REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 1365/2020

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES: YES

REVISED: YES

18/01/2022

In the matter between:

N M[....]2 obo A[....] M[....]	Applicant
and	
JACOB ALBERTUS VAN ZYL N.O.	First Respondent
JEANNE HELENE RABIE N.O.	Second Respondent
MASTER OF THE HIGH COURT: MBOMBELA	Third Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This application traces its genesis to a court order dated 31 May 2019 by which this Court made a capital award of an amount of R17.8 Million, directed that the amount be protected by the formation of a trust and appointed the Second Respondent as a trustee. The award was in respect of a damages claim following a finding by this Court that the Applicant's daughter, A[....] M[....] ("the minor child"), suffered cerebral palsy that left her physically and brain challenged due to the negligent conduct of the personnel of the hospital facility under the control of the MEC for Health: Mpumalanga. A trust named A[....] M[....] Trust ("the Trust") was subsequently formed as per the direction of the court. The minor child is the only beneficiary of the Trust.

[2] The Applicant now applies to this Court to remove the Second Respondent as a trustee of the Trust. Additionally, the Applicant seeks that she, her husband ("M[....]"), her attorney of record and an accountant and tax practitioner be appointed as trustees of the trust. As an ancillary matter to the aforegoing, the Applicant also pursues relief that the trustees proposed by her be exempted from furnishing security to the Master of the High Court. The Second Respondent opposes the application for her removal. Furthermore, she also objects to the appointment of the trustees suggested by the Applicant and that if so appointed, they be excused from providing security.

[3] The Second Respondent has not only opposed the application for her removal as a trustee but has launched a counter application wherein she wants this Court to authorize her to bring an application before this Court limiting or ending or putting in abeyance the parental authority and rights of the Applicant and M[....]. In her application for the removal of the Second Respondent as a trustee, the Applicant makes various allegations whose objective is to demonstrate that the Second Respondent is not acting in the best interest of the minor child. Similar accusations meant to show that the Applicant and M[....] Are not acting in the best interest of the minor child are thrown back at them.

[4] The Second Respondent wants the court to direct that the minor child be immediately admitted to Butterfly Haven, a facility situated in Johannesburg, for

three months. The three-month admission period will be utilized to evaluate, treat and determine future treatment regime for the minor child. The Second Applicant further applies that a *curator ad litem* be appointed for the minor child to investigate and report to the court on the limitation or termination or suspension of the parent's parental rights and authority and the appointment of *a curator ad personae*.

<u>FACTUAL MATRIX</u>

[5] It is anomalous that the parties persist to cite the First Respondent as a party to these proceedings whereas both of them are now aware that as a result of his inability to provide security to the satisfaction of the Third Respondent, his appointment could not be consummated. To avoid possible further confusion, where mention of respondents is made in the papers of both parties, I shall regard it as reference to the Second Respondent. In this judgment the Respondent shall mean the Second Respondent unless the context demands the inclusion of the Third Respondent in which case I shall refer to them as such.

[6] The court order to which I have made reference in Paragraph 1 *supra* was granted on 31 May 2019. The court directed that an amount of R17.8 million be awarded to the minor child and that the Trust whose chief object would be the control and administration of the capital amount on behalf of the minor child be formed. The letters of authority in terms of which the Respondent was authorised to act as trustee of the Trust was issued on 25 October 2019. The trust funds were paid to the bank account of the trust on 6 November 2019.

[7] It is common cause that neither the respondent, the trustee of the Trust, nor the case manager, with whom she works closely, are medical experts and that as such, they are not entitled to determine the patient's future treatment trajectory. For that reason, the Respondent reasoned that it was vital that an action plan for the minor child's future medical treatment be compiled by medical experts. The action plan would serve as a basis for the following:

7.1 Preparation of a budget for the trust;

7.2 Calculation of future medical expenses in order to –

7.2.1 budget for the rental of a house;

7.2.2 budget for the purchase of a motor vehicle;

7.3 allocate specified amounts to determined medical expenses;

7.4 how to invest surplus capital to allow for capital growth to occur.

