

SOUTH AFRICA / JUDGMENT

Mbethe v Road Accident Fund (856/2020)

[2023] ZAMPMBHC 5 (26 January 2023)

[2023] ZAMPMBHC 5**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Roelofse

CASE / FILE NUMBER

856/2020

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Source record**HEADNOTE:**

RAF
SETTLEMENT AGREEMENTS AND AFFIDAVITS
Motor
collision – Road Accident Fund – Contingency fees –
Settlement agreements to be made orders of court
–
Affidavits to be submitted to court – Requirements –
Templates with variables inserted insufficient
– Affidavits
to deal with all the requirements so that court in its oversight
function can consider the probity of
the settlement agreements –
Contingency Fees Act 66 of 1997, s 4(1)(a)-(e).
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION (MAIN SEAT)
Case
Number: 856/2020

REPORTABLE:

YES/ NO
OF
INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO.
26
January 2023
In

the matter between:

MBETHE

CHRIS

HENDRY

Plaintiff

and

THE

ROAD ACCIDENT FUND

AND

EIGHT SIMILAR

MATTERS^[1]

Defendant

This

judgment was handed down electronically by circulation to the parties' representatives by email and by its release to SAFLII.

The

date and time for hand-down is deemed to be 10h00 on 26 January 2023.

JUDGMENT

Roelofse AJ:

Introduction

- [1] Fortunately, in our country, the doors of court are wide open to everyone for in terms of section 34 of the Constitution of the Republic of South Africa, 1996 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This, every person should know by now. However, what is sometimes overlooked by litigants and those who are involved in the administration of justice is that the right of access to courts encompasses the entire judicial process – from the time a litigant enters the court's doors by issuing a proceeding up to when a litigant exits the court because the litigation is finalized or resolved.
- [2] This judgment concerns the process after entering the courts' doors, what happens in court and the ultimate exit from court.
- [3] Due to the insistence in this Division on strict compliance with the Rules and Directives in respect of pre-trial and judicial case management procedures, many actions founded upon compensation for personal injuries become settled in its entirety before they reach their trial date. This is all the more so with actions against the Road Accident Fund. As recently as 24 January 2023, Legodi JP (Mphahlele DJP and Mashile J concurring), writing for the Full Court, said the following over pre-trial and judicial case management:[2]

'[31] In paragraph

- [1] and [2] of this judgment I referred to the weapon which the courts have in the form of costs orders when rules of court are not complied with in particular, rules 37(6) and rule 37A(10) read with sub-rules 7(d)(ii), (8) and (9). All these sub-rules deal with what I refer to as a “meaningful pre-trial conferences” between the parties. This must happen before judicial case management conferences are held. As indicated earlier in this judgment, sub-rule(2)(c) of rule 37A places an obligation on the parties or parties’ legal representatives to prepare properly, comply with all rules of court and to act professionally in expediting the matter towards trial and adjudication. This should be seen in the context of rule 37A(2)(a) which provides that case management through judicial intervention shall be used in the interest of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. In this Division all matters on any roll are subject to judicial case management process in terms of rule 37A (4) read with sub-rule (1)(a) and (b) thereof. The two cases before us are therefore subject to judicial case management process. A meaningful pre-trial conference has a two-fold purposes. The primary aim is to assist towards the resolution of disputes without recourse to protracted trials. The parties are given the benefit and an opportunity of resolving or curtailing the issues between themselves before trial and without the involvement of the court. The costs of litigation related to such pre-trial conferences between the parties are very minimal. A meaningful pre-trial conference is intended to enable the parties to explore settlement, to identify and limit issues and also to seriously consider settlement through voluntary mediation the latter of which is regrettably not taken seriously despite rules 41A and 37(6)(d) read with rule 37A(11)(a).’
- [4] Personal injury litigation is almost always undertaken by legal practitioners on a contingency basis. Under these circumstances, the Contingency Fees Act 66 of 1997 (the Act) applies. Litigation undertaken by legal practitioners on contingency basis has vast advantages as it provides access to the court for persons who wish to vindicate their rights who might otherwise not have been able to do so. In *Mfengwana v Road Accident Fund*[3] Plasket J (as he then was) said over the Act as follows:
- ‘[5] The Act was promulgated to facilitate access to court – a fundamental right – for the large number of people in this country who cannot afford the considerable cost of legal services. Typically many of those who are injured in motor vehicle accidents enter into contingency fee agreements with attorneys in damages claims against the RAF.
- [6] The basic idea behind a contingency fee agreement is that the attorney takes on the risk of financing his or her client's litigation in the hope – or anticipation – of succeeding. If the litigation is not successful, the attorney will not be paid. If the litigation is successful, the attorney will be entitled to a success fee that is higher than his or her normal fee.
- [7] The context and background of the Act was considered in *Price Waterhouse Coopers Incorporated and others v National Potato Co-operative Ltd*² in which Southwood AJA stated:

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

[5] Yet, contingency litigation has shown to be open to abuse if same is not regulated and closely monitored. In *Mfengwana supra* Plasket J was requested to make a settlement agreement between the plaintiff and the Road Accident Fund an order of court. The court discovered that the plaintiff had entered into a contingency fee agreement with the attorney and held that the attorney had to pursue the contingency fee agreement through the Act and file the affidavits required by the Act.[4] The court found that the contingency fees agreement appeared to be in conflict with the Act. Ultimately, the court issued an order safeguarding the interests of the plaintiff.

[6] In *Kedibone obo MK and another v Road Accident Fund and another as amicus curiae* and a related matter[5], the importance of proper judicial oversight was emphasized. In the matter, moneys were paid to the attorney by the Road Accident Fund before the settlement agreements were made orders of court. Fisher J set out as follows:[6]

"The entire RAF system is underpinned by the legislative scheme in the CFA [the Act]. The purpose of CF [contingency fees] agreements is to enable litigants to obtain legal representation to prosecute their claims where such litigant is otherwise unable to do so by reason of the prohibitive cost of litigation. CF agreements thus provide the entire substructure for the many thousands of actions instituted against the RAF in our courts annually. Indeed these matters comprise approximately 90% of all legal process in this and many other divisions of the High Court and thus the contingency fee process is foundational to our system of justice. Its importance cannot be overemphasised.

CF agreements are strictly controlled in terms of the CFA. Prior to the CFA coming into force, contingency fee agreements were prohibited for being contra bonos mores. The intention of the CFA is thus to encourage speculative litigation in order to allow for access to legal representation. However, due to the high risk of abuse and corruption attendant on contingency fee agreements, the Legislature has placed tight strictures and requirements on such agreements. Thus a CF agreement that is not covered by the CFA, or which does not comply with its requirements, is invalid. (Endnote omitted).

[7] In respect of a claim by minor dependants, which in my view equally apply to all plaintiffs in Road Accident Fund matters, Fisher

J said:

‘It seems to me that, in each instance, where an order is sought under these circumstances, the judge called upon to approve the settlement must deal with each matter in accordance with its own peculiar facts. In all instances, a court should satisfy itself that the rights of the dependants are properly taken account of by the order which is granted ultimately granted.[sic] This would, to my mind, involve a consideration of the issues set out in this judgment in relation to the contents of the section 4(1) affidavit and thus it would be prudent in each case to insist on the filing of such an affidavit.’ (Footnotes omitted)

[8] I have decided to produce this single judgment in respect of all of the matters that were placed before me in terms of Clause 15 of this Court’s Practice Directive (the Directive)[7] pursuant to the settlement of the plaintiffs’ claims who all instituted actions against the Road Accident Fund for injuries they had suffered in motor vehicle accidents. The settlement agreements were in writing. The plaintiffs required the court to make the settlement agreements that were concluded orders of court. Draft orders were prepared.

[9] In all instances contingency agreements were entered into between the plaintiffs and their attorney in accordance with the Act. In all instances, affidavits as prescribed in section 4 of the Act were filed.

[10] Having considered the settlement agreements and the affidavits that were filed, I resolved to engage the plaintiffs’ attorney

before I would make the settlement agreements orders of court. I engaged Ms. Van Heerden of Frans Schutte Matthews Phozza Inc. in open court. Mr. Siliga appeared for the Road Accident Fund.

