

SOUTH AFRICA / JUDGMENT

Mucavele v Health MEC Mpumalanga (3352/2016) [2022] ZAMPMBHC 32; 2023 (3) SA 173 (MM) (17 March 2022) [2022] ZAMPMBHC 32

COURT

Mbombela High Court, Mpumalanga

BEFORE

Legodi JP

CASE / FILE NUMBER

3352/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MAIN SEAT)

CASE

NUMBER 3352/2016

Reportable:

YES

Of

interest to other Judges: YES

17

March 2022

THOBILE

KHETHIWE MUCAVELE

PLAINTIFF

Obo

MPHO SIBONISO MUCAVELE

And

THE

MEC FOR HEALTH, MPUMALANGA

DEFENDANT

(Registration

number: 2013/214353/07)

JUDGMENT

LEGODI JP

- [1] According to Merriam-Webster Dictionary, a contingency fee agreement means a fee for services as of a lawyer paid upon successful completion of the services and usually calculated as a percentage of the gain realised for the client. It implies generally that only if a claim is successful will a fee be payable, possibly on a higher rate than normal and from the capital amount recovered in such claim.
- [2] Before me, the question is whether the plaintiff in this matter entered into a contingency fees agreement with the attorney, Mr Johann Wilhelm Joubert or Mr Louw of Attorneys VZLR Inc practicing at Monument Park, 71 Steenbok Avenue, Pretoria, and if so, whether the agreement in question is illegal under common law for non-compliance with the provisions of the Contingency Fee Agreement Act No. 66 of 1997 (hereinafter referred to as the Act). The question was prompted by an enquiry made by this court on 19 January 2022 which enquiry was preceded by an allegation in an affidavit deposed to by Mr Louw on 16 November 2021 in which he stated that ‘neither the plaintiff nor plaintiff’s legal representatives entered into a contingency fee agreement as is contemplated in terms of section 4(1) of the Contingency Fees Act No. 66 of 1997 with another’.
- [3] Initially, I thought the affidavit deposed to on 16 November 2021 by Mr Louw, was prompted by paragraph 15.11.4 of the Practice Directive dated 9 January 2020 as amended which provides that in selected damages claim matters, like RAF and medical negligence matters, if a bill of costs is submitted where a settlement has been reached, and

is suggested that no contingency fee agreement has been concluded with the client in whose favour a settlement has been reached, the party or party’s attorney filing such a bill of costs, shall also file an affidavit confirming that no contingency fee agreement has been concluded with the client. Unfortunately, the attorneys seem to have seized an opportunity to twist and manipulate this provision which was meant to be resorted to when a bill of costs is submitted to the taxing master. Further provision in the directive will have to be added to ensure that this abuse and chance taking to avoid complying with section 4 of the Contingency Fees Act, is brought to an end.

- [4] Upon receipt of the affidavit aforesaid and the draft order intended to be made an order of court as so agreed between the parties, more information was requested as follows:

“The statement appears to pre-suppose that the plaintiff and his or her attorney agreed on a specific amount of a fee for the litigation when the instructions were taken and that the agreed fee was so paid by the plaintiff. For this, the plaintiff’s attorney is hereby directed as follows:

1. If it is correct that the plaintiff and his attorney agreed on a fee as so required and it was so paid, the following information should be provided in an affidavit by the plaintiff and his attorney by not later than 12h00 on Monday the 24 January 2022.
 - 1.1 When was such a fee agreed upon?
 - 1.2 When was such a fee paid in total?
 - 1.3 What is the amount of the fee agreed upon?
 - 1.4 If no fee was paid or was paid in part, when was such a fee or remaining part thereof supposed to be paid?
 - 1.5 If no fee was paid, what is the basis upon which is alleged no contingency fee agreement was concluded?”
- [5] “The statement appears to pre-suppose” in the quotation above, is with reference to what was said by Mr Louw in his affidavit as quoted in paragraph [2] of this judgment. I will later turn to deal with the responses to the questions raised as quoted in the preceding paragraph. But, before that, i deal first with the

background

of what Mr Joubert articulates in paragraphs 5 and 6 of his affidavit in which is stated as follows:

“5.1 After receipt of the instruction and upon considering all the documentation and initial reports relating to this particular claim, I concluded that the Plaintiff had a prosecutable claim, although of course by no means without risk.

5.2 All practitioners of this field of the law are required to make such an assessment.

6.1 I therefore entered into an agreement with the plaintiff on the basis that I would accept the mandate to act on behalf of her child, represented by the Plaintiff and that I would only, at the finalisation of the matter, recover my reasonable attorney and own client fees as well as all disbursements not recovered in the party and party bill of costs.

6.2 This is standard practice and in my view fairer to the client than entering into contingency fee agreement, for the obvious reason that although the client carries the risk of having to pay my fees and disbursements, that payment obligation is held over until finalisation and there is no success fee involved”. (My emphasis).

- [6] Starting with the latter statement, I am at a loss how such an agreement can be ‘fairer than entering into a contingency fee agreement’ when in actual fact client would then run the risk of paying out of her own pocket hundred thousands of thousands or millions of rand in the event the case is not successful and assuming that it was reasonably expected by Mr Joubert or Mr Louw that the plaintiff was capable of paying any such of his “reasonable attorney and own client fees as well as all disbursements not recovered in the party and party bill of costs”, should the plaintiff not have been successful in the litigation. As it would

appear later herein, it is common cause that the plaintiff is indigent who is apparently relying on other people including her attorneys for subsistence. The suggestion that “no success fee” or “no win or no fees” agreement was involved, is not convincing as it would appear later in this judgment. But, if the provisions of the Act were heeded to and the case was lost, the client did not have to worry as that would have been the risk the attorney was prepared to take. Indeed, that is the risk Mr Joubert or Louw took and this appears to be common cause. But for falling for what Mr Joubert asserts in his affidavit, the client

runs the potential risk of being hit with inflated fees which did not conform to the provisions of the Act and the relevant provisions of the Legal Practice Act. That is what the two Acts are intended to curb by allowing the court to have an oversight authority on matters where contingency fee agreement was concluded. Before an order is made, the court in such cases has to be satisfied that the relevant provisions of the Act have been complied with. The Act is actually meant to protect the poor, the vulnerable and the uneducated litigants like the plaintiff in this case who is said to be indigent and living in one room RDP house at Matsulu- Mpumalanga.

[7] It is worrying that an agreement relied upon is in the form of consultation notes taken down on 1 September 2016, although Mr Mullins SC sought to downplay the salient features in the affidavit of 24 January 2022 in particular paragraph 9 thereof. The notes are in Afrikaans and to paraphrase, they allude to this: It was on 1 September 2016 when the consultation took place. Present, was the attorney, the plaintiff and the child. The attorney explained to the plaintiff that the records and I want to assume referring to hospital records, have been sent to various experts. The report of the radiologist was received. The report confirmed the injuries. It was then explained to the client that it was a good case. The attorney then explained the process to client and that it might take long time about seven years to finalise the matter. Furthermore, client was

informed that an advocate would be briefed. Client indicated that she understood. Client then asked for money and the attorney responded by saying he will make a plan or will see what he could do.

[8] Then, is concluded in the consultation notes document as follows and this is my own translation from Afrikaans to English:

“I explained fees and that at the end, a statement of account will be issued. I do not know how much it would be but I should first see how much; work (hours) I am going to make. She understands. Explained the role of an advocate and that she will be informed as soon as counsel shall have been briefed. She must just hang on there”.

[9] I deal later with this statement in its context when I deal with the responses contained in Mr Joubert affidavits filed as so directed. It suffices for now to mention that when a contingency fee agreement is not applicable, client should be told upfront what the litigation is likely to cause and an attorney is not expected to take and execute instructions where there is no cover unless the instruction is accepted on the basis of contingency fee agreement. In the present case for example, having assessed the merits of the case and found that there was a

good case, an hourly rate or estimation of fees should have been provided. In addition, the estimate fee of the advocate should have been provided there and then or once counsel is briefed and fees or estimate thereof the attorney agreed with the advocate should have been conveyed to client.

- [10] Paragraph 32 of the code of conduct for legal practitioners dealing with prohibited fees agreement provides as follows:

“32.1 Counsel shall not agree to charge on results or agree to reduce or waive fees if a positive result is not achieved, except in a matters taken on contingency in terms of the Contingency Fees Act 66 of 1997 and or save as contemplated in section 92 of the Act.

32.2 Counsel shall not agree to charge a fee as allowed on taxation except in a matter undertaken on contingency, or as permitted in terms section 92 of the Act”.

- [11] There is another mystery around the consultation notes document of 1 September 2016. In the affidavit deposed to by Mr Louw on 16 November 2021 it was him who came with the no contingency fee agreement has been concluded statement. He asserted that the facts in his affidavit were within his personal knowledge save where the context indicated to the contrary or where he expressly stated otherwise and were to the best of his knowledge and belief both to be true and correct. Then in paragraph 1.4 of his affidavit he confirmed that no contingency fee agreement was concluded. He said nothing about the consultation notes document. But all what we now know from the consultation notes document, only one attorney was present when the document was contemporaneously produced during consultation. Who was the attorney involved on 1 September 2016? This is the mystery I am talking about. It is not explained in the affidavits filed by Mr Joubert. When Mr Mullins was engaged on the issue, it did not appear he was aware of Mr Louw’s affidavit.
- [12] I now find it necessary to deal with the background that led to the Act. I do this before I deal with the responses to questions posed to the parties as quoted in paragraph [4] of this judgment. On 23 April 1999, the Act came into operation. This was preceded by the South African Law Commission having investigated and reported on their findings in 1996 on the question of contingency fees. The Commission recommended that contingency fee agreements should be legalised in South African law and that common law prohibitions on such fees should be removed. The Act was introduced following the English law which permitted contingency fee arrangements on ‘no win, no fees’ and thus with increased fees in case of success, but of course subject to some restrictions as it would appear later hereunder.
- [13] As stated above, the Act was promulgated after the South African Law Commission was requested to investigate the desirability of a system of contingency fees. The Commission published a working paper for public comment in March 1996. Resultantly, the report was approved by the Commission and was submitted to the Minister responsible on 6 December

1996. The crux of the recommendation by the Commission was that contingency fee agreements were to be legalised in South African

law and that common law prohibiting such fees ought to be removed. For this, the Commission came to the conclusion that a system of contingency fee in terms of which a prospective litigant would only be liable to remunerate their legal representative in the event of a successful litigation, should be allowed. This so the Commission found, could contribute to promote access to courts and that such a system was desirable.

