successfully finalized. **<u>The correspondents will be entitled to use the same cost structure as my Attorney of Record as set out in Paragraph 5.5.1-5.5.11</u>."(My emphasis)

Legal Framework regarding Contingency Fees Agreement Act

[56] Prior to addressing the extracted portions of the Contingency Fee Agreement between the Plaintiff and her attorneys of record, it is prudent to discuss the jurisprudence surrounding the contingency fee agreement scheme.

[57] It has been already stated by Southwood AJA in *Price Waterhouse Coopers Inc* that the Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients, which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties, which is not covered by the Act, is therefore illegal. It was further held in *Mostert and Others v Nash and Another*[20] that *"any non-compliance with or departure from the requirements of the Contingency Fees Act, either as to substance or as to form renders the contingency fee agreement invalid and unenforceable."*

[58] Section 4(1) of the Contingency Fees Act provides that once an offer of settlement is made to a claimant who has concluded a contingency fee agreement with a legal practitioner, the latter is not entitled to accept the offer of settlement without the approval of the court, if it is a litigious matter, or the profesional controlling body, in case of a non-litigious matter. The reason for this is well articulated by Van Zyl DJP, writing for the Court in *Mkuyana v Road Accident Fund.*[21] I would not do justice to this articulation if I were to not export the relevant passages in full. This is what Van Zyl DJP said:

> "[15] Contingency fee agreements facilitate access to justice as they enable litigants to obtain legal representation to prosecute their claims where the litigant may otherwise have been unable to do by reason of the prohibitive cost of litigation. However, such agreements carry with them the inherent risk of abuse and the incentive to profit. The undesirable features of contingency fee agreements were highlighted as follows in *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development, (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ) at 587 H-I:
>
> > 'The first is that they compromise the lawyer's relationship with his client by introducing conflicts of interest and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with a financial interest in the outcome of the case, which may adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding

[20] 2018 (5) SA 409 (SCA) at para 54.
[21] 2020 (6) SA 405 (ECG).

desire to secure a successful outcome may tempt him or her into practices which may compromise his or her duties to the court, such as coaching witnesses, misleading the court, falsifying evidence, etc.'

[16] Unregulated, contingency fees agreements have the potential for earnings by legal practitioners which are excessive and disproportionate to the labour and risk invested. This will negatively impact on public confidence in the legal system. The legislature was clearly conscious of the risk of exploitation when it legitimised contingency fee agreements. What the Act therefore sets out to do is to carefully regulate the extent to which a legal practitioner may agree with his client for the payment of an increased fee. It does that in section 2 of the Act'

[21] Contingency fee agreements are accordingly subject to judicial oversight and intervention. This is consistent with the right vested in the courts at common law to determine the propriety of any agreement entered into between an attorney and his client with regard to fees. The authority of the court to set aside a fee agreement is founded upon considerations of public policy and in the context of the supervisory function of the court over the conduct of its own officers, and the protection of the court's dignity and reputation." (Footnotes omitted)

[59] Another reason, according to Plasket J in *Mfengwana,*[22] is that this judicial oversight or monitoring by the professional controlling body as the case may be, is *"...necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients – a phenomenon that is ... unfortunately all too common."*

[60] In *Mofokeng,*[23] Mojapelo DJP further states that:

"The client must not only have agreed to the terms when explained to him by the attorney but he or she must also still agree to those terms in the affidavit before court. The final provision is that the client must disclose to the court what his or her attitude is to the settlement (s 4(2)(c)). The client should thus not only tell the court that he or she has accepted the terms of the agreement after understanding them but also whether he or she is happy or unhappy about (attitude towards) the settlement."

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[22] *Mfengwana* above n 14 at para 12.
[23] Id at para 57.

[61] One could understand this statement in one of two ways, or in both ways, as saying that these intimations by the client must be averred to in the affidavit and/or in both the affidavit and viva-voce in Court. The latter can only be achieved by the client taking the witness stand. I favour the interpretation which allows the Court to call the client to confirm the correctness of averments made in their affidavit, and that they truly understand the effects thereof.

Acceptance of the loss of earnings settlement offer.

[62] The settlement and acceptance of the offer in respect of loss of earnings was accepted by SJA on 24 February 2023, pursuant to a tender made by the Defendant on the same date. The acceptance of this offer, even if it is just in part of the damages claimed in the suit, was not in compliance with any of the aforementioned provisions.