[11] My concern was that the material before me was inadequate for me to consider making the settlement agreements orders of court and I raised my concerns with Ms. Van Heerden in this regard. After my engagement with Ms. Van Heerden, I resolved to reserve judgment in all of the matters.

The legislation and the Directive

[12] Section 2 of the Act provides:

‘Contingency fees agreements.—(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.’

[13] Section 4 of the Act provides:

‘Settlement.—(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, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating—

- (a) the full terms of the 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.’

[14] Clause 15 of the Directive provides for the removal of matters from the roll upon settlement. Clauses 15.8 to 15.11 of the Directive

specifically deals with settlements made orders of court where contingency fees agreements have been entered into. It reads:

‘Making of an order upon settlement in contingency fee agreement

15.8 As contemplated in section 4(1) of the Contingency Fees Act No. 66 of 1997, no offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted or made an order of court unless after the legal practitioner shall have filed an affidavit with the court, if the matter is before court, stating:

- (a) the full terms of the agreement.
- (b) as estimate of the amount or other relief that may be obtained by taking the matter to trial;
- (c) an estimate of chances of success or failure at trial;
- (d) an outline of the legal practitioner’s fees and if the matter is settled as compared to taking the matter to trial;
- (e) the reasons why settlement is recommended;
- (f) that the matter contemplated in paragraphs (a) to (e) was explained to the client, and the steps were taken to ensure that the client understands the explanation; and

15.9 The affidavit referred to in subsection (1), must in terms of subsection (2) be accompanied by client’s affidavit 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 (c) what his or her attitude to the settlement is.

15.10 In terms of subsection (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’. Therefore, no settlement made where a contingency fees agreement has been entered into, shall be valid and made an order of court, unless such a settlement is made an order of court as contemplated in subsection

(3) after compliance with subsections (1) and (2) referred to in paragraphs 15 .8 and 15.9 above.

15.11 For the purpose of ensuring that the legislative framework in subsections (1)(2) and (3) is complied with, the following shall be used as an oversight and control mechanism:

15.11.1 All matters which are before court in respect of which an offer of settlement is made to any party who has entered into a contingency agreement, upon filing the affidavits as contemplated in subsections

(1) and (2), the registrar shall secure the file which has to be properly indexed and paginated by the party filing and the registrar shall thereafter immediately submit same to any available judge in chambers or remotely for the purpose of making the settlement an order of court as contemplated in subsection (3) provided a contingency fees agreement has been entered into.

15.11.2 The Judge before whom a matter has been laid in chambers or remotely as contemplated in paragraph 15.11.1 above, may decide to deal with the matter in an open court should he or she deem it necessary to do so in order to satisfy himself or herself that the settlement entered into where a contingency fee agreement has been concluded is justified, or ought to have concluded is proper and above board.’

[15] It immediately is clear that clause 15.8 the Directive echoes the provisions of the Act. It was in terms of clause 15.11.2 of the

Directive that I decided to hear the plaintiffs in open court so that I could explain what was lacking to enable me to make the settlements orders of court. After all, once the orders were made, it become the orders of the court and the court alone may be called to account for the orders it had granted.

Discussion

[16] Of course it is well established that there are substantial advantages in rather settling disputes rather than to leave it to the court to resolve. In *Eke v Parsons*[8] it was said:

‘Claassens captures the essence of a settlement and what may inform it well:

“Agreements governing maintenance often cover other topics too. They are frequently compromises over hotly contested issues of all sorts, and the product of hard and protracted bargaining. Everyone with experience of negotiations in matrimonial cases is well aware of that. Questions of ‘guilt’ and ‘innocence’, fundamental to the wife’s claim for alimony while the 1953 Act lasted and not entirely irrelevant to it since then, may have been disputed. So may the amount she needed, and how much of that the husband could afford. Property had perhaps to be settled or divided, maintenance for children

to be resolved. The alimony eventually agreed can seldom be isolated from such surroundings. Like the rest of the compromise, it is the result of give and take. Sometimes it is more than the Court is likely to have awarded the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the Court would never have decreed has compensated her for the difference.”

Although this was said in the context of maintenance in matrimonial disputes, it applies with equal force to other types of suits.

[22] Surely then, an expedited end to litigation may not only be in the parties’ interest, it may also serve the interests of the administration of justice. This finds support at common law. Le Grange quotes Huber with approval:

“A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.”