[14] I find the following statement by the Law Commission to fit the facts of the present case regarding what was intended in the proposed legislation which ultimately became the Act under consideration. The statement reads: “should the client win the case, the fee payable to the legal practitioner in terms of the contingency fee agreement may be recovered from the proceeds of the litigation and is usually higher than the practitioner’s normal fee”.

[15] The Act is very short and precise. In 2004 the Supreme Court of Appeal in the matter of Price Waterhouse Coopers Inc and Others V National Potato Co-operative Ltd 2004 (6) SA 66 (SCA) at para [41] held as follows:

“[41] 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 per cent and in the case of claims sounding in money this fee may not exceed 25 per cent 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”. (My emphasis).

[16] The Supreme Court of Appeal seems to have been guided by the development in other countries regarding the common law prohibition of contingency fees agreement. What is stated in paragraphs 35 to 39 of the SCA’s judgment in Price Waterhouse case, can be

paraphrased as follows: The United Kingdom Law Commission in 1967 recommended that prohibition of conclusion of contingency fees agreement in terms of the common law be done away with. The United Kingdom Law Commission further considered the effect of illegality of champertous, that is, akin to contingency fees and stated that the question whether solicitors should be permitted to enter into contingency fee agreements involving payment to the solicitor of an agreed percentage of compensation recovered required further study. This resulted in the public condemnation of the contingency fee agreement becoming a matter of public debate.

[17] That led to the enactment of section 58 of the United Kingdom Courts and Legal Service Act of

1990. The Act permitted speculative actions in accordance with the Scottish practice and rendered enforceable, subject to certain conditions that is a contingency fee agreement and the most important condition was the strict regulation of the percentage whereby the fee was to be increased. The Lord Chancellor of the United Kingdom Courts was to be given the power to regulate the increase. Then, Steyn LJ in *Giles v Thompson and Related Appeals* emphasised the point by stating that the ability to recover fees beyond what was otherwise reasonable was intended to be an incentive to lawyers to undertake speculative actions. Such agreements however remained unlawful in the absence of the Lord Chancellor's order. It was however a clear departure from the rationale of the common law rule that such agreements cause the duty and interest of solicitors to conflict with a resultant risk of abuse of legal procedure. It clearly recognised that the abuses associated with champerty are not the inevitable result of all varieties of contingency fee agreements. Steyn LJ regarded this as a consent evidence of a change of public policy.

[18] Southwood AJA in paragraph [39] of his judgment in the matter referred to in paragraph [15] above held:

"[39] These developments in English law are mirrored in South African law. The judiciary is independent. Its independence is guaranteed by the Constitution. The civil justice system is regulated by the state and has the necessary mechanisms to withstand the abuses perceived to flow from champertous agreements. There are trained and disciplined legal professionals who are subject to strong ethical codes. And there are pre-trial procedures such as discovery to ensure that evidence is not fabricated or suppressed. There is also the trial itself where the veracity of the evidence can be properly tested. There is also the cost of losing. This is a great disincentive to the dishonest litigant".

[19] I now turn to deal with the question whether Mr Joubert or Mr Louw had entered into a contingency fees agreement with the plaintiff, Ms T Mucavele who acted on behalf of Mpho. For this purpose, paragraph

[41] of the judgment in *Price Waterhouse Cooper Inc* and quoted in paragraph [15] is very instructive particularly with regard to section 2(1) which provides as follows:

“Notwithstanding anything to the contrary in any law or common law, 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 not be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, to the extent set out in such agreement”. (My emphasis).

[20] This is my understanding: One cannot enter into a fee agreement based on specific or implied agreement that fees will only be paid upon the success of the litigation without complying with the provisions of the Act. Neither can one avoid the provisions of the Act on the basis that a legal practitioner will only be entitled to charge a fee equal to his or normal fees or less than his or her normal fees which specifically or impliedly is payable on the success of litigation and from the capital amount recovered in the litigation. To do this will be to frustrate the principle relating to contingency fee agreements

as quoted in paragraph [29] of this judgment and the imperative in the Act. On the other hand, subsection (2) of section 2 provides that 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 percent: 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 percent of the total amount awarded, or any amount obtained by the client in consequences of the proceedings concerned, which shall not for purposes of calculating such excess, include any costs.

[21] The Act is clearly meant to carefully control fees and disbursements that are earned and incurred on contingency basis. That is, fees which are only payable after a successful litigation. That is the clear intention of the legislature in enacting the Act as clearly stated in paragraph [41] of Southwood AJA’s judgment. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited at common law. Any contingency fee agreement between such parties which is not covered by the Act, is therefore illegal.

[22] As stated in paragraph 42 of Southwood AJA judgment in Price Waterhouse Cooper Inc, the Act is designed to encourage legal practitioners to undertake speculative actions for their clients. “The Legislature was obviously of the view that conflict between the duty and interests of legal practitioners would not lend to an abuse of legal procedure. It is clearly considered that it is better that people be able to take their dispute to court in this way rather than not at all”. (My emphasis).

- [23] “In this way”, should mean the way as prescribed in section 4 of the Act after having met the requirements in terms of the Act. The procedure laid down in section 4 is meant to bring the courts to the fore to avoid an abuse. It is an important oversight role that is given to protect the unsuspecting ordinary members of the public like the plaintiff in the present case.
- [24] Mr Joubert in paragraph 6.2 of his affidavit makes a somewhat worrying statement as follows:
- “This is standard practice and in my view fairer to the client than entering into a contingency fee agreement, for the obvious reason although the client carries the risk of having to pay any fees and disbursements, that payment obligation is held over until finalisation and there is no success fee involved”.*
- [25] If this “practice” was to be allowed to be the normal, the Act would not be worthy of the paper is written on. Of course there is “success fee” involved here. Acceptance of a mandate to act on behalf of the plaintiff’s child representing the child as indicated in paragraph 6.1 of Mr Joubert’s affidavit, and then only recover from the capital amount, reasonable “attorney and own client fees as well as all disbursements not covered in the party and party bill of costs”, is all coming to success fee being involved.
- [26] If indeed there is such a “standard practice” as articulated by Mr Joubert in his affidavit, then one should even be more worried that it is becoming a wide-spread abuse in this Division as we are now experiencing. It appears that our courts are used to rubber stamp such an abuse. In my view, this will be tantamount to authorising something that is illegal and in so doing, making the courts to be part of a compromised practice. This requires vigilance on the part of the courts.
- [27] On 4 October 2019 under Government Gazette No. 42739 the Legal Practice Council published rules made in terms of section 6 of the Contingency Fee Act 66 of 1977. Rules 1.7 thereof defines “contingency fee agreement” as meaning ‘any agreement entered into in terms of the Act, in terms whereof a legal practitioner shall not be entitled to any fee for services rendered in respect of proceedings unless the client is successful in such proceedings’. The facts of this case which are common cause in a very material respects point to the fact that Mr Joubert expected the plaintiff to pay and be able to pay his fees and disbursements only from the capital amount upon the case being successfully finalised. This will become clearer when one deals with the responses to questions quoted in paragraph [4] of this judgment.
- [28] Mojaelo DJP in the matter of Masango and Another v Road Accident Fund (2012/21359) [2016] ZAGP JHC 227; 2016 (6) SA 508 (GJ) (31 August 2019) had an opportunity to deal with the impact of contingency fee agreements at common law and the Act. He held that “success fees” are contemplated and explained (and this was with reference to section 2 (1)), but are not defined in section 2(2) of the Act. They are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in the litigation to the extent. Mojaelo DJP put it this way:

“[18] “Success fees” are contemplated and explained, but are not defined, in section 2(2) of the CFA. They are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in the litigation to the extent set out in the agreement concluded in term of the CFA. The subsection requires the legal practitioner and the client to specify in the agreement what they will regard as success in the particular litigation.[27] A success fee is 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. Ordinarily a 100% increase on the normal fee in effect entitles the attorney to charge a fee for one matter as if the attorney had done two matters. A double fee is more than sufficient incentive to the legal practitioner to pursue litigation on a contingency basis. One can therefore not understand the ever increasing rampant and persistent attempt by legal practitioners (especially attorneys) to provide for and recover more than the legitimate and legalised success fee.]

[29] Tuchten J in the matter of Nash and Another v Mostert & Others 14395/2013 Gauteng Division Pretoria in paragraph 69 thereof had an opportunity to refer to the cases of Price Winterhouse Coopers Inc and Others supra, South African Association of Personal Injury Lawyers (SAAPIL) v Minister of Justice 2013 (2) SA 583 GSJ and the Ronald Bobroff and Partners Inc v De La Guerre 2014

(3) SA 134 CC (Bobroff). Tuchten J held that these cases are authority for the proposition that at common law, agreements between a legal practitioner and his client that the legal practitioner will receive his remuneration out of the proceeds that client recovers in litigation, including cases before quasi-judicial tribunals such as licensing authorities or that the legal practitioners’ right to recover will depend on the outcome of the litigation in a phrase contingency fee agreements between legal practitioner and client, are contrary to public policy, unenforceable and unlawful. In paragraph 77 of his judgment Tuchten J quoted what was held in Bobroff case wherein in paragraph [7] it was stated:

“Contingency fee agreements are a species of pacta de quota litis which were looked upon with disfavour at common because they were considered to encourage speculative litigation and consequently amounted to an abuse of legal process. Consequently, fee agreements

were singled out for particular censure because they are a form of pacta de quota litis between a lawyer and his client, which has additional undesirable features. The first is that they compromise lawyer’s relationship with his client by introducing conflict of interest, and have high risk of abuse. Contingency fee agreements vest the legal practitioner with financial interest in the outcome of the case, which may adversely affect legal practitioner’s ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding 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.”