[63] I am alive to an argument that could be made to the effect that the settlement was only on a portion of the claim and not in respect of the entire claim. My answer thereto is found in section 4(1) of the Act. The wording, ***"any offer of settlement*** *made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court (my emphasis), or has filed an affidavit with the professional controlling body, if the matter is not before court"*, does not give an ambiguous interpretation in the stipulation of the mandatory affidavit that is to be filed with either the Court or a professional controlling body, as the case may be, in respect of any offer tendered to a party that has entered into a contingency fee agreement with another. Simply put, whether the accepted offer is to the claim as a whole or part thereof, any such acceptance must be in compliance with section 4(1). I am fortified by the decision of the Court in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another*[24] where it was held that:

> "Thus, pursuant to those provisions, the attorneys were undoubtedly obliged to obtain judicial approval before accepting the offers of settlement agreements from the RAF. As mentioned already, it is common cause that the attorneys did not comply with this requirement."

[24] 2023 (4) SA 516 (SCA) at para 18.

[64] The acceptance of the offer from the Defendant by the correspondent attorneys is also another problematic aspect, but I will not set the settlement aside due to the fact that I have considered the settlement amount, and I am satisfied that the settlement amount is fair and that the minor will suffer prejudice that will be caused by a further delay in concluding this matter.

Analysis of the contingency fees' agreement

[65] I now address the clauses of the Contingency Fee Agreement itself. The clauses which I address are already stipulated above, therefore, in the interest of brevity, I limit the discussion of their invalidity to the main points. The problematic sections of the Contingency fee agreement are that:

> "The computation of the attorneys' fees is calculated as a payable fee of *'25% of the amount of money paid out in settlement of the claim subject to the following minimum and maximum parameters whichever is the lesser amount*: A maximum fee of double the nominees' normal charge-out rate plus VAT as set out in paragraphs 5.5.1 -5.5.11 below". (My emphasis)

[66] In her affidavit, Ms. Mtsweni stated that she understood that the attorneys "can only take a maximum of 25% **or lesser** amount **depending on fees**". The "depending on fees" adds further compound to the issues.

[67] This clause is not too entirely clear. Be that as it may, whatever is meant by the clause; whether the attorneys' deductible fees are **up to** 25% or that they take 25% of the award, it is best to clear the position in terms of law.

[68] The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fee agreement, and then increases it in terms of the contingency fee agreement. Mojapelo DJP puts it this way in *Masango v Road Accident Fund:*[25]

> "[16] 'Normal fees' of an attorney for litigious work are fees or charges that would ordinarily be allowed on taxation. The High Court rule on taxation provides a useful

[25] 2016 (6) SA 508 (GJ).

guide as to what fees are normally allowed on taxation. The Rule provide that a taxing master shall be competent to tax a bill of costs "for services actually rendered by an attorney in his capacity as such in connection with litigious work" (emphasis added). When one focusses on the concept "for services actually rendered", it is an established principle that charges for work not actually done cannot be allowed on taxation. The practitioner's statement for fees must be specific in respect of the particular business done and for which a fee is charged. In *City Deep (Pty) v Newcastle Town Council and Another* 1973 (2) SA 109 (W) at 119F- 120G; Galgut J restated the well-established principle that in a bill of costs the business or action of the practitioner for which a fee is raised should be specified item by item with each item dated and its subject matter stated precisely and not in general terms.

[17] In a sense, normal fees that an attorney charges his client are the fees which are included in what is referred to as attorney and client costs. Such fees are payable by the client regardless of the outcome of the matter for which the attorney's services were engaged. They are not dependent on an award for costs by the court. In a wide sense, such fees include all fees that an attorney is entitled to recover against own client on taxation... by the taxing master outside any special arrangements. The legal practitioner (the attorney in this case) and the client are required by sec 2(2) of the CFA to set out the normal fees in the contingency agreement concluded.'

[69] It is only after the normal fees of the attorney have been set out, that one can reach a stage of speaking about the **"success fee".** A success fee is a normal fee which has been increased by a pre-agreed percentage. There is no other way of increasing the normal fee to the increased or success fee other than through a percentage. The normal fee may be increased by up to 100% to reach the success fee. Success fee may thus be and is often double the normal fee.[26]

[70] In *Masango,*[27] Mojapelo DJP explains:

"In claims sounding in money the total of the success fee shall not exceed 25% of the total amount awarded or obtained by client (excluding costs). It is important to emphasise that there is no basis for the practitioner to charge 25% of client's capital as his or her fees. The 25% of the client's capital is introduced only as a cap: the attorney charges a success fee which shall not exceed 25% of the client's capital award. Twenty-five per cent of the capital claim is therefore not a fee.

[26] Id at para 19.
[27] Id at paras 19 and 22.