[23] Le Grange says:

“[T]he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the Court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently.

...

If one is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the Court is required, when exercising its discretion whether to make a settlement agreement an order of the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess the wider impact which its order may potentially have.’ (Footnotes omitted)

[17] There is an obligation upon judges who have to consider a settlement agreement to satisfy themselves that such settlements are proper and in terms of the law. The requirements for lawful settlement agreements were set out in Eke supra. Three requirements were set out.

[18] Part of the first requirement is:

‘This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. ...’[9] (Footnote omitted).’

The second requirement is:

‘Secondly, “the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order...” That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy.

The third requirement is:

‘Thirdly, the agreement must “hold some practical and legitimate advantage”.[10] (Footnotes omitted).

[19] In *PM obo TM v Road Accident Fund*[11], regarding the settlement of a Road Accident Fund claims, it was said:

‘Judges in all divisions have expressed concern that in many RAF cases, there is an abuse of process. Settlements are concluded where, for example, the substantial damages agreed to bear no relation to the injuries sustained. In this case the judge had a legitimate concern that the only reason for the settlement was the lack of preparation of the RAF’s case and that there may, in truth, as appeared to be the case from the evidence she heard from a passenger in the vehicle, have been no negligence on the part of the insured driver and thus no liability on the part of the RAF. Concern has been noted that to require a Judge to scrutinise every settlement in a RAF case would cause delays in the administration of justice. However, it is not every case that will require this form of judicial scrutiny. When a Judge expresses concern over the terms of a settlement, the court must ensure that those concerns are addressed by the parties to prevent an abuse of process and the unjustified disbursements of public funds.’

[20] In *Mofokeng v Road Accident Fund*, *Makhuvele v Road Accident Fund*, *Mokatse v Road Accident Fund*, *Komme v Road Accident Fund*[12], *Mojapelo DJP* expressed himself as follows over the monitoring or supervisory function of the court in settlements consequent to

contingency fees agreements. It constitutes an extremely useful guide with which I respectfully fully agree:

‘The question arises as to what the supervisory functions of the court must entail. Firstly, it appears that the court must ensure that the prescribed affidavits are signed and filed. The court must thus have sight of the affidavits. I do not accept the submissions that the court must only be advised that the affidavits have been filed. The court must further ensure that the affidavits contain the matters which the Act stipulates to be contained in such affidavits.

The supervisory functions of the court in relation to the contents of the affidavits must be determined, in relation to each affidavit, with reference to the prescribed contents. The affidavit of the attorney must, in terms of section 4 (1), state:

1. the full terms of the settlement - Nothing must be withheld from the court.

2. an estimate of the amount or other relief that may be obtained by taking the matter to trial - The court must be placed in a position to see what is it that the client abandons or compromises by settling in the specific terms and at the particular stage instead of proceeding to full trial.
 3. an estimate of the chances of success or failure at trial - The court should satisfy itself that it is prudent to settle having regard to the chances of success as seen by the professional who is aware of the evidence and the relevant considerations. Here, the practitioner may not simply state that the chances are good or bad. It seems to me that the practitioner must give his or her reasons for holding the view that the chances are good or bad with reference to the available evidence and other relevant considerations.
 4. the outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial
 - The Act here seems to require the practitioner to state what his fees are at the stage of settlement – albeit an estimate and what his fees would be if the matter was to proceed to trial. The court should be able to determine whether the legal practitioner is financially better or worse off with the settlement than he or she would be with the trial option. Against this, one would have to consider whether the client is financially worse or better off than would be the case at the end of the trial.
 5. reasons for settlement - This must no doubt be given having regard to the chances of success and the financial implications that would appear from paragraphs (a) to (d). It appears that the court has to be satisfied that the client is better off with the settlement and that the attorney's financial or pecuniary interest in the capital is not allowed to outweigh those of his or her client.
 6. 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 - It will not be enough for the attorney simply to say that he explained the steps or the matters contemplated in the subparagraphs in question to the client. The attorney must convey to the court and satisfy it that the client understood. It appears as if the attorney would amongst others have to satisfy the court that the client understood the language used, and where the client, for instance, does not speak the same language as the attorney, the court would require that some steps were taken to bridge the gap of understanding for instance by providing the interpretation services.
 7. that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement
 - This provision is self-explanatory.
- [57] The affidavit of the client essentially confirms that the attorney has complied with his or her obligations vis-à-vis the client as appears or is prescribed in relation to the affidavit of the attorney. The client must thus state in the affidavit that he or she was notified in writing of

the terms of settlement (s 4(2)(a)), and that the terms of the settlement were explained to him or her and that he or she understands and agrees to them (s 4(2)(b)). 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.'