[30] On the other hand, Christie in his book *The Law of Contract in South Africa*, 7th ed (2015) 411-413 is of the view that any system of payment by results than payment for work done is equally bad. In the present case, payment for the work done was based on a system of payment by results. This is confirmed by Mr Joubert's own evidence and concessions and the concession by Mr Mullins had it not have been good merits of the case, Mr Joubert would not have proceeded with the litigation. This could only have been because the plaintiff is in no way to avoid the litigation financially and on the other side, Mr Joubert would not have wanted to take the risk on a bad case. From all the authorities cited in the preceding paragraphs, one thing is clear. Any entitlement to any fees for services in respect of proceedings, payable after such legal proceedings being successful, will be unlawful at common law, unless it is tied up to compliance with the provisions of the Act. I now proceed to deal with the responses to the questions quoted in paragraph [4] of this judgment.

Response to question 1.1

[31] The question required the plaintiff or her attorneys to file an affidavit to indicate when the alleged agreement that did not amount to a contingency fees agreement was concluded. The response to the question is sought to be fortified by a consultation notes document dated 1 September 2016 as the date on which the fee agreement was concluded. As said, it is not clear from the document who the attorney was with whom the plaintiff concluded the agreement on the date in question. Was it Mr Louw or Mr Joubert? As the consultation document is in Afrikaans can it be assumed that the consultation took place in Afrikaans? If the consultation was not in Afrikaans, why was Afrikaans used in the consultation notes document? If the consultation note document was meant to constitute an agreement, why did plaintiff not sign it? All these questions remain unanswered because the affidavits which Messrs Joubert and Louw deposed to are unhelpful on the question. More so that Mr Mullins sought to suggest

that the consultation notes document has nothing to do with alleged fee agreement something which I found strange because there was a purpose why Mr Joubert in his affidavit chose to introduce the consultation notes document of 1 September 2016.

Response to question 1.2

[32] Because 'no contingency fees agreement' statement pre-supposes that a certain fee or estimate thereof was agreed upon, the plaintiff or her attorney was requested to file an affidavit furnishing information as to when a fee the plaintiff and her attorney agreed on was paid in full. Mr Joubert starts by putting it this way: "The fee is premised on the foresaid and the fact that the plaintiff is indigent, would require of me to fund the litigation".

[33] There it goes. The plaintiff has no money. So, the attorney undertakes to pay the bill for the litigation on behalf of the client. What is it? A clear contingency fee agreement is conceded. Particularly seen in the context of what is averred in paragraph 16.1 of Mr Joubert's affidavit

deposed to on 24 January 2022 and quoted in paragraph [36] hereunder. In paragraph 14.2 of the affidavit it is made clear that attorney's fee has not been paid and the statement of account will only be drawn upon finalisation of the matter. This should be assumed to include the statement of accounts for services rendered by the advocates. The suggestion that the trustees to be appointed in terms of the proposed draft order will administer the funds and that he or she will also choose or be entitled to have the bill or attorney's fees and disbursements be taxed, does not make the fee agreement in question not to be a contingency fee agreement. This is like to say, because this is not a contingency fee agreement, the court has nothing to do other than to make the settlement agreement an order of court without determining whether the agreement on fees and disbursements is valid and enforceable in law. This was the suggestion by Mr Mullins because at one stage during argument he insinuated that the court was litigating, the statement which I think was unfortunate. The agreement clearly constituted a contingency fees agreement and should be found to be illegal for non-compliance with the provisions of the Act.

Response to question 1.3

- [34] The plaintiff or attorney was required to indicate the amount of fees agreed upon. Neither the plaintiff nor the attorney sought to claim privilege information on this question. Instead, Mr Joubert elected to highlight that 'the amount of the fee agreed upon was premise on his years of experience as an expert in medical negligence matters. He is entitled to an attorney and client fee and the fee has not yet been determined because the matter has not yet been finalised, so is Mr Joubert's evidence or contention.
- [35] The statement can only mean that attorney and client fee will only be determined once the claim has successfully been finalised. Otherwise, how do you expect an indigent litigant living in an RDP house to be able to service the most expensive litigation regarding medical negligence involving about 23 or 24 experts, senior and junior counsel and a very experienced lawyer of many years in medical negligence legal field that is, Mr Joubert himself. As so conceded by Mr Joubert in paragraph 14.1 of his affidavit deposed to on 24 January 2022, he was the one required to fund the litigation as part of the agreement. This could only have been based on "a no win, no fee" principle or put differently on "a success fee" which without compliance with the provisions of the Act, is not allowed and in my view, amounts to an unprofessional conduct not to have complied with the provisions of the Act including the relevant provisions in the Legal Practice Act to which I make reference later

in this judgment.

Response to question 1.4

- [36] Question 1.4 required of the plaintiff or her attorney to indicate when any such fee paid or remaining part thereof was supposed to be paid. The response is articulated as follows:

16.1 As pointed out above, fees to be recovered by me are payable upon the finalization of the matter, once payment of the capital and recovery of party and party has been achieved, when the final accounting is done.

16.2 My attorney and own client bill of costs will be drafted at that time and the fee is to be agreed with duly appointed trustee or if so required by the trustee, presented to the taxing master to be taxed”.

(my emphasis)

[37] This is very important. To say this is not a contingency fee agreement would be to completely ignore the meaning of contingency fee agreement as articulated in paragraph [1] of this judgment and more clarified in the body of this judgment. When Mr Joubert deposed to an affidavit on 24 January 2022 he was responding to a directive dated 19 January

2022. In that directive the following was stated:

“In Meriam-Webster Dictionary the meaning of contingency fee is ‘a fee for services paid upon successful completion of services and usually calculated as percentage’. Contingency fee is also described as ‘any fee for services provided where the fee is payable if there is a favourable result’.

[38] It was further stated that “Contingency fee generally imply that only if a claim is successful and fees be payable, possibly on a higher rate than normal and from the capital amount recovered”. This is exactly what Mr Joubert says is the situation as indicated in paragraph 16.1 of his affidavit quoted in paragraph [36] of this judgment. One cannot ignore what is stated in rule 1.7 of the Legal Practitioners Rules issued by the National Legal Practice Council under Government Gazette No 42739 which was referred to in paragraph

[27] of this judgment. At the risk of repetition, it provides as follows:

“1.7 Contingency fee agreement means any agreement entered into in terms of the Act, in terms whereof a legal practitioner shall not be entitled to any fees for services rendered in respect of proceedings unless the client is successful in such proceedings”.

[39] If the rule was to be read in isolation, one will be bound to go astray. But taking in the context of the historical background alluded to in this judgment which background culminated in the Act, it must be clear what the rule meant to achieve. That is, any fee agreement where client pays nothing in advance, but only pays from the capital amount awarded upon successful finalisation of a litigation as it was the case here, the provisions of the Act kick in. Otherwise, such an agreement cannot be enforced because of its illegality.

[40] So, the common law principle which prohibited contingency fee agreements was abolished with the enactment of the Act. Contingency fee agreements can therefore be entered into, but subject to compliance with the provisions of the Act so is argued in paragraph 18.1 of the defendant’s written heads filed on 2 February 2022 and this is correct. But to conclude a contingency fee agreement as described earlier and at common law and then do so without complying with the Act, would be tantamount to subverting the Act and that remains to be

outlawed as so clearly articulated by Southwood AJA in Price Waterhouse Inc case. So, insofar as the defendant seeks to argue for the plaintiff on this issue, she is wrong in law and on the facts of this case. In any event that is a matter between the plaintiff and her attorneys and not the defendant.

Response to question 1.5

- [41] In question 1.5 as quoted in paragraph [4] of this judgment, the parties, and the plaintiff in particular, were requested to deal with the basis upon which is alleged ‘no contingency fee agreement’ was concluded. The answer is revealing, in particular paragraph 17.2 of Mr Joubert’s affidavit wherein he states:

“I repeat that no contingency fee agreement was entered into. This is despite the fact that there was risk and that the plaintiff, being indigent, would clearly not have been able to pay my fee had the matter failed. I took that risk and did not negotiate a contingency fee or a success fee...”

- [42] Mr Juobert cannot have it both. It does not matter whether Mr Joubert negotiated a contingency fee, a success fee or not. The issue at hand is what was the nature of the agreement. An agreement where fees and disbursements are paid out of the capital amount upon favourable finalisation of the matter can be nothing else than a contingency fee agreement. The risk that Mr Juobert or Mr Louw took on 1 September 2016 was based on the fact that the case looked good (Ek se dit klink soos ‘s goeie eis). And this, can be nothing else, but a success fee agreement. It was this assessment of a good case on merits and the injuries confirmed by the radiologist, which on 1 September 2016 drove the plaintiff’s attorneys to be prepared to take the risk.
- [43] The addition to paragraph 15 of the Division’ Directive was meant to have strict compliance with the imperative in the Act. Unfortunately, this is resulting in a complete abuse where in almost every damages claim relating to RAF matters and matters against the Department of Health for medical negligence, are now characterised as “no contingency fee agreement was concluded”. In many of these matters, the plaintiffs are indigent, uneducated, vulnerable and poor. To them any money is a big money. For this, the potential for abuse is rife and that is what the Act is intended to root out by clothing the courts with an oversight role as provided for in section 4 of the Act. It is for this reason that I intend to refer this judgment to the Legal Practice Council, the RAF and to the MEC for Health for further investigation and to take such appropriate steps as it might be necessary to do so. The MEC and RAF are interested parties because the defendants’ attorneys in medical negligence and RAF matters are so inclined with ease to agree to reservation, preparation, consultation and qualifying fees of experts with the magic words “if any” included in the agreed draft orders as it will later appear in this judgment.