> An attorney can for instance not simply agree with his client to charge 25% or 20% of capital. His charge is neither a percentage commission nor a share in the injuries or damages suffered by his client. An agreement or practice that makes an attorney a partner in the injuries suffered by his client is *contra bones mores* and is therefore unlawful and illegal at common law and under the CFA." (My emphasis)

[71] Simply put, the explanation given in *Masango* is that what makes a contingency fee agreement is that the attorney can charge up to double (100%) of his/her normal fees in respect of prosecuting the claim where success is attained. Conversely, if the claim is unsuccessful, the client is not liable as debtor to the attorney as creditor. In other words, the attorney cannot claim his/her professional fees from the client in an unsuccessful prosecution of the claim.

[72] In *Mkuyana,*[28] Van Zyl DJP stated that:

> "The principle is that the legal practitioner charges his normal fee, and as an added incentive, to compensate him for the risk of undertaking the litigation, he be rewarded by being permitted to agree with his client to charge an extra fee over and above his normal fee, either equal to or a percentage increase on the normal fee. The normal fee of the practitioner is therefore taken as the base fee from which a percentage increase is by agreement with the client permissible to arrive at the amount of the success fee."

[73] In *Tjatji v Road Accident Fund and two similar cases,*[29] it was said that *"The purpose was also to encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts but subject to strict control so as to minimise the disadvantages inherent in the contingency fee system and to guard against its abuse."*

[74] The contingency fee agreement in this matter has set out the normal fees. Clause 5.4. states that *"the nominees hereby warrant that the normal fees on an attorney and own client basis to perform work in connection with the aforementioned proceedings are set out in paragraph 5.10 below".* The reference to paragraph "5.10" must be an error. The fee arrangement is covered from clauses 5.5.6 up to 5.5.11.

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[28] *Mkuyana* above n 17 at para 17.
[29] 2013 (2) SA 632 (GSJ) at para 21.

[75] Are the normal fees set out in the contingency fee agreement all in order? No, they are not. I elaborate below;

[76] Firstly, clause 5.5.9. states that "*in the event of [the Plaintiff's] mandate to [her attorneys] exceeding 1 (one) year the costs structure per each item set out above, shall increase by 12.5% (TWELVE AND A HALF PERCENT) on each anniversary of the date of the power of attorney*". This power of attorney was signed on 27 January 2014. The arithmetic of 12.5% compounded over a period of nine years in personal injury claim is cringey. The same goes for clause 6.12 whereby the Plaintiff has agreed that the attorneys are "***entitled to charge interest at two times the current overdraft interest rate per annum*** *as levied by them their banker from time to time on amounts disbursed by them and that interest will be calculated from the time when the payment of disbursements is made until payment by the Plaintiff.*"

[77] Morison AJ in *Thulo v Road Accident Fund*[30] had this to say about the 25% ceiling cap:

> "[51] The true function of a proviso is to qualify the principal matter to which it stands as a proviso — as to which see, for example, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 79F – J and the cases there cited. In other words, a proviso taketh away, but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double — 100% more than — the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.
>
> [52] As this principle of interpretation is not always applied there is a danger of a misinterpretation of this section by legal practitioners. Incorrectly interpreted it can be used to argue that the client has to pay (i) double the normal fee or (ii) 25% of the total amount awarded in a claim sounding in money, whichever is the higher. That is completely wrong. The practitioner's fee is limited, on a proper reading of the section, to (i) 25% of the amount awarded in the judgment, or (ii) double the normal fee of that practitioner, whichever is the lower. If double the normal fee results in the client having to pay a fee higher than 25% of that which was awarded to the client in a money judgment (costs aside) the legislature has put a ceiling on such fee and said,

[30] 2011 (5) SA 446 (GSJ).

in effect, 25% of the money amount awarded is the maximum fee that can be raised. Where, however, double the normal fee does not exceed 25% of the money amount awarded then double the normal fee is the maximum fee that can be raised."

[78] Secondly; the fees structure also provides that any work done by "***any administrative personnel/professional assistant <u>or para-legal assistant</u> will be charged at R300.00 per quarter hour or part thereof thereon."*** This too is illegal, and my sentiments above apply mutatis mutandis.

[79] Section 33 of the Legal Practice Act[31] provides that:

"33. (1) Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward—

(a) ...

(b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(3) No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer, or notary, unless that person is an advocate, attorney, conveyancer, or notary, as the case may be."

[80] The work of a legal practitioner's employee, save for work done by perhaps a candidate attorney engaged in the same case, is an operational expense of the firm. The principal cannot bill the client for work done by his employees, whether it be by a senior law researcher, a professional /para-legal assistant, in the course of their employment, and then bill again for his time (which was actually not consumed).

[81] Thirdly, there is security proviso in disbursements. Clause 8 provides, "***furthermore and as security for my indebtedness to the nominees*** *which may arise in respect of the said fees and disbursements,* ***<u>I hereby cede</u> to the nominees all right, title and interest in and <u>to any proceeds of any claim amount or entitlement paid out or to be paid out by the defendant or the Road Accident</u>***

[31] Act 28 of 2014.