The information before me

- [21] The contingency fees agreements, settlement agreements, affidavits in terms of section 4 of the Act and draft orders were before me for consideration as well as the court file containing the pleadings and notices in each action.
- [22] It clearly appeared to me (and it was conceded by Ms. Van Eden), that the affidavits were in the form of a template that was used in all the matters. It is clear that only the variables such as the plaintiffs' details, the settlement amounts were changed in accordance with the particulars of each matter and the settlement that was reached. The section 4(1) affidavit in *Mbethe v RAF*, case number: 856/20 reads:

- '1. I am a practicing attorney and an attorney of the firm Frans Schutte & Mathews Phoza Inc, at White River, Mpumalanga.
2. Our firm has entered into a contingency fee agreement with Henry Christopher Mbethe on the 28th of August 2019 relating to his personal injury claim against the Road Accident Fund arising a [sic] collision in which he was injured on the 7th of July 2019.
3. I confirm that an offer of settlement was tendered, in the total amount of [___] which includes an amount of [___] for general damages, and an amount of [___] for loss of earnings sustained by the claimant, and confirm that the issue of merits was conceded in favour of the claimant. An undertaking in respect of future medical expenses is also included in aforementioned settlement.
4. In my opinion the offer is acceptable and I do not have the view that better relief can be obtained by taking the matter to trial. I cannot reasonably give an estimate of the relief that may be obtained by taking the matter to trial, or an estimate after the chances of success or failure at the trial, as there are always risks and uncertainties involved by proceeding to trial.
5. I cannot now estimate the amount of fees payable by the client as a bill of costs must first be drawn up. The fees will be charged in accordance with the contingency fee agreement entered into with the client subject to the terms of Act 66 of 1997. It is more cost-effective to rather accept the original offer than to proceed to trial as there will be higher cost implications for the client if the matter went to trial.

6. I confirm that the settlement is recommended to my client, by myself, due to the fact that the offer of settlement tendered is fair and reasonable compensation in respect of the third party claim against the Road Accident Fund.
7. I confirm that all of the above has been explained to the client with the use of an interpreter, a copy of the settlement was provided to the client, and that he fully understands the content and implications of the preceding paragraphs.
8. I also confirm that the client has informed me that he understands the above and that the client has given instructions that the offer of settlement can be accepted.'

[23] The section 4(2) affidavit reads:

- '1. I am an adult male residing at with identity number [____].
2. I confirm that my attorney from Frans Schutte and Mathews Phoza has notified me, in writing, of the terms of the offer of settlement as tended by the Road Accident Fund in the amount of [____] and I confirm that the implications and terms of the settlement were explained to me in detail.
 3. I confirm that all statements made by myself are true, that all documentation and information provided by myself to my attorney is true and correct and is what it purports to be, and that none are of false or fraudulent nature
 4. I confirm that I did not collude with any person to create a false claim. Further that I have been advised that she did come to light that the claim is indeed one of faults with nature that I will then be liable for the legal costs and will be prosecuted criminally.
 5. I once again confirm that I am satisfied with the offer made in the amount of [____] is acceptable and I have given my attorneys instructions to accept the offer.'

[24] It is clear to me that mere lip-service was given to the information that ought to have been included in the section 4(1) and 4(2) affidavits. The content of the sections was repeated in the affidavits without the substance these sections ultimately require.

[25] There is absolutely no way in which I am, in the mandatory exercise of my oversight function, able to consider the probity of the settlement agreements with the information that is before me.

[26] I simply cannot estimate of the amount or other relief that may be obtained by the plaintiffs if the matters are taken to trial,

nor should it be expected of this court to do so. I do not know what the plaintiffs abandon or compromise by settling as opposed to proceeding to trial. What is needed is a summary of what would ultimately have been claimed at trial so that what the plaintiffs

would be compromising if they settle is clearly apparent.