Further terms of the draft sought to be made an order of court

- [44] The parties settled the matter on the basis that the defendant, that is, the MEC for Health in Mpumalanga will pay an amount of R7 184 950.00 into the trust account of the plaintiff's attorneys. In the draft order, 24 experts are listed. Despite the matter which was enrolled for hearing on 22 November 2021 having been settled on 11 November 2021 and immediately removed from the roll as per the Division's Directive, the court was still required to make the draft order an order of court authorising payment for preparation, qualifying and reservation fees ("if any") of all the 24 experts listed in the draft.
- [45] Worried by why the experts should be entitled to preparation fee for trial, qualifying and reservation fees when the case that was enrolled for hearing on 22 November 2021 and removed from the roll on 11 November 2021, a directive was issued. I was also worried that by the time the matter was laid before me, the plaintiff's attorneys had an opportunity to ascertain who of the 24 listed experts were entitled to be compensated for reservation, preparation, consultation and for qualifying fees. I therefore queried 'if any' in the draft because there was an opportunity to establish the facts than to want the court to make an order in such vague terms which always becomes a problem for the taxing masters. This practice tends to amount to an abuse.
- [46] It was for the reason as stated above that questions were put to the plaintiff's attorney as follows:

"4.1 Why did the plaintiff's attorneys serve on the defendant's

attorneys a notice in terms of rule 34 (1) on 15 November 2021 when at that time the matter was already settled in its entirety on 11 November 2021 and was so removed from the roll on the 11 November 2021?

4.2 Was any or all of the 24 experts subpoenaed to justify reservation

and preparation for trial or qualifying fees? If the answer is yes, the following information must be provided on affidavit:

4.2.1 Which of the experts were subpoenaed? Proof thereof must form part of the affidavit.

4.2.2 Which of the experts were reserved? Proof thereof must form part of the affidavit.

4.2.3 Which of the experts prepared for trial, when and where did such preparation take place? Proof thereof is required.

4.2.4 Which of the experts are entitled to qualifying fees and what is the basis thereof?

4.3 Why "if any" is used in paragraph 3.3 of the draft order despite the matter having been settled on 11 November 2021? In other words, why there should not be certainty about who is entitled to such fees as stated in paragraph 3.3 of the draft order? In this division, we do not accept "if any" draft order as this poses a serious problem to the Taxing Master.

4.4 When and where did any of the consultations with the experts take place? And, specifically who of the experts were so consulted to justify reservation, qualifying and preparation fees?

4.5 Who of the experts referred to in paragraph 3.4 of the draft order “supplied various expert joint minutes” and when were such joint minutes served on the defendant or on each other?

4.6 When did the plaintiff’s counsel attend the pre-trial conferences referred to in paragraph 3.8 of the draft order regard been had to relevant applicable provisions of the rule?”

I will not deal with all the responses to each question, but if I do, it will be as brief as it might be necessary.

Response to question 4.2

[47] The question is quoted in paragraph [46] above. According to Mr Joubert, all of the experts were notified of date of trial and were subsequently reserved for trial. This appears in paragraph 21.1 of Mr Joubert’s affidavit. He says it is his duty to his clients to reserve the experts. As his practice, he notifies all relevant parties to a matter the moment he receives a trial date. He then took the view that preparation and reservation fees or costs will have to be proved at taxation. He does not issue subpoenas against his own experts unless such experts refuse to attend court, which was not the case here. So, according to Mr Joubert none of the 24 experts as per the list were subpoenaed but were all reserved. And as they did not revert to him to say they were not available, they “accepted the reservation and undertook to make themselves available to testify”, so is Mr Joubert response.

[48] Annexure “E” is an email to the experts and was sent to all them in one email on 9 September 2021. The matter was settled on 11 November 2021 and removed from the roll on the same date. As the draft order was delivered or filed for the draft to be made an order of court on 16 November 2021, Mr Louw who had deposed to an affidavit, should have known better as to who of the 24 experts, is entitled to what. Secondly, the matter having been settled on 11 November 2021, the experts should immediately have been taken off as witnesses to avoid unnecessary reservation, qualifying and preparation for trial fees, costs or disbursements. There is nothing in Mr Louw’s affidavit or that of Mr Joubert to show that since Annexure E was sent to the 24 experts on 9 September 2021 which was followed, I want to believe, by consultation or preparation for trial

to justify reservation or qualifying fees or costs for the experts.

[49] To put every expert witness on the list of witnesses and keep them on it on 16 November 2021 as witnesses who are entitled to such costs and take it a step further by wanting the court to make an order in vague terms, is in my view, a bad and dangerous practice by the legal practitioners and ought to be discouraged. Similarly, to state “if any” in a court order relating to such experts entitling them to consultation, preparation, reservation or qualifying fees after a matter was settled and removed from the roll on 11 November 2021 and then contends that the taxing master will police who is entitled to such costs is also a bad practice that is subject to be abused. The taxing master deals with the reasonableness of

costs or fees and not necessarily who is entitled thereto. It is the court to determine who of the experts is entitled to fees, costs or disbursements. The making of an order for such costs in respect of specific experts and then introduce (“if any”) instead of being specific, is the kind of orders which in this Division, we are not prepared to accept as a good practice because once such an order is made the taxing master is bound thereby and all what is left is for the taxing master, is to determine the reasonableness of their fees and so forth.

[50] Look at what had ultimately happened in the present case. What Mr Joubert had initially insisted on in his affidavit of 24 January 2022 ended up with Mr Joubert having to say the issue of the alleged preparation, consultation, reservation and qualifying fees has become “moot”. The mootness was only introduced after the 24 experts were directed to file affidavits to confirm that they were so entitled to consultation, preparation, reservation and qualifying fees. It was this inquiry which resulted into a U-turn by claiming that the issue of such costs was moot.

[51] In the affidavit of Mr Joubert deposed to on 1 February 2022, one is now told that ‘due to the time constraints and most of the experts being extremely busy to the ensuing effect of the Covid pandemic, I was not able to obtain affidavits from each experts as directed and I will however endeavour to obtain these affidavits by the 9th of February 2022’. The 9th February 2022 came and passed and there were still no affidavits by the experts as directed by the court. Perhaps it makes sense that the affidavits were never forthcoming.

[52] Look at it this way: Having said what is stated in paragraph [51] above, then in paragraphs 4.3 and 4.4 of the affidavit of 1 February 2022 Mr Joubert stated as follows:

“4.3 What I was able to do is to request the final accounts from each expert. Out of the 23 experts none has have charge (sic) a reservation fee. I attach hereto as annexures “A” to “Z”

the accounts of all of the experts including that they only charged for compilation of their respective reports.

4.4 I therefore submit that the point regarding reservation, preparation and qualifying fees has become moot”.

[53] Unfortunately, Mr Joubert cannot have it both. He cannot have experts about whom he had insisted that they had been reserved and now say the issue is moot or academic because instead of asking for their affidavits as directed by the court, he on his own elected “to request the final accounts from the experts”. When they provided him with the final accounts without other costs as asserted by him on affidavit, he saw his insistence on the reserved, preparation, consultation and qualifying fees as being moot or academic. The point is this: The court was meant to believe that such witnesses are indeed entitled to preparation, consultation and qualifying fees based on the insistence by Mr Joubert as it appears in his affidavit deposed to on 24 January 2022. The insistence was so made despite and after an enquiry by the court as quoted in paragraph [46] of this judgment was made. The red light raised in the enquiry did not deter Mr Joubert from insisting that such costs

have been

incurred. It was this insistence that prompted the court to direct that the experts should speak for themselves on the issue as it would appear later in this judgment.

[53] Mr Joubert instead of asking for their confirmatory affidavits as so directed by the court, he resorted to asking them to provide their reports arising from medico-legal examinations which is often a once off examination. The statement quoted in paragraph [52] of this judgment gives that impression more so that as on 9 February 2022 the affidavits were still not filed as so promised. It is very interesting that amongst all the 24 experts, not even a single one filed confirmatory affidavit as directed by the court. Instead, all of them filed their accounts for the compilation of their reports. Was it so difficult then to show in their accounts how much they have charged for the other costs which Mr Joubert in his affidavit of 24 January 2022 insisted that they have been incurred?

[54] This is a matter that one cannot do without referring it to the professional body to investigate the appropriateness or otherwise of the conduct of Mr Joubert and or Mr Louw regarding their failure to comply with the contingency fees agreement and regarding the insistence that experts were entitled to reservation, preparation, consultation and qualifying fees. The Legal Practice Council will be required to update the court on their investigation, should I find it necessary to do so.

[55] The Legal Practice Council by proclamation of rule 1.7 referred to in paragraph [38] of this judgment, shows that it takes seriously the question of strict compliance with the provisions of the Contingency Fees Act and Legal Practice Act regarding contingency or any fee agreements in general. Unfortunately, legal practitioners seem to be in the practice of ignoring this and their own obligations in terms of section 35 of the Legal Practice Act to which I make reference later in paragraphs [75] to [78] of this judgment. As indicated previously in this judgment, the majority of the legal practitioners

in RAF and medical negligence matters seem to take the view that they can do without the provisions of the Act by stating that “no contingency fees agreement has been concluded”. That has to be rooted out. It is also the duty of Legal Practice Council to do so. Our courts must also be vigilant. Otherwise, the courts may find themselves unintentionally facilitating promotion of wrong things in the form of court orders

The imperative in paragraphs 30, 32 and 34 of the code of conduct regarding fee agreements between attorneys and advocates.

[56] In my view, paragraph 32.1 of the legal practitioners’ rules or code of conduct dealing with prohibited agreements between attorneys and advocates should apply with full force to fees agreement between attorney and client insofar as any such fee agreement is intended to be heeded to upon successful litigation. It is prohibited in terms of paragraph 32.1 of the code of conduct for an advocate to charge a fee on the successful result of a litigation or agree to reduce or waive

fees if a positive result is not achieved. Charging of a fee on the result, is subject to the provisions of the Act.