Fund which may arise in the prosecution of my / our claim." The statement found in paragraph 22 of *Masango*[32] by Mojapelo DJP refutes this best. *"An agreement or practice that makes an attorney a partner in the injuries suffered by his client is contra bones mores and is therefore unlawful and illegal at common law and under the CFA."*

[82] Fourthly, the inclusion of Value Added Tax (VAT) to the fee payable to the attorneys. Mojapelo DJP had occasion to consider the legality of this in *Masango.*

[83] The legal question considered in that matter applies aptly to this case. There, it was considered whether a legal practitioner is entitled to charge, as his or her fees, 25% of the capital amount recovered for his or her client plus 14% (VAT) in terms of a contingency fee agreement concluded with the client under the Contingency Fees Act ("the CFA").[33]

[84] After a thorough exposition of the Value-Added Tax Act[34] ("the VAT Act"), Majopelo DJP reached a well-reasoned conclusion, that VAT is a tax on the legal practitioner and not on the client. Consequently, the legal practitioner pays the tax to the South African Revenue Services (SARS). The quoted price (being the legal practitioner's fees) is deemed to include VAT, unless the price is broken down into its components in terms of section 65 of the VAT Act.[35] What the client pays to the legal practitioner (vendor) is the "price" (fee). The client does not pay VAT, although the price may be structured to account for the VAT payable by the legal practitioner (vendor) to SARS. Regardless of how the price is structured or quoted, the final price charged by a vendor (being the legal practitioner in this case) is inclusive of VAT.[36] The relationship between the practitioner (vendor) and SARS, in relation to VAT collected by the latter, is not one of agency, but is that of debtor and creditor. This is a further confirmation that the liability for tax is that of the legal practitioner and not of his or her client. It is not a relationship of agency in which the legal practitioner collects VAT on behalf of SARS and pays it over to SARS.[37]

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[32] *Masango* above n 22.
[33] Id at para 1.
[34] Act 89 of 1991.
[35] *Masango* above n 22 at para 34.
[36] Id at para 35.
[37] Id at para 41.

[85] The conclusion reached by Mojapelo DJP is well premised in thorough exposition of the relevant provisions of the VAT Act. In summary, for the purposes of contingency fee agreements, VAT cannot be added on top of the fees payable to the practitioner for those fees are deemed to be already inclusive of VAT.

[86] Having addressed the invalidity of the attorneys' normal fee structure contained in the contingency fee agreement, what follows next is the nullity of the contract in its entirety of its provisions, and such nullity is not triggered by the fee arrangement only but rather by something more. Pre-emptively, the contract has, in itself, an inherent built in provision against its unenforceability, which holds the client liable for the attorneys' fees even in the event of the contingency fee agreement being held to be unenforceable for any reason. Clause 5.5.2. reads:

> "The parties agree that in the event of the contingency agreement not being enforceable for any reason [the Plaintiff] shall owe the attorney an amount to be calculated according to the fees as calculated as per paragraph 5.5.1-5.5.11 plus disbursements."

[87] In the event of a clause or provision of a contract being declared invalid and/or unenforceable, the traditional provision of invalidity and divisibility applies. This principle says that in the event of a clause or provision of a contract being found to be invalid or unenforceable, such clause shall be deemed to be separate and divisible from the remaining terms and conditions of the contract, of which shall not be affected by the invalidated clause.

[88] This clause, truly put, is a mockery of Judicial authority. If a Court nullifies a contract, that renders its termination without consequence and prejudice to the other party that did not draft the contract and/or to both parties – and that would be end of the matter. If this clause were to be indulged, Judicial orders would be *brutum fulmen* (of empty or ineffectual effect or force).

[89] The effect of non-compliance with the provisions of the Act was dealt with by Boruchowitz J in *Tjatji v Road Accident Fund and two similar cases*:[38]

> "[21] Although the Act does not state in express terms that a failure to fulfil the statutory requirements will render the contingency fee agreement null and void, there are clear

[38] *Tjatji* above n 26.

indications that this was indeed the legislature's intention. The primary object of the Act was to legitimise contingency fee agreements which were otherwise prohibited by the common law. The purpose was also to encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts, but subject to strict control so as to minimise the disadvantages inherent in the contingency fee system, and to guard against its abuse (see the report of the South African Law Commission, chs 2, 3 and 4; KG Druker op cit, chs 6 and 7). The safeguards introduced to prevent such abuses include ss 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would undoubtedly have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions.

[22] A further indication that non-compliance would be visited with invalidity arises from the fact that ss 2 and 3 are couched in peremptory language. The word "shall" is used extensively in s 3 (see ss (3)(1)(a), (3)(2), (3)(3) and (3)(4)). The word "shall", when used in a statute, is generally an indication that the provision is peremptory rather than directory."