[8] On 9 September 2019 M[....] indicated that the Applicant and he agree to the minor child's treatment. On 16 September 2019, a meeting of everyone involved was held at the offices of VZLR Attorneys as a result of the Applicant and M[....] still having many questions. It was at that meeting that the Applicant and M[....] agreed to have the minor child admitted to a facility in Johannesburg. On 25 September 2019, the Applicant, grandmother of the minor child and the minor child were transported to the facility where the minor child was to be place. On arrival at the facility, the Applicant refused that the minor child be admitted as previously arranged. On 6 November 2019, Ms Lejara, the case manager, the Applicant and M[....] discussed and agreed that the minor child would be placed at a different facility, Butterfly Haven in Johannesburg.

[9] It was planned that the placement would occur on 1 December 2019 and that the Applicant would accompany the minor child. The plan foiled because the Applicant and M[....] wanted the minor child to spend Christmas with them. When the placement arranged for 1 December 2019 could not be executed, the Respondent agreed with the case manager ("Ms Lejara") that during the period December 2019 to January 2020 the dietician and the occupational therapist would perform a short term needs assessment for the minor child. It was further arranged that the occupational therapist would subsequently provide the Applicant with a treatment plan to increase the strength of the minor child during that period as well as a pain relief programme. Additionally, Ms Lejara was to arrange delivery of food, milk, supplements, nappies and toiletries to the minor child.

[10] The Applicant and M[....] refused that a caregiver be appointed. Their attitude was that the Respondent must send the doctors to treat the minor child in Mbombela. In a WhatsApp message the Applicant and M[....] request the bank statement of the Trust because they want to see what was paid to the trust and how much was spent thus far. On 26 November 2019, the request is repeated in their attorney's letter addressed to the Respondent. Furthermore, the attorney adds that the Applicant is not willing to agree to the minor child's placement in a Johannesburg facility.

[11] It appears that in the letter of the attorney to the Respondent, the Applicant and M[....], to the extent that, they regard sending experts from Johannesburg to treat the minor child in Mbombela as improvident, are repudiating their earlier decision of 25 November 2019 to do exactly the opposite. In her letter of 26 November 2019 to the Applicant, the Respondent threatens the Applicant and M[....] that unless they ceased being obstructive to her discharge of her fiduciary duties towards the Trust by their refusal to work with her, she would consider approaching this Court for relief. The Respondent in that letter also denies that she sent experts to consult or treat the minor child in Mbombela and points out that it was in fact a suggestion of the Applicant to do so.

[12] The Respondent reiterates in that letter that the minor child should be admitted to a facility in Johannesburg for 3 months. She states further that the Applicant's refusal offends her earlier agreement to such an arrangement. She records further that she worked on the understanding that the Applicant and M[....] had agreed and recognised the need that the minor child should be admitted to a Johannesburg based facility. In her letter to the Applicant's attorney, she explains that she never intended to move the minor child to Johannesburg on permanent basis albeit that the plan of action would be performed in Johannesburg.

[13] The attorney of the Applicant in his letter to the Respondent reiterates the stance of the Applicant and M[....] that there are properly qualified experts in Mbombela to treat the minor child. This assertion is disputed by the Respondent who points out that such claim is unsustainable in the absence of any facts in support of the contention. In a follow up letter of 27 November 2019, the attorney of the Applicant

states further that the Applicant and M[....] have informed him that it was possible to find a care facility in Mbombela. The attorney goes on to enquire from the Respondent if indeed such facility was available in Mbombela.

[14] The difference of opinion that surfaced on 25 November 2019 notwithstanding, Ms Lejara proceeded to arrange to have the minor child evaluated by Mbombela based StepMed- therapists as per the instructions of the Respondent. The arrangement was that the occupational therapist, the speech therapist and the physio therapist would assess the minor child on 6 December 2019 and then compile a report to be made available on 13 December 2019 with a treatment plan for the patient to be applied throughout December 2019. As backup, the therapists had arranged for the driver of the StepMed practice to be available to collect the minor child in case the therapists struggled with the minor child's home environment.