[57] Furthermore, in terms of paragraph 32.2 of code of conduct, counsel is prohibited from agreeing to charge a fee as allowed on taxation except in a matter undertaken on contingency or as permitted in terms of the Contingency Fees Act. All this brings one to deal with the question as what was a fee agreement between the plaintiff's attorney and the two counsel who are said to have been part of the litigation until up to settlement thereof on 11 November 2021. One of them is said to have been Adv Venter who appeared together with Mr Mullins SC on behalf of the plaintiff in the present proceedings before me.

[58] In dealing with the topic under discussion, I find paragraph 34 of the code of conduct to be of relevance. It deals with the marking of briefs and submission of fee accounts for services rendered. Paragraph 34.1 thereof is peremptory and it provides that counsel shall render an account monthly of all fees owing by every debtor. The present litigation started in 2016. Seen in the context of the consultation document referred to earlier in this judgment, I want to believe that the plaintiff's attorney instructed counsel in September 2016 or immediately thereafter. Insofar as the plaintiff's attorney insists that no contingency fee agreement

was concluded between him and the plaintiff, one would have expected that in a true non-contingency fees agreement, the plaintiff would have made payment upfront or immediately after counsel accounts were rendered in terms of rule 34.1 referred to above.

[59] At the start of the hearing herein, counsel, that is, Mr Venter and Mr Mullins were asked if they were counsel involved on behalf of the plaintiff in the litigation that resulted in the settlement agreement between the plaintiff and defendant. And if so, whether they feel at ease in proceeding with the current hearing which may touch on their own professional conduct and they may end up having to defend themselves. Mr Mullins SC indicated that they were indeed so instructed at all the stages of the litigation herein and that there was nothing in their conduct that makes them to feel unease in making presentations in the present proceedings. And, that if they had to defend themselves they will do so. I deal later with what were his

submissions

in relation to paragraphs 32 and 34 of the code of conduct referred to in the preceding paragraphs.

[60] I however pause for a moment to deal with what Mr Mullins SC's contention was with regards to the question whether the nature of the fees agreement his instructing attorney concluded with the plaintiff amounted to a contingency fee agreement or not. During his oral argument, he sought to explain his understanding of contingency fee agreement by making a statement as follows:

“Prohibited contingency fee agreement at common law was (and I use the word advisably, we now have an Act which governs the position), an agreement in terms of which an attorney agrees not to charge a fee if the matter is unsuccessful and stipulated increased fee if it is successful”

[61] The statement above, coupled with the use of words “advisably” and “prohibited” which words were repeated by Mr Mullins SC, gives one the impression that Mr Mullins was conceding that the agreement in question was contingency fee agreement but that it was not prohibited. For his meaning of a contingency fee agreement as quoted above, he seemed to rely on paragraph 40 in the matter of Price Waterhouse and paragraph 7 in the matter of SAAPIL cited in paragraph [29] above. Perhaps in dealing with the question whether such an agreement as described by him is prohibited or not, one should start first, with his own code of conduct as a legal practitioner insofar as he might have wanted to suggest that the imperative in paragraphs 32 read with 34 of the Code of Conduct did not apply to him and his attorneys.

[62] I referred to paragraphs 32 and 34 of the code of conduct in paragraphs [56] to [59] above. At the risk of repetition, the two paragraphs of the code of conduct are crafted as follows:

“32 Prohibited fee agreements between counsel and attorney

32.1 Counsel shall not agree to change on results or agree to reduce or waive fees if a possible result is not achieved, except in a matter taken on contingency in terms of the Contingency Fees Act 66 of 1997 and/or save as contemplated in section 92 of the Act.

32.2 Counsel shall not agree to charge a fee as allowed on taxation except in a matter undertaken on contingency or as permitted in terms of section 92 of the Act.

34 Marking briefs and submitting fees accounts

34.1 Counsel shall mark a fee as soon as practicable after the specific service has been rendered and shall render an account monthly of all fees owing by every debtor.

34.2 ...

34.3 ...

34.4 ...

34.5 ...”

[63] Mr Mullins conceded that he had never, as I understood him, rendered any fee account as required in terms of paragraph 34.1 of the code of conduct and that he did not have to do so despite the fact that he did not enter into a contingency fee agreement with the instructing attorney. He first suggested that in terms of Bar’s rules to which he belongs and is prepared to report himself to, he was only obliged to render such an account or accounts within three months upon specific service shall have been rendered and that the three months’ period had not expired as yet, so was his contention. Two issues arise from this contention. First, the Bar’s rule cannot supersede the code of conduct in paragraph 34.1 which is peremptory.

Second, it was not the first time that Mr Mullins and his junior Mr Venter had rendered specific legal services in the matter. But still, as I understood Mr Mullins, they never rendered or submitted the accounts to the instructing attorney for payment. In

addition, he was apparently never paid anything since the start of the litigation in 2016.

[64] The need to instruct counsel was mooted by Mr Louw or Mr Joubert on 1 September 2016 when consultation with client took place. Those counsel referred to in the consultation document or note appear to have been Mr Mullins and Mr Venter. In 2020 the matter was set down for hearing to deal with the question of liability. The date of hearing was agreed upon amongst the parties as 3 August 2020. On 29 July 2020 the matter was settled on merits and removed from the trial roll of 3 August 2020. If these facts are correct and Mr Mullins and Mr Venter were counsel for the plaintiff throughout, one would have expected compliance with paragraph 34.1 read with 32 of the Code of Conduct. Perhaps it makes sense why compliance with paragraphs 32 and 34 of the code of conduct could not have taken place. How the plaintiff could have been in a position to settle their fees account? It is irresistible to come to the conclusion that the litigation on behalf of the plaintiff was conducted on the basis of contingency

without complying with the provisions of the Contingency Fees Act. This is clearly a matter reportable to the legal professional body, namely, the Legal Practice Council.

[65] Mr Mullins also sought to distance himself from the consultation notes document of 1 September

2016. The contention was that the document has nothing to do with the fees agreement and that it did not form part of Mr Joubert's affidavit for the purpose of seeking to show that the fees agreement in question did not amount to contingency fees agreement. This contention cannot be correct. Look at it this way: In paragraph 9 of his affidavit deposed to on 24 January 2022 Mr Joubert stated:

"I further explained to her (referring to during consultation on 1 September 2016) that the fees payable to me will be determined at the finalisation of the matter and that I would be entitled to recover my reasonable attorney and own client fees which may be agreed with her or if requested be determined by a taxing master and that any fees will be determined based on my seniority, experience, difficulty or intricacy of the matter in proving her claim and that certain items in respect of fees will be recovered from her as on attorney and client fees even though they might be allowed on party and party scale".

[66] "Fees will be recovered from her on attorney and client fees" could only have meant "recovered from the capital amount". In paragraph 10 of the affidavit aforesaid, Mr Joubert continued to state that "we did not enter into a contingency fee agreement with the plaintiff". Having said this, he concluded on the topic as follows:

"I attach herewith a copy of the consultation note, marked Annexure "A" in confirmation of the aforesaid..."

- [67] I understand “the aforesaid” as being reference to a copy of the consultation notes document and the suggestion that there has not been a contingency fees agreement concluded and that the fee agreement in question was based on charging reasonable fees. Well, the reasonableness of fees is also applicable under the Act. That is, there is a curb with regard to the higher fee that might be charged in terms of subsection (2) of section 2 of the Act. It is not free for all and the sky is not the limit under the Act regarding permissible fees to be charged. It must in fact be assumed that every fee charged by an attorney to client must be reasonable with or without the application of the Contingency Fees Act.
- [69] I would want to believe that the consultation document or note referred to in paragraph [66] above, was annexed to Mr Joubert’s affidavit to show that there was a fees agreement not based on contingency but on its reasonableness regarding fees to be charged. But that is not what the consultation note or document shows. First, it says nothing about “reasonableness of fees”. Second, in the document nothing is said about an hourly rate or an estimation of chargeable fees including that of counsel who was promised on 1 September 2016 to be briefed. This should have been done. What is applicable to fees agreement between an instructing attorney and counsel, in my view, should apply to any agreement between an attorney and client.
- [70] Paragraph 30.2 of Code of Conduct provides that counsel shall at the time of accepting a brief, stipulate to the instructing attorney the fee that will be charged for the service or the daily or hourly rate that shall be applied to computing a fee. This, in turn, must be conveyed to and agreed with a client. Furthermore, paragraph 30.3 of the code of conduct of relevance provides that counsel shall, in respect of every brief, expressly agree with the instructing attorney the fee or the rate of fees to be charged. In my view, what is stipulated in paragraphs 30.2 and 30.3 of the Code of Conduct is what is expected of every attorney who concludes a fee agreement with client whether client pays upfront or at the conclusion of a successful litigation as is the case here, except that with the latter, the Contingency Fess Act will also apply.
- [71] Perhaps the meaning of the word “contingency” needs to be explored further and see if it fits into the facts of the present case. According to the UK Dictionary, the word “contingency” means ‘a future event or circumstance which is possible but cannot be predicted with certainty’ and according to the Legal Dictionary, “contingency” ‘refers to an event that may or may not occur in the future’. In other words, it depends on fulfilment of a condition, which is uncertain or incidental. Mr Joubert who knew that the plaintiff was indigent and could not afford any legal costs, took a chance. This is common cause. He took that chance after having assessed the merits of the plaintiff’s claims and came to conclusion the merits were good. If the merits were not good, he would not have proceeded with the litigation. The outcome of the litigation remained uncertain which uncertainty resulted in the parties discounting the risk on a 50/50% basis.