[90] This is further supported by the dictum found in *Mostert*[39] which says that *"any non-compliance with or departure from the requirements of the Contingency Fees Act, either as to substance or as to form renders the contingency fee agreement invalid and unenforceable."*

Costs

[91] In *Coetzee v Taxing Master, South Gauteng High Court and Another* [40], Sutherland J mentioned that:

"The relationship between attorneys and their clients is a private affair founded on contract. However, the state imposes itself upon that relationship to regulate the fees levied by attorneys on their own clients in order to ensure that clients are not charged unreasonable fees. The taxing master is a gatekeeper of fairness about those fees. (See: *Aircraft Completions Centre (Pty) Ltd Rossouw & Others* 2004 (1) SA 123 (W) para 108.)."

[92] In CFAs, this is but one example whereby the Legislature unapologetically imposes in the affair of attorney and own client relationship insofar as the two have

[39] *Mostert* above n 16 at para 54.
[40] 2013 (1) SA 74 (GSJ at para 9.

intended to enter into a Contingency Fees Agreement. Having done so, the Legislature, or at least, the judicial interpretation of the Legislature's intention says, that it does not have to be the case that the clauses of the contingency fee agreement must be substantially invalid; far from it, the declaration of invalidity of one or any more clauses of the CFA renders the whole thing invalid and unenforceable. Furthermore, this contract, unlike other contracts, is not capable of rectification *ex post facto.* Rigidly strict compliance with the provisions of the CFA does not flow from the common law but is rather imposed by the Legislature for reasons elucidated above.

[93] Having declared the Contingency Fee Agreement invalid, the common law applies. It has been held by our Courts that the effect of invalidity of the agreement means that the attorney is only entitled to a reasonable fee in relation to the work performed, with taxation being the means of which the reasonableness of the fee is performed. The attorney is not entitled to charge the success fees and any normal fees flowing from the contingency fee agreement. Furthermore, the attorney is prohibited from enforcing the clause which states that in the event of the contingency fee agreement being found to be unenforceable or set aside for whatever reasons, the Plaintiff will still be responsible for the payment of the attorney and client fees.

[94] In *Tyatji*[41], Boruchowitz J endorsed the common law position that whereby a contingency fee is declared invalid and unenforceable for any reason, *"The plaintiffs' attorneys are therefore only entitled to such fees as are taxed or assessed on an attorney and own client basis."*

[95] In *Coetzee,*[42] Sutherland J alludes to the point that where an attorney and own client fee agreement is unreasonable, or non-existent, then the fees to be paid by the client to that attorney for services rendered shall be at the discretion of the taxing master, whom may exercise his/her discretion to tax the fees identically to Rule 70 or at a tariff which s/he may determine to be reasonable in the circumstances.

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[41] *Tjatji* above n 26 at para 26.
[42] *Coetzee* above n 37 at paras 25.6 and 25.7.

[96] In the circumstances of this matter, the Plaintiff's attorney shall be entitled to recover from the Plaintiff, his reasonable normal fees for the services rendered to her.[43]

[97] Regard being had to the invalidity of the Contingency Fee Agreement in form; in substance and for reasons elucidated above, the Plaintiff's attorney is not entitled to a "success fee".

[98] The last issue, but certainly not the least of the fees structure is the allowance to the correspondent attorney to charge the same fees as applied by the attorneys of record. The plaintiff simply cannot just be mulcted with double identical costs of those of his attorney and so duplicated by the correspondent attorney.

[99] The correspondent attorney is the agent of the client's attorneys of record and not that of the client him/herself. Save in the pursuance of her action at the instance and instruction of the client's attorneys of record, there is no mandate and agent relationship that exists between the client and the correspondent attorney. Therefore, even if the bill incurred from the work of the correspondent attorney, the former is not entitled to charge as if it were the client's attorney of record.

[100] What I have just demonstrated above is the invalidity of the contingency fee agreement in its substance. In *Mkuyana,*[44] at paragraph 25, the following passage appears:

> "A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an attorney to charge an unreasonable fee that amounts to overreachment, will be unreasonable and consequently unenforceable.
>
> > 'An agreement would be unreasonable if, for instance, it authorised unprofessional fees or work or expenses which were unreasonable or unnecessary...'
>
> An unprofessional fee is a fee that constitutes overreachment, that is,
>
> > 'the extraction by an attorney from his client, by the taking by the former of undue advantage in any form of the latter, of a fee which is unconscionable, exercise or extortionate, and in so overreaching his client that attorney would be guilty of unprofessional conduct.'" (Footnotes omitted)

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[43] *Tjatji* above n 26 at para 26.
[44] *Mkuyana* above n 17.