[27] I am unable to access or estimate of the chances of success or failure at trial nor should this court be expected to do so. This

falls squarely within the knowledge of the plaintiffs' legal practitioners. They have presumably consulted with their clients and expert witnesses. They must know the strengths and weaknesses of their clients' cases. What would be useful for the court to properly make a determination in this regards would be a memorandum where the plaintiffs' prospect of success is set out. Only then would the court be able to determine whether it is proper to settle '...having regard to the chances of success as seen by the professional who is aware of the evidence and the relevant considerations.'

[28] In paragraph 4 of the section 4(1) affidavits, the plaintiffs' attorney states that he/she is unable to give '...the chances of success or failure at the trial, as there are always risks and uncertainties involved by proceeding to trial.' This allegation I find perplexing because section 2 of the Act requires a legal practitioner, before entering into a contingency fees agreement, to form an opinion whether there are reasonable prospects that his or her client may be successful in any proceedings. To proclaim risks and uncertainties in the litigation at settlement stage is far too late. A proper evaluation had to be done before the contingency fees agreement had been entered into. Surely it would not be too difficult to disclose to the court, as part of the requirements for the section 4(2) affidavit what the prospects of success were. In addition, clause 3.10 the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities requires that legal practitioners to:

'advise their clients at the earliest possible opportunity on the likely success of such clients' cases and not generate unnecessary work, nor involve their clients in unnecessary expense;'

Surely, in order not to contravene this provision of the Code of Conduct, the legal practitioner would have known and should have explained to the plaintiffs the likely success in the litigation against the RAF and there should, in my view, be a record of this explanation. Why not disclose this to the court in an effort to comply with the provisions of section 4(2) of the Act?

[29] In not one of the section 4(1) affidavits is it disclosed what the attorney's fees are at the stage of the settlement. Surely

the attorney has kept record of what was done in respect of each plaintiff's case in order to determine the fees. I see no

reason why it cannot be disclosed to court. The statement that the fees must still be taxed is no excuse at all for not disclosing to court even a fee outline in the form of a pro-forma invoice (which must still inevitably be taxed). This is all the more important as the attorney's fees are capped in terms of the Act and the attorney is entitled to a fee surcharge of 100%. The surcharge cannot be recovered from the Road Accident fund – the plaintiffs would have to foot that bill. I also see no reason why a comparison of the fees if the matter is settled as to proceeding to trial cannot be furnished. After all, pre-trial conferences and judicial case management conferences must have been conducted where the evidence that would have been led and the duration of the

trial have been determined. How else would this court be able to determine ‘...whether the legal practitioner is financially better or worse off with the settlement than he or she would be with the trial option...’

and ‘...whether the client is financially worse or better off than would be the case at the end of the trial.’

[30] To only state that the attorney believes that no better relief would be obtained if the case proceeds to trial is simply not adequate. The chances of success and the financial implications are simply not apparent or disclosed. There is no way in which this court

is able to satisfy itself that ‘... the client is better off with the settlement and that the attorney’s financial or pecuniary interest in the capital is not allowed to outweigh those of his or her client.’

[31] With regards to the section 4(2) affidavits, I am also of the view that same is entirely inadequate. How would it have been possible for the attorney to explain the consequences of the settlement as opposed to proceeding to trial if the attorney is unable to disclose what is set out in the immediate preceding paragraphs to this court?

[32] The section 4(2) affidavits record that the plaintiffs were informed in writing of the terms of the offer and the amount of the settlement. The affidavits are silent on what was reduced to writing in respect of the benefits versus the disadvantages of settling. More telling, the section 4(2) affidavits (and the section 4(1) affidavits) do not disclose what the final financial outcome for the plaintiff will be if the settlement is accepted or rejected. The plaintiffs simply do not know what they can reasonably expect to receive (which must surely be quite accurate to estimate at this point). Here is where the danger of conflict lies. The plaintiffs may have expected an award of a certain amount and then, after settlement, may only receive an amount substantially less than what

they had expected. Without a reasonably accurate estimate of the monetary amount the plaintiff may receive upon settlement or at

trial, the plaintiff cannot possibly make an informed decision either to instruct his or her attorney to settle or to proceed to trial. I echo what Mojapelo DJP in Mofokeng supra said that it will not be enough for the attorney simply to say that he explained the steps or the matters contemplated section 4(1) of the Act to the client. The client must fully understand the financial implications too. After all, what is mainly sought is monetary compensation.