- [72] During argument, Mr Mullins conceded that if on 1 September 2016 the attorney for the plaintiff did not come to the conclusion that there was a good case, they would not have proceeded with the claim. It boggles one's mind that despite this concession, it was still persisted that the agreement with the plaintiff did not amount to contingency fee agreement. It is common cause that payment of the legal fees was dependent on the success of the litigation and was to be paid from the capital amount that may be recovered in the litigation. All was therefore dependent on "no win, no fee" model or on the so called "success fee".
- [73] One must accept that 'the recovery of contingency fee is hourly rated. In fact, most law firms make their money by billing their clients by the hour. In order to be profitable they make enough money from billable hours not only to cover salary and overheads, but also to generate revenue for the firm'. This is the view expressed in Gace-Law School.
- [74] What is stated in paragraph [73] above is not a factor to be considered in isolation. It has to be seen in the context of what is required as stipulated in paragraph 30.2 of the code of conduct. It is expected that in the acceptance of a brief, counsel shall stipulate to the instructing attorney the fee that will be charged for the service or the daily or hourly rate that shall be applied to computing a fee. Look at the consultation document of 1 September 2016.
- Nothing is said about the amount of daily or hourly rate of the attorney and neither is that of the advocate stipulated. The plaintiff uneducated as she might be and indigent as she is, was put in no position to determine the reasonableness of the fees. But most importantly, there were many opportunities the attorney and counsel for the plaintiff had to stipulate their daily or hourly rate in affidavits or during argument. But that did not happen. At the same time, it is contended that contingency fee did not apply because the agreement with client was that of a reasonable fee per hour without being specific as it appears in the consultation document or note in question. (My emphasis).
- Attorney's fees in respect of legal services and agreement in relation thereto
- [75] A fee agreement is also known as a mandate agreement. It is a signed agreement and it regulates the payment terms between the attorney, attorney's firm and client. The attorney and client would agree to a fee arrangement on an hourly basis. The fee agreement will clearly stipulate what the attorney's hourly charge is. Before an attorney commences on a matter, the client may be requested to deposit a certain amount money into the trust account of an attorney to ensure that fees and disbursements would be covered. In the course of litigation an amount of fee initially agreed upon and paid, may be depleted. It is expected that when a fee agreement is concluded, such a possibility will be explained and that it would be agreed when an invoice will be provided to client and it will also be stipulated when additional payment will be made upon submission of an invoice.

This has been a practice for many years and it has almost become unwritten rule in the legal provision. Similar provisions are found elsewhere in the Legal Practice Act although not proclaimed yet.

[76] In the face of the facts of the present case, Mr Joubert has no escape route. He cannot rely on his assertion of reasonable fees agreement with his client and at the same time find no need to comply with a well-established practice as explained in the preceding paragraph. I actually find it difficult to understand why section 35 of the Legal Practice Act is not proclaimed. Its core purpose must be obvious. That is, to protect the vulnerable litigants who are mostly uneducated and poor, especially in RAF and medical negligence matters. It is even more necessary and worrying now that the legal practitioners in this Division seek to side-step an oversight of the court in terms of section 4 of the Contingency Fee Act by stating that “no contingency fee agreement has been concluded with client”. We have recently discovered that in more than 60% of RAF matters settled, is alleged that no contingency fee agreement has been concluded as was the case in present proceedings against the MEC

for Health.

[77] The statutory obligation in section 35 of the Legal Practice Act No. 28 of 2014 is very important and the sooner is proclaimed in its entirety the better. Section 35 (7) provides that when an attorney first receives instructions from client for rendering of litigious-legal services, or as soon as practically possible thereafter, he or she must provide the client with a cost estimate notice in writing specifying all particulars relating to the envisaged costs of legal services, including; (a) the likely financial implications including fees, charges, disbursements and other costs; (b) the attorney’s or advocate’s hourly fee rate and an explanation to the client of his or her right to negotiate the fees payable to the attorney or advocate, (c) an outline of the work to be done in respect of each stage of the

litigation process, where applicable; (d) the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise and (e) if the matter involves litigation, the legal and financial consequences of the client’s withdrawal from the litigation as well as costs recovery regime.

[78] In addition to providing client with a written costs estimate notice as contemplated in subsection

(7) of section 35 aforesaid, the attorney in terms of subsection (8), must verbally explain to the client every aspect contained in that notice as well as any other relevant aspect relating to the costs of the legal services to be rendered. In terms of subsection (9) thereof, a client must, in writing agree to the envisaged legal services by that attorney or advocate referred to in section 34(2)(b) and the incurring of the estimated costs as set out in the notice contemplated in subsection (7). Non-compliance by any attorney with the provisions of section 35, constitutes a misconduct in terms of subsection (10).

- [79] Subsection (11) is also very important for the present proceedings. It provides that if attorney does not comply with the provisions of this section (referring to section 35 of Legal Practice Act), the client is not required to pay any legal costs to that attorney until the council has reviewed the matter and made determination regarding amounts to be paid. Similarly, subsection (12) of section 35 is also important for the present case. It provides that the provisions of this section do not preclude the use of contingency fee agreements as provided for in the Contingency Fees Act... (My emphasis).
- [80] What is provided in subsections (7) to subsection (12) is similar to the well- established practice as explained earlier. Failure to comply therewith along the provisions of section 35 is laid bare for everyone to see in the present case. Any suggestion to rely on the asserted no contingency fees agreement regarding reasonable fees without complying with the imperative in the established practice, has no legal basis. One may ask why the provisions of section 35 detailed as it is, is so necessary. First, it is intended to avoid client being caught unaware with exorbitant legal fees and costs or disbursements. That too is the purpose in the established practice. The practice like section 35 is also intended to curb an abuse in charging higher fees not properly discussed and agreed with client and also without complying with the Contingency Fee Act. For this purpose, the plaintiff in the present case is not obliged to pay any legal costs to her attorney until Legal Practice Council has reviewed the matter and made determination regarding the amount of fees to be paid, should the Legal Practice Council so decide. I deal later with the appropriate remedy. It suffices for now to mention that any fee agreement which does not comply with the peremptory provisions of the Contingency Fees Act, is illegal and unenforceable.

Alleged preparation, consultation, reservation and qualifying fees of the 23 experts

- [81] In paragraph 3.3 of the draft order the court is expected to make an order of court by agreement between the parties. The draft order inter alia, is crafted as follows:

“The reasonable preparation/qualifying and reservation fees (if any) of the experts referred to in paragraph 3.2 above, including the costs of consultations (if any) with the legal team”. (My emphasis).

In paragraph 3.2 referred to in the quotation above, 24 experts are listed as being entitled to such costs as described in the quotation.

- [82] This part of the draft order was so crafted as quoted above despite the followings: As indicated earlier in this judgment, the case was enrolled for hearing on 3 August 2020 to deal with the question of liability only. On 29 July 2020 the question of liability was settled on 50/50% discounting of liability. The case was then removed from the trial roll of 3 August 2020. Subsequent thereto, the matter was enrolled for hearing on 22 November 2021 to deal with the question of quantum. This too was settled on 11 November 2021 and the matter was accordingly on the same day removed from the trial roll of 22 November 2021 supposedly in terms of paragraph 15 of the Division’s Practice Directive dated 9 January 2020 as amended. On 16 November

2021, one of the plaintiff's attorneys, that is, Mr Louw deposed to an affidavit and submitted the draft order in question to be made an order of court by agreement between the parties.

[83] One would have thought that the matter having been settled on 11 November 2021 and removed from the trial roll including the initial removal from the trial roll of 3 August 2020 regarding liability, as on 16 November 2021 or at least before the request was made on 16 November 2021, the plaintiff's attorneys would have known or expected to have known as to who of the 23 experts were entitled to the fees as articulated in paragraph 3.3 of the draft order and quoted in paragraph

[81] above. Instead, the parties opted for "if any" on something that could easily have been established or ascertained before the request for the draft order to be made an order of court was filed. I find "including the costs of consultations (if any) with legal team" as quoted in paragraph [81], is even most astonishing. First, no such an order is usually made. That forms part of the general costs order. Second, why an attorney should be uncertain as to who of the experts he or she has consulted with, is mind boggling to the extreme. I suspect this could only have been intended to tie up the taxing master hands by using a court order. Vigilance by the courts with this kind of draft court orders is necessary. But most importantly defendants' attorneys in matters like the RAF and Department of Health attorneys should be more vigilant and not allow themselves to be taken for a ride at a huge legal costs to the prejudice of their clients like it nearly happened in this case.

[84] What is stated above, prompted this court to give a directive of relevance, drafted as follows:

“

4.2.1 Which of the experts were subpoenaed? Proof thereof must form part of the affidavit.

4.2.2 Which of the experts were reserved? Proof thereof must form part of the affidavit.

4.2.3 Which of the experts prepared for trial, when and where did such preparation take place? Proof thereof is required.

4.2.4 Which of the experts are entitled to qualifying fees and what is the basis thereof?

4.3 Why "if any" is used in paragraph 3.3 of the draft order despite the matter having been settled on 11 November 2021? In other words, why there should not be certainty about who is entitled to such fees as stated in paragraph 3.3 of the draft order? In this division, we do not accept "if any" draft order as this poses a serious problem to the Taxing Master.

4.4 When and where did any of the consultations with the experts take place? And, specifically who of the experts were so consulted to justify reservation, qualifying and preparation fees?

4.5 Who of the experts referred to in paragraph 3.4 of the draft order "supplied various expert joint minutes" and when were such joint minutes served on the defendant or on each other?

4.6 When did the plaintiff's counsel attend the pre-trial

conferences referred to in paragraph 3.8 of the draft order regard been had to relevant applicable provisions of the rule?

4.7 Why should a specific order be made with specific reference to paragraphs 3.6, 3.7, 3.9 and 3.10 of the draft order instead of leaving same to the discretion of the Taxing Master?”

[85] The plaintiff’s attorneys were directed to file an affidavit to deal with the questions so posed in the preceding paragraph and were also given an opportunity to file written heads of argument if they so wished. Mr Joubert on behalf of the plaintiff filed both the affidavit and written heads. Dealing with the reservation, consultation, preparation and qualifying fees, the responses can be paraphrased as follows: Due to the complexity of the matter and scale of quantum, all of the experts were notified and subsequently reserved themselves for trial. For this, Mr Joubert attached an email which was sent, I want to believe, to all the listed 23 experts. The email of 9 September 2021 reads as follows:

“Good morning. We refer to the above matter. The matter has been set down for trial for 22 November 2021”.