[101] In *Hitchcock v Raaff*,[45] the client's attorney was mandated to procure the setting aside of a rival trader's liquor license so that he could obtain it. The attorney exacted from his client an agreement to pay a special remuneration, branded by the court as an unfair bonus and, as it then was, an improper contingency fee. Wessels J at 368-369 held that an attorney cannot behave in such manner. The critical passage reads:

> "... [the attorney] cannot contract for himself a bonus, either dependent on the result of the case or even if the result should be adverse. When once his client has embarked on litigation and when once he has obtained the confidence of his client in that litigation *he is bound to charge only the tariff fees allowed to be charged to solicitors."*

[102] This remark, in context, is intended to refer to the absolute prohibition, even with a client's consent, of an attorney charging a fee that contradicts the reasonableness standard.

[103] Therefore, the correspondent attorney is not entitled to charge attorney and own client fees as if it were the client's attorney of record, regard being had to the clause in the invalidated contingency fee agreement.

Counsels Fees

[104] I have taken note that the latest revised draft order just seeks counsel's fees but does not give reference to senior counsel fees for preparation of the heads of argument, as the initial draft order **(1)** and its amended form **(2)**. The senior counsel confirmed that he will relinquish his fees for preparation and drafting heads of arguments.

Costs of experts qualifying and preparation fees

[105] The Plaintiff's counsel also sought costs for the experts' qualifying and preparation fees. *Randall v Baisley*[46] provides a useful analysis of the range of the work of a professional or expert witness constituting qualifying expenses, or preparation fees. The Court held:

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[45] 1920 TPD 366.
[46] 1992 (3) SA 448 (EC) at 453C – 454C endorsed by Hartle in *Dutton v Road Accident Fund* (EL901/2016, ECD2201/2016) [2017] ZAECELLC 18 at para 14.

"...the enquiry does not turn on whether or not he was an expert, but rather on whether his services were in respect of 'qualifying' himself as a witness. The scope of the act of qualifying as a witness was fully considered by Harcourt J in *Köhne and Another v Union & National Insurance Co Ltd* 1968 (2) SA 499 (N) at 499- 501. I refer to a number of principles conceived by the learned Judge to be applicable to the question of qualifying expenses, viz in the general way it may be said that an expert witness 'qualifies' when he reads up, or otherwise masters the details of the particular case on which he is to give evidence (501F); qualifying fees are regarded as part of the costs of production of reasonably required evidence (501H); they are part of the expense of procuring information which might bear upon the issue in dispute and includes the costs of witnesses preparing themselves for examination (502A-B); although the practice has not been entirely consistent, it has long been accepted that expert witnesses are - subject to there being an order of court or agreement - entitled, as between party and party, to 'qualifying' fees in addition to payment under any tariff of remuneration of witnesses (502C); an expert witness is not one who can be subpoenaed to give his expert opinion, in doing this he is a volunteer and there is no objection on the grounds of public policy to an agreement that he should be paid additional remuneration for the work necessarily required to be done in preparation for giving expert opinion evidence (502E); a professional witness may make his own terms for doing the research work which is necessary in order to qualify himself for expressing his opinion in the case, such remuneration is not for attending in court, but for qualifying himself to give evidence (502G); the scope of 'qualifying fees' is not precisely defined in any single case but should be taken to include, *inter alia*, the attendances involved in the inspection of persons, places, or things necessary to ensure that a scientific witness, however eminent, is far more useful to those conducting the case if in fact he has had the advantage of viewing the *locus in quo* (503A-B); it is expected of experts to read relevant authorities and scientific journals to enable them to express well-founded opinions with reference to learned authority which they may adopt as the evidence for the assistance of the court (503C); it is also clear that the qualifying fee covers expenses of the expert necessarily and properly incurred in experiments and investigations involved in qualifying himself (503H). 'Qualifying expenses', it seems, covers all acts performed by the expert which relate to the opinion which he would express in court. This may include the observation of persons and places, or the investigation of or experiments on the *corpus delicti*. It does however not include pre-trial examinations or investigations which go to direct proof of the *factum probandum*. The pre-trial activity of the expert may relate to both qualifying and non-qualifying preparatory acts; indeed, it may be difficult to unravel the one from

the other. But the basis of the distinction however is clear: qualifying acts bear upon the expert's opinion, all other acts fall outside the scope of the concept."

[106] What is clear from both these authorities is that expert qualifying, and preparation fees are those costs incurred by an expert where there was an intention by the concerned litigant to bring the expert in Court to adduce evidence – his opinion thereto the issue at hand. In *The Government* v. *The Oceana Consolidated Co.,*[47]it was stated:

"It seems to me that the cost incurred in putting a witness into a position to give evidence may well be considered as part of the costs of preparing the case and laying it before the Court. There cannot, I think, be any question as to the desirability of permitting a party to recover any such costs as the Court thinks were necessarily incurred in placing his case before the Court."