[15] The Applicant showed lack of interest in the treatment programme prepared for December 2019 as a result of which the Respondent cancelled the arrangements to avoid being extravagant with the resources of the Trust. Despite having been advised by the Respondent that Ms Lejara was available to meet during December 2019 with both the Applicant and M[....] to discuss the medical needs of the minor child, the Applicant did not contact Ms Lejara during December 2019. Ms Lejara phoned the Applicant on 9 January 2020 to arrange for the implementation of the recommendations made by the StepMed therapists. She arranged consultations with the therapists for 27 January 2020. When the Applicant complained that she could not afford the travelling costs, she arranged that those costs be met by Fernandes. The Applicant then advised Ms Lejara to stop all plans as she and M[....] were seeking legal opinion.

[16] On 25 January 2020, the Respondent wrote to the Applicant's attorney advising him that she was planning to move the minor child's treatment forward. On 27 January 2020, the Applicant's attorney discussed the contents of her letter. On the same day, the Applicant's attorney replied informing the Respondent that the Applicant and M[....] had agreed to a three-month evaluation period on condition that the Applicant approved the facility and any operation. On 30 January 2020 the attorney of the Applicant told the Respondent that Butterfly Haven was the facility of

their choice. The Respondent then proceeded to reserve a bed for the minor child at Butterfly Haven from February 2020.

[17] The placement did not materialise as the Applicant and M[....] insisted that they be afforded opportunity to first visit the facilities in Johannesburg. The Respondent then instructed an attorney to approach the court for relief. On 27 January 2020, the attorney of the Applicant again advised that M[....] sought an account from Mr Joubert ("Joubert"). On the same day, the Respondent advised the attorney of the Applicant that Joubert has already accounted and that he had explained the finances to the Applicant and M[....] in detail during the meeting of 16 September 2019.

[18] On 29 January 2020, the Applicant caused Joubert to advance to her an amount of R12 000.00. On 30 January 2020, the Respondent reported this conduct of the Applicant to her attorney. She also notified him that the Applicant had given an undertaking to Joubert to reimburse VZLR Attorneys. In an e-mail of 31 January 2020, the Respondent provided all the accounting documentation to the attorney of the Applicant. On 4 February 2020, the attorney of the Respondent wrote to the attorney of the Applicant commencing arrangements for the Applicant and M[....] to view suggested facilities.

[19] On 13 February 2020, the Applicant and M[....] inspected recommended facilities among which were Little Gems and Auckland Park Rehabilitation Hospital. Following their inspection of those facilities, they settled on the latter. This facility turned out to be prohibitive. Notwithstanding that it was expensive, the Applicant and M[....] insisted that the minor child be placed there. On 17 March 2020 and only after obtaining quotations and engaging with the Applicant and M[....], the Respondent instructed Lejara to make arrangements to have the minor child admitted to the Auckland Park Rehabilitation Hospital. Their plans to place the minor child at the facility were stymied as a result of the declaration of the national lockdown.

[20] On 6 April 2020, it was confirmed that the Respondent's attempts to have the minor child treated by the StepMed therapists were unsuccessful. On 14, 24 and 25 April 2020, Lejara's personnel called the Applicant offering to assist whenever she

felt that she needed it. This offer notwithstanding, the Applicant and M[....] elected to approach Joubert on the minor child's dental needs. At the time of their attempt to engage Joubert, he was not involved with the minor child's daily care. In any event, his involvement had come to an end. In her WhatsApp message of 21 May 2020, the Applicant requests Joubert to convey to Lejara and her personnel to stop calling her as they were abusing her emotionally and mentally.

[21] On 22 May 2020, the Respondent spoke to the Applicant following Lejara's complaint to her that the Applicant would not take their calls. From 28 May 2020 the Respondent and Joubert received threatening messages from the Applicant and M[....]. On 1 June 2020, the Applicant informed Lejara that she wished to terminate communication with her office and turned off her phone. On 12 June 2020, the attorney of the Applicant addressed a letter of demand to the Respondent. On 21 June 2020, this application was served.

ARGUMENT

[22] The Applicant argues that the Respondent did and does not have the well-being of the minor child at heart because her conditions have not changed since settlement of the claim. The minor child still receives medical treatment from public hospitals, uses the same chair, bed and lives in the same house not suited to her condition. Furthermore, contends the applicant, the Respondent was preoccupied with having the patient admitted to her "partner's" facility.