I am unable to see how a statement like this can constitute reservation, including entitlement to qualifying, consultation and preparation fees and or costs.

Response to questions 4.2, 4.2.1 and 4.2.2

[86] I now turn to deal with the responses to some of the questions quoted in paragraph [84] above. What Mr Joubert regards as “subsequently reserved themselves” referring to the 23 experts, if it is based on the email of 9 September 2021 as quoted above, it then does not make sense. It is not clear how they have so “reserved themselves”. The problem however is that by the time the email of 9 September 2021 was so despatched, it was expected that Mr Jourbert and his counsel would have already identified who of the 23 experts would be required for evidence on quantum including some of those who might have been involved during the proceedings on liability issue. Secondly, writing one email to all the 23 experts and inform them that the matter has been set down for hearing on 22 November 2021 without more, as it has happened here, can never be regarded as the basis to come to the conclusion that every one of the experts had been reserved and that every one of them was entitled to

consultation, preparation, reservation and qualifying fees. As at the time the matter was settled on 29 July 2020 and 11 November 2021 respectively, it is expected that the plaintiff’s attorney would have been specific about who was entitled to reservation,

consultation, preparation for trial and qualifying fees on liability and on quantum.

[87] Mr Joubert articulates in paragraph 21.1.1 of his affidavit that it is his duty to reserve experts. But, he cannot be heard to be saying he is obliged or entitled to do so in respect of every expert simply on the basis that such experts compiled medico-legal reports. It is expected that some reports in the course of consultation, preparation for trial and

negotiation for settlement will fall by the way side. It is unthinkable that an attorney who is experienced as Mr Joubert will resort to such practice unless the motive is to unduly pile up unwarranted costs, using the courts to authorise such costs. This

standard practice in the office of Mr Joubert's office and wide spread as we have now lived to see, does not make sense. The statement "I notify all relevant parties to a matter the moment I receive a trial date" as alluded to in paragraph 21.1.2 of his affidavit deposed to on 24 January 2022, I want to assume that it includes also "all relevant experts". It has to be relevant experts and not just club all of them together as being entitled to all sorts of fees simply because they compiled the medico-legal reports.

[88] In paragraph 21.3 of his affidavit Mr Joubert alludes to the fact that he does not issue subpoenas against his own experts unless an expert refuses to testify at court. None of the experts to whom the email of 9 September 2021 was addressed, was asked to attend court to give evidence at trial on 22 November 2021. Instead they were in one sentence told of the date of trial. That is not reserving the experts. The statement, 'none of the experts were subpoenaed, but only were all reserved', is clear insistence that all the experts were so reserved and by implication that they were all entitled to reservation, consultation,

preparation and qualifying fees. The experts are further said to have 'accepted the reservation and undertook to make themselves available to testify'. There is nothing which confirmed this assertion by Mr Joubert in his affidavit despite the court's attempt to induce such confirmation. If indeed all the 24 experts 'accepted the reservation and undertook to make themselves available to testify', there was then no need to include in the draft the words "if any". I deal later with the difficulty the taxing masters are confronted with in the words "if any" being included in a court order, an issue which of course Mr Joubert refuses to accept as significant.

[89] I find it particularly worrying that Mr Joubert now cannot 'speak to which of the experts prepared for trial or how and where they did so' as it appears in his affidavit. The statement 'I emphasise that whether any of the experts prepared for trial (as the matter became settled, but only fairly close to the trial date, and if so to what extent (and when and where) they did so will have to be proven at taxation', is equally worrying and not looking at the principle issue at hand. The point is this: The matter having first been settled on 29 July 2020 regarding merits and 11 November regarding quantum, by 16 November 2021 when Mr Louw deposed to an affidavit wanting the draft to be made an order of court, he should long have known who of the experts was entitled to reservation, preparation, consultation and qualifying fees. He could easily have ascertained from his own notes or from the experts themselves who of them were entitled to such costs before the matter was referred on 16 November 2021 for the draft to be made an order of court.

Difficulties posed by the words ("if any") to the taxing masters during taxation

[90] It has become a practice by the legal practitioners in damages claim cases to use the words "if any" in draft orders to be made orders of court upon settlement particularly regarding fees and costs in matters involving RAF and the Health Department. This is often followed

by settlement of the bill of costs to which there is also a practice that once an order for costs is made in such vague terms and once items on the bill costs are settled, the taxing master will be told all what he or she has to do is to “stamp” the bill of costs by issuing the allocatur. One had an occasion to deal with this practice in the matter of Smith and others v MEC for Health Mpumalanga (571/2017) [2021] ZAMPMBHC 2; 2021 2021 (6) SA 532 (ML) (3 February 2021) when the taxing mistress in this Division was reported by an attorney for disciplinary investigation after she had refused to rubber stamp settled items in the bill of costs without considering the reasonableness of fees and costs charged for each item.

- [91] Draft court orders with hidden words (“if any”) pose and is bound to cause a serious problem to the taxing masters. The suggestion to make such an order and then contend that the taxing master will still exercise his or her discretion as to who is entitled to be paid for fees and or disbursements regarding certain items in the bill costs, has its own dynamics and difficulties. Very often the taxing consultants used by attorneys rely on the court orders by asserting that the court had authorised such costs and that the taxing master has no basis to question the reservation, preparation, consultation and qualifying fees for specific experts. The abuse is that even the experts who may not be entitled to such fees and costs find themselves forming part of the bill of costs beyond the compilation of the medico-legal reports. It is for this reason that one has to be apprehensive when such draft orders with the words “if any” are presented to be made orders of court. The agreement with ease by defendants’ attorneys to the words “if any” in a draft order promotes the abuse. We see this on daily basis. Such settlement agreements expressed in such vague and uncertain terms, should not easily be resorted to unless there are good reasons to do so. It has become a practice for the defendants’ attorneys in RAF and medical negligence matters as it has happened in the present case to concede to such phraseology without questioning and thus becoming part of an abuse at a huge unwarranted and unjustified legal costs for the defendants. It cannot be a problem for attorneys on behalf of the plaintiffs to establish which of the witnesses are entitled to which costs before a draft order is sought to be made an order of court. Once an order is made in such vague terms by including (“if any”) for specified

experts, the taxing master’s authority is limited except for only deciding on the reasonableness of such costs or fees and not who is entitled to them.

Directive for confirmation by experts due to failure to heed to the previous directive

- [92] With the challenges and concerns in mind as alluded to in the preceding paragraphs, after having been provided with an affidavit by Mr Joubert deposed to on 24 January 2022, the plaintiff or her attorneys were further directed as follows:

“6. As regards to the averments made with reference to the reservation, preparation, consultation and qualifying fees, it is hereby directed that the experts in particular those who assert that they had been reserved, consulted with for the purpose of trial, prepared for trial or are entitled to qualifying fees, should so file affidavits by not

later than 12h00 Wednesday 2 February 2022 confirming same and the particulars thereof should be provided regard being had to the fact that the matter was settled in its entirety and removed from the roll on 11 November 2021”

[93] Mr Joubert in his affidavit deposed to on 1 February 2021 responded thereto of relevance, as follows:

“4.2 Due to the time constraints and most of the experts being extremely busy due to the ensuing effect of the Covid pandemic I was not able to obtain affidavits from each expert as directed. I apologise for this and will however endeavour to obtain these affidavits by the 9th of February 2022.

4.3 What I was able to do is to request the final accounts from each expert. Out of the 23 experts none have charged a reservation fee. I attach hereto as annexures “A to Z5” the accounts of all of the experts indicating that they only charged for compilation of their respective reports.

4.4 I therefore submit that the point regarding reservation, preparation and qualifying fees has become moot.

[94] Very late in the afternoon of 8 February 2022 Mr Joubert filed another affidavit in which he stated as follows:

“3.1 In endeavouring to obtain the affidavits as requested I contacted the experts. They advised me that premised on the fact that they are not charging fees for preparation, qualifying and reservation for trial they are not in a position to depose to such affidavits as it would result in them utilising their profession time to attend thereto and as such will have a costs implication to client”. (My emphasis).

[95] At the start of the hearing of this matter on 9 February 2022, counsel for the plaintiff was asked to deal amongst others, with the following questions:

“6. Did the experts have a choice not to file the affidavits as so directed by the court? And if so, on what basis are they so entitled?”

7. If they were so obliged as directed, what is proposed this court should do with such failure to file the affidavits as so directed?”

[96] Mr Mullins SC, in my view dealt with the matter as Mr Joubert did in his affidavits of 1 and 8 February 2022 respectively. As quoted in paragraph [93] above, Mr Joubert moved from the premise that “the point regarding reservation, preparation and qualifying fees has become moot”. This appears in paragraph 4.4 of his affidavit of 1 February 2022. This is somewhat repeated in paragraph 3.1 of his affidavit of 8 February 2022 and quoted in paragraph [94] of this

judgment.

[97] Of course the issue cannot be academic. First, Mr Joubert till up to when this matter was heard never retracted the statement that he had reserved all 23 experts and that all of them were entitled to reservation, preparation, consultation and qualifying fees. The directive for

the experts to speak for themselves in this regard did not materialise for reasons still not confirmed by them. It must be of concern that they would just like to abandon their fees or costs if indeed they were ever reserved, prepared for trial, consulted and entitled to qualifying fees as Mr Joubert insisted. If they were never reserved, never consulted and prepared for trial, it should be of a grave concern that an officer of court would assert and insist as Mr Joubert did in his affidavit of 24 January 2022 on something that is not true. The only people who can clear the air, are the experts themselves. But, the experts also owe a duty to the court to provide an explanation why they did not comply with the directive issued by this court and quoted in paragraph [92] of this judgment. If they were never informed of the directive, they should be at liberty to state so.