[107] However, the injunction to this is that that without an order of Court or the consent of all interested parties, the experts qualifying, and preparation fees cannot be allowed on taxation. (See the proviso to item 5, Section D of the tariff appended to Rule 70).

[108] In RAF cases, the Plaintiff must either obtain an offer or tender or consent in this regard from the Fund or such orders must expressly be requested from the Court. Proper notice must be given to the RAF that such an order will be applied for, to enable the RAF to be heard on this aspect. This is especially ever more so important in the majority of RAF cases which tend to proceed by default; and even in those where there is a dispute as to quantum, such as this case, the Plaintiffs' usually make application for the affidavits of experts be admitted into evidence in terms of Rule 38(2) without recourse to oral evidence. This is seldom a contentious issue to the Fund even in those actions where it does not concede quantum.

[109] Where, however, it appears that the party in question originally intended to call the expert as a witness and that, in the light of the issues then subsisting, the expert's evidence would have been relevant, but that subsequently the issues were narrowed down or eliminated by reason of the attitude adopted by the other party rendering the

[47] 1908 TS 43 at 47 – 48.

calling of the person as a witness unnecessary, then in that instance, the need for appearance by the expert has been obviated. However, this does not mean they would have not prepared and qualified themselves to give evidence and opinion thereto the matter in issue. And as such, it may be correct and reasonable to hold the view that the said expert is rightfully entitled to their preparation fees.[48]

[110] Since the experts' evidence was submitted in terms of Rule 38(2), I am disinclined to bind the hands of the Taxing Master, and in so doing, tempering with his/her discretion to tax any bill of costs as provided for by Rule 70[49] read together with Rule 70(3)[50] of the Uniform Rules of Court.

[111] Its trite law that the taxing master has discretion to allow, reduce or reject items in a bill of costs. Subrule (5) indicated in Rule 70 which provides the discretionary power off the taxing master to tax any bill of costs, has been interpreted to mean that the taxing master's power to tax "any bill of costs" includes bills as between adversaries in litigation and as between a litigant and that litigant's own attorney: ie. bills usually described as "attorney and own client". She must exercise this discretion judicially in the sense that she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case.[51] On this basis thereof, all other costs of suit, as demanded by the Plaintiff, are best left to the discretion of the taxing master as may be taxed and/or agreed between the parties.

Conclusion

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[48] **(Cf:** *Stauffer Chemical Co v Safsan Marketing Distribution Co* 1987 (2) SA 331 at 355 E – H; and See also *Cassel and Benedick NNO v Rheeder & Cohen NNO* 1991 (2) SA 846 (A) at 853 E – I.)

[49] **Rule 70:**

"(1) (a) The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the taxing master shall not tax costs in instances where some other officer is empowered so to do."

[50] **For its purpose, Rule 70 is to be read with Rule 70(3) which provides:**

"**70. (3)** With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has *been awarded the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.*

[51] *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) 232 at para 17.

[112] The Plaintiff is substantially successful; I shall therefore grant an order along the lines proposed in the draft order with amendments. Regarding the establishment of the Trust and the draft Trust Deed, the Plaintiff's attorneys are to find an IsiZulu and/or IsiNdebele fluent speaking Trustee, and in the consent letter to be given by said Trustee, they should confirm their fluency in either the isiZulu and/or IsiNdebele language.

Order

[113] In the result, I order as follows:

1. The Defendant is ordered to pay to the Plaintiff (in her representative capacity on behalf of the minor child) a Capital Amount of **R 1 086 780.75 (One million, Eighty-Six thousand, Seven-Hundred and Eighty Rands, Seventy-Five cents)** in full and final disposal of the Plaintiff's claim on behalf of the minor child, which amount shall be paid into the trust account of Savage Jooste & Adams, with banking details:

Nedbank name	:	NEDCOR – ARCADIA
Account type	:	TRUST ACCOUNT
Branch code	:	16-33-45-07
Account no	:	1633357619
Reference no	:	Mr Hayes/M Havemann/RB858

2. The above-mentioned capital amount consists of the following:

    i. **R 1 086 780.75 (one million, eighty-six thousand, seven hundred and eighty rands, seventy-five cents)** in respect of Future Loss of Earnings and / or earning capacity. And
    ii. **R 900 000 (Nine Hundred Thousand Rands)** in respect of General Damages

3. It is ordered that the capital amount be paid into the above-mentioned trust account of Savage Jooste & Adams within 180 (ONE HUNDRED AND EIGHTY DAYS) days from the date of this order.