[33] Nothing is said about the language used in the explanation in the section 4(2) of the Act affidavits – I am simply unaware of the ‘...steps [that] were taken to bridge the gap of understanding....’ even though it is stated in the section 4(1) affidavit that an interpreter was used. This is not confirmed in the section 4(2) affidavit and none of the affidavits state that that the implications of settling or not settling were understood by any of the plaintiffs.

- [34] Ms. Van Heerden told the court that it would place an almost impossible administrative burden upon the attorneys to furnish information to such complete extent as set out above. For instance, Ms. Van Heerden told the court that bills of cost are drawn by cost consultants only after the matter is settled and for purposes of taxation. This emphasises the point, how was the plaintiffs informed of the costs upon settlement if no bill were drawn when the settlements were reached. I see no reason why cost consultants cannot be engaged earlier in the process to produce pro-forma bill of cost at least.
- [35] Ms. Van Heerden also told the court that it would take too much time to furnish all the information alluded to before in this

judgment.

The counter argument is that since the matters are settled, the time that would be taken up by the trial is freed up for this purpose.

- [36] For the reasons set out above I am not prepared to make the settlement agreements in the matters orders of court unless this court is furnished with proper and full information so to enable it to properly exercise its oversight role.
- [37] In the premises, I made the following order:
- (a) The plaintiffs' attorneys shall file and deliver supplementary affidavits to their section 4(1) and section 4(2) of the Contingency Fees Act 66 of 1997 (the Act) affidavits fully dealing with each of the requirements in sub-sections 4(1)(a) to (e) of the Act.
 - (b) Upon complying with paragraph 1 of this order, the plaintiffs' attorneys shall approach the Registrar of this Court for purposes of enrolling case numbers 856/2020, 2370/2020, 3453/2020, 3453/2020, 291/2020, 2194/2020, 4179/2019, 1181/2020 and 114/2020 on the settlement roll.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 23 January 2023

DATE OF

JUDGMENT:

26 January 2023

APPEARANCES

FOR THE PLAINTIFFS: Me. Van Heerden on behalf of Frans Schutte Matthews Phosa Inc.

FOR THE DEFENDANT: Mr. Siliga for the State Attorney

- [1] KOCK WILMAH LEAH vs RAF (2370/2020); NGOBENI LUCKY vs RAF (3453/2020); MAREE PETRUS JOHANNES vs RAF (291/2020); MTHENJANE OUPA DANIEL vs RAF (2194/2020); MADIKE PETER vs RAF (4179/2019); MOKGOPE BONGINKOSI MAXWELL vs RAF; (1181/2020); KOMANE QUEEN TUMELO vs RAF (114/2020); MILAZI HALLIMA MARIAM vs RAF (144/2020).
- [2] As yet unreported judgment in Hlatsayo vs. Road Accident Fund (case number: 3242/2019 and Masilela vs. Road Accident Fund (case number: 1741/2019) at para. [31].
- [3]
- [2017] JOL 38473 (ECG) at paras. [5] to [7].
- [4] More about the Act later in this judgment.
- [5]
- [2021] 3 All SA 544 (GJ).
- [6] At paragraphs [86] and [87].
- [7] Dated 9 January 2020 and amended with effect from 3 October 2022.
- [8]
- [2015] ZACC 30 at paras [21] to [23].
- [9] At para. [25].
- [10] At para. [26].
- [11] (1175/2017) [2019] ZASCA 97: [2019] 3 All SA 409 (SCA); 2019 (5) SA 407 (SCA) (18 June 2019). at paras [35] and [36].
- [11] (1175/2017) [2019] ZASCA 97: [2019] 3 All SA 409 (SCA); 2019 (5) SA 407 (SCA) (18 June 2019). at paras [35] and [36].
- [12] (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012) at paras. 55 to 57.

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