[98] Our court orders and directives will mean nothing if they are allowed to be ignored. For this, I will make an order later herein in terms of which the experts will be ordered to explain why they did not respond to the directive which were expected to have been brought to their attention by Mr Joubert. It would still be necessary for them to explain whether or not they were so reserved, prepared for trial, consulted and if so whether is correct that they intended to forsake their reservation, preparation for trial, consultation and qualifying fees or costs as so conveyed to the court in the affidavit deposed to by Mr Joubert on 8 February 2021 and also as so conveyed to the court during the hearing on 9 February 2022. They would also be required to explain whether the directives of this court dated 27 January 2022 were brought to their attention and why they did not take heed thereto. For this purpose, paragraphs [92] to [98] above read together with the quotations in paragraphs [84] and [85] of this judgment, should be of help to the experts in dealing with the order as it would appear later hereunder.

Remedy

[99] I have already indicated in this judgment that the fee agreement which Mr Joubert concluded with the plaintiff is a contingency fees agreement and that it is illegal for failure to comply with the provisions of the Act. Failure to comply with the provisions of paragraphs 30, 32 and 34 of the Code of Conduct should also be interpreted to disentitle an attorney from levying any disbursements he or she might have had against client unless the Legal Practice otherwise directs in a review process. Insofar as Mr Joubert might have wanted to suggest that the fee agreement cannot be classified as a contingency fees agreement, that too cannot make it to be a legal fee agreement for failure to enter into a proper fee agreement. Whist section 35 of the Legal Practice Act my not have been proclaimed in its entirety as yet, it is not something to ignore completely as is in line with a well-established practice regarding fee agreement between client and an attorney.

[100] Rule 8 issued in terms of section 6 of the Contingency Fee Act provides that the provisions of these rules (referring to rules issued under the Act) do not derogate in any way from the power of the Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner. Furthermore, rule 7 of the rules in question deals with the review of agreement or fees in terms of section 5 of the Contingency Fee Act. The rule

entitles the Legal Practice Council or Provincial Council to review a fee charged to client. This then brings me to the question: What remedy would be appropriate in the circumstances? Put it differently, does the invalidity of the agreement between the plaintiff and his attorney affect the validity of the settlement agreement between the plaintiff and defendant in terms of which it is agreed that the defendant is liable to the plaintiff in the amount of R7 184 950.00 which was the result of 50/50% discounting of liability? The agreement between the plaintiff and defendant remains intact and the amount has to be paid as soon as practicable. The next question is into whose account to pay the capital amount and under what circumstances. The capital amount agreed upon is in respect of one Mpho, a disabled child of the plaintiff born on 17 February 2011. He was diagnosed with cerebral palsy arising from partial medical negligence during his birth.

[101] In the draft order that was presented to be made an order of court is stated that the capital amount should be paid into the trust account of the plaintiff's attorneys. In paragraph 5 of the draft order it is suggested that the nett proceeds after payment of all the costs and disbursements due to the plaintiff's attorney, shall be paid into a trust to be created within twelve months of the date of the order proposed and that the trust will be created on the basis of the provisions as fully set out in the draft Trust Deed attached as "A" to the draft order. It is proposed that the trust be authorised to administer the net capital amount. Professional trustees, namely, Ms Helen Rabie and Mr Jacobus P Viljoen are the recommended trustees to be vested with the powers, duties and functions as set out in the draft Trust Deed attached to the draft order.

[102] Then in paragraph 7 of the draft order it is suggested that until such time as the professional Trustees are able to take control of the capital sum and to deal with same in terms of the Trust Deed, the plaintiff's attorneys of record:

"7.1 Are authorised to invest the capital amount in an interest bearing account with a registered banking institution in terms of section 86

(4) of the Legal Practice Act to the benefit of the child pending the finalisation of the Trust.

7.2 Shall be prohibited from dealing with the capital in any other manner unless specifically authorised thereto by the court, subject to paragraph 7.3 hereunder; and

7.3 Are authorised and ordered to make any reasonable payments to satisfy the child's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim".

[103] In paragraph 8 of the draft order is concluded by stating that the appointment of the professional Trustees should be subject to the trustees furnishing security to the satisfaction of the Master of the High Court and that the Trustees' conduct should also subject to the supervision of the Master of this Court or of the Gauteng Provincial Division Pretoria.

[104] I have already indicated that the fee agreement in question between the plaintiff and her attorney is unlawful at common law, for failure to comply with the provisions of the Contingency Fees Act. That being the case, it becomes an issue to be dealt with by the Legal Practice Council including reviewing of fees and costs to which the plaintiff's attorneys might be entitled. The agreement being illegal, it would in the circumstances not be appropriate to have the capital amount paid into the trust account of the plaintiff's attorneys. For this purpose, the Legal Practice Council as a professional body will have to assist.

[105] The interest of the child is at stake. Whilst the fee agreement between the plaintiff and her attorney is illegal in whatever way one looks at it, the agreement between the plaintiff and defendant remains intact. Therefore, the capital amount will have to be paid elsewhere than into the trust account of attorneys of record for the plaintiff. The establishment of the Trust as so proposed in the draft order should also be pursued and for this, the Legal Practice Council will have to assist in making a suggestion as to in whose attorneys trust account the capital amount should be paid. First, to take care of the interest of the child in question and also to invest the capital amount or portion thereof into an interest bearing trust account whilst waiting for the establishment of a Trust.

[106] Consequently an order is hereby made as follows:

106.1 The court declines to make paragraphs 1 to 4.3 of the draft order an order of court due to the illegality of the fee agreement concluded between the plaintiff and her attorneys as set out in this judgment and due to the fact that the request to make settlement agreement an order of court has been pre-maturely brought for consideration contrary to paragraph 15 of this Division's main Practice Directive as amended.

106.2 The Legal Practice Council is hereby directed to propose the attorney's firm that can be appointed by this court for the purpose of receiving into their trust account the sum of R7 184 950.00 which is the subject of a settlement between the plaintiff and defendant as indicated in this judgment.

106.3 Upon submission of the particulars of the proposed attorney's firm and upon appointment thereof by this court, if so satisfied, the defendant, (MEC for Health), shall pay within 30 days the said sum of R7 184 950.00 into trust account of such attorneys so to be appointed by the court.

106.4 Such attorney's firm once appointed shall upon receipt of the payment of the sum of R7 184 950.00 into their trust account, establish or create a Trust within six months from date thereof and once such a Trust is created, the amount so standing in attorneys trust account to the credit of the plaintiff, shall then be paid into such Trust account.

106.5 The appointment of trustees of such Trust shall be made by the Master of the High Court of this Division on the recommendations of the attorneys so to be appointed or as the Master may deem fit.

106.6 The attorneys to be appointed as contemplated in this order, shall be entitled to propose to the Master of this Court the names of the trustees to be appointed and such trustees shall have the authority, powers, duties and functions as so set out in Trust Deed to be drafted and prepared by the attorneys appointed and approved by this court.

106.7 The trustees to be so appointed would be required to furnish security, the amount of which will be determined by the Master of the High Court.

106.8 Until the Trust is created and Trustees thereof are appointed as contemplated in this order, the attorneys to be appointed shall be authorised to take control of the capital amount of R7 184 950.90 in their trust account and deal with the amount as so contemplated and quoted in paragraph [102] of this judgment.

106.9 Should the plaintiff's attorneys of record wish to recover any fees earned or costs and disbursements incurred in the course of litigation on behalf of the plaintiff in this matter, they may so approach the Legal Practice Council to review the matter regarding fees and other costs and the Council in so reviewing the matter, shall also take into account the plaintiff's right not to pay based on the illegality of the agreement concluded with client.

106.10 Should the Legal Practice Council find that the plaintiff's attorneys of record are entitled to any reasonable fees, costs and disbursements, same may be recovered as the Trustees of the Trust contemplated herein may find obliged to do so after a positive review by the Council.

106.11 The experts identified in paragraph 3.2 of the draft order and to whom the email of 9 September 2021 is said to have been sent to them notifying them of the date of trial for 22 November 2021, are hereby

ordered to file affidavits with the Registrar of this court by not later than 16h00 on 4 April 2022 wherein they deal with the followings:

106.11.1 Whether they were ever consulted by the plaintiff' legal practitioners for trial, prepared for trial, reserved for trial and whether they are entitled for qualifying fees as so claimed in the draft order discussed in this judgment and insisted on by Mr Joubert in his affidavit deposed to on 24 January 2022.

106.11.2 Whether the questions as quoted in paragraph [84] of this judgment were ever brought to their attention by Mr Joubert.

106.11.3 Whether the directive as quoted in paragraph [92] of this judgment was ever brought to their attention by Mr Joubert and if so why they did not comply therewith by filing affidavits as so directed by the court and regard should also be had to the assertions made by Mr Joubert as quoted in paragraphs [93] and [94] of this judgment.

106.12 The Registrar of this court is hereby directed to send a copy of this judgment direct to the plaintiff's experts at the email addresses used by the plaintiff's attorneys as per the email of 9 September 2021.

106.13 The Legal Practice Council is hereby directed to consider whether the conduct of all legal practitioners for the plaintiff in this matter have made themselves guilty of misconduct for failure to comply with the provisions of the Contingency Fees Act and also considering other concerns raised in this judgment.

106.14 Insofar as the MEC for Health- Mpumalanga may have an interest in this matter including the Road Accident Fund regarding experts' costs and conduct of their attorneys in easily agreeing to experts' costs that may not have been incurred in medical negligence and RAF matters generally as discussed in this judgment, the Registrar of this court is hereby directed to bring a copy of this judgment to the attention of both the MEC and the Chief Executive Office of the Road Accident Fund.

106.15 Each party to pay its own costs regarding the proceedings of 9 February 2022.

DATE OF HEARING: : 09 FEBRUARY 2022

DATE OF JUDGMENT : 17 MARCH 2022

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