4. The Defendant shall capture the payment of the Capital Amount onto its "Registered Not yet paid / (RNYP) list by no later than 30 (Thirty) days from the date of this Court Order being granted.

5. Should the Defendant fail to make payment of the capital within 180 (ONE HUNDRED AND EIGHTY) days from the date hereof, the Defendant will be liable for interest on the amount due to the Plaintiff at the prescribed rate per annum, from the 181st (ONE HUNDRED AND EIGHTY FIRST) day from the date of this order to the date of final payment.

6. It is declared that the award to the minor be protected by way of a trust of which the trust is in terms of the provisions of the Trust Property Control Act, created with this order. A copy of the suggested draft Trust Deed setting out the powers of the trustee and 2023 Pricing Guide is attached hereto marked "**A**".

7. The proposed trustee, being Keshma Vallabh of Standard Bank Limited, is set aside, and the Plaintiff's attorneys are ordered to find a trustee that is fluent in either the IsiZulu and/or IsiNdebele language, and in the consent letter of said trustee, the said trustee must confirm their fluency in either of the languages indicated above.

8. The Defendant will furnish the trustee(s) with an Undertaking in terms of Section 17(4)(a), to compensate the minor for **100%** of the cost of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the minor resulting from injuries sustained by the minor as a result of an accident that occurred on the 4 October 2013. The reasonable fees and costs of the trustees will be recoverable in terms of the said Undertaking, which will include the following:

    8.1. The fees of the trustees of the trust which are fully set out under paragraph 12 in the suggested Draft Trust Deed attached hereto. This includes the trustee's remuneration for exercising his duties in terms of the trust, inclusive of the administration of the section 17(4)(a) Undertaking;

9. The reasonable out-of-pocket costs of the trustees of the trust, which costs shall be determined once they have been incurred.

10. In the event of a dispute relating to the remuneration, fees and costs of the trustees, such remuneration will be fixed by the Master of the High Court.

11. The appointed trustee or his/her nominee for the trust formed for the sole benefit of the minor with powers as set out in the suggested Draft Trust Deed attached hereto.

12. The trust will dissolve when the minor reaches age of majority.

13. The trustee, beneficiary or any other person who has sufficient interest may approach the court in terms of section 13 of the Trust Act, for termination of the trust or to dissolve the trust earlier than what is set out in 4.5 and 4.6 above, should he / she be able to show reasonable cause for such an application.

14. Any amendment to the Trust Deed shall be subject to the approval of the High Court.

15. The trust is ordered to furnish security to the satisfaction of the Master. The security so furnished will be adjusted from time to time, at least once per year to reflect the decrease or increase of the capital and income from time to time.

16. The Contingency Fee Agreement is declared invalid.

17. The Defendant is ordered to pay the Plaintiff's costs of suit of the Plaintiff's instructing and correspondent attorneys to date on the party and party High Court scale as taxed or agreed.

18. The Plaintiff's attorney shall be entitled to recover from the Plaintiff his reasonable normal fees for the services rendered to her.

19. All costs remain at the discretion of the Taxing Master.

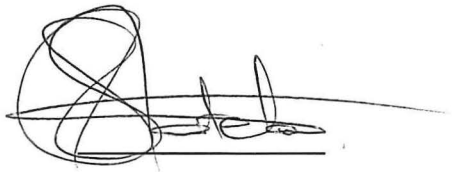
20. Should the Defendant fail to pay the Plaintiff's party & party costs as taxed or agreed within 14 (fourteen) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at the prescribed mora rate per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

21. The Plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraph 17, serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant fourteen court days to make payment of the taxed costs.

22. The taxed or agreed costs, as referred to above, shall be paid into the trust account of Savage Jooste & Adams, with banking details:

Nedbank name	:	NEDCOR – ARCADIA
Account type	:	TRUST ACCOUNT
Branch code	:	16-33-45-07
Account no	:	1633357619
Reference no	:	Mr Hayes/M Havemann/RB858

23. Upon taxation of the Bills of Costs by the Taxing Master, the Plaintiff attorneys are directed to deliver the taxed Bill of Costs to the Registrar of this Court before deducting any monies due to them. The Registrar of this Court is then ordered to translate and explain to the Plaintiff personally the taxed bills of costs, the sums thereof, the deductions and payment due to her attorneys and her award less all applicable deductions.



FLATELA L

JUDGE OF THE HIGH COURT

PRETORIA DIVISION

Appearances

Counsel for Plaintiff:	Adv ACJ Van Dyk instructed by SJA Attorneys, M Havermann
State attorney for Defendant:	Thomas Bell
Date of Hearing:	27 February 2023
Request for further submissions:	13 & 14 September 2023
Date of further submissions:	15 ,19 September 2023 and 21 November 2023