[23] The Respondent did not take kindly to M[....] raising financial issues pertaining to the Trust. Each time that M[....] did so, she would scare him off such that he would feel apprehensive to touch on the subject. Additionally, it is the Applicant's argument that VZLR Attorneys have overreached the Applicant as they have charged far beyond what the Contingency Act prescribes in circumstances where an attorney accepts instructions on contingency basis.

[24] The position of the Respondent as a director of VZLR Attorneys and a trustee of the Trust simultaneously is untenable as it places her in a conflict. The Applicant argues that the Respondent is supposed to act in the best interest of the Trust and

its beneficiary, the minor child. Given the two positions that the Respondent holds, how can she discharge her fiduciary duties towards the Trust in case VZLR Attorneys does not measure up to standard? The Applicant concludes in this respect that the Respondent ought to be removed and replaced because she is highly conflicted.

ISSUES

[25] The Applicant has aptly identified the issues to be considered by this Court. As such, there is substance in reproducing them in this judgment to avoid reinventing the wheel. These issues are:

25.1 Has a case for the removal of the Respondent from the Trust as a trustee been made out?

25.2 Has the Applicant made out a case for her own appointment as a trustee together with M[....] and Mr Maseko ("Maseko")?

25.3 Has the Applicant made out a case for dispensing with the furnishing of security by the above-mentioned proposed trustees?

25.4 Should the Trust be responsible for payment of the legal fees of the successful party?

LEGAL FRAMEWORK

[26] From the perusal of the parties' papers, it is clear that they agree on the law governing the area of their dispute. That said, they seem to be sharply divided on how the legal principles should be applied. The case law and statutory provisions that I will outline below is intended to serve as guidance for the adjudication of this matter. Firstly, I shall deal with the relevant statutory provisions contained in the Trust Property Control Act, 57 of 1988 ("the Act"). Secondly, I shall turn the focus to case law on the meaning of those provisions as they affect trustees.

[27] The removal of the Respondent as a trustee is founded on the Act. For purposes of this judgment the most pertinent provisions of the Act Are Sections 9 and 20. Section 9 provides that:

> *"9 Care, diligence and skill required of trustee*
>
> *(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*
>
> *(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)."*

[28] Dealing with removal of trustees for their failure contemplated in Sub-Section 2 of Section 9, Section 20 is headed: Removal of trustee and it stipulates:

> *"(1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.*
>
> *(2) A trustee may at any time be removed from his office by the Master*
>
> > *(a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or*
> >
> > *(b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having*

been requested thereto or within such further period as is allowed by the Master; or

(c) if his estate is sequestrated or liquidated or placed under judicial management; or

(d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or

(e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.

(3) If a trustee authorized to act under section 6 (1) is removed from his office or resigns, he shall without delay return his written authority to the Master."

[29] *In Land and Agricultural Bank of South Africa v Parker and Others* **2005 (2) SA 77 (SCA) at paragraph 10,** it was stated that: "In its strictly technical sense the trust is a legal institution sui generis… The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein." In the same vein, in *Lupacchini NO and Another v Minister of Safety and Security* **2010 (6) SA 457 (SCA) at paragraph 1** the court said the following:

"….is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act…"

[30] As early as 1925, the Appellate Division, as it then was, stated the following in *Sackville West v Norse and Another* **1925 AD 516** on the fiduciary duties of trustees:

“ The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias. . .. We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with . . . the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks.”

See also, *Administrators, Estate Richards v Nichol and Another* **1999 (1) SA 551 (SCA).**

[31] The general rule regarding the removal of trustees is that a trustee will be removed from office when continuance in office will imperil the property of a trust and prevent the trust itself being properly administered to the welfare of the beneficiaries. The power to remove a trustee must be exercised circumspectly but neither mala fides nor even misconduct is required for the removal of a trustee. See, *Gowar and Another v Gowar and Others* **2016 (5) SA 225 (SCA**A) at paragraphs 30 – 31. Courts have over and over again stressed that the removal of trustees must be done in line with the provisions of Section 20(1) of the Act - when it is in the interests of the trust and its beneficiaries.

ANALYSIS

REMOVAL OF THE RESPONDENT AS A TRUSTEE

[32] The principal accusation here is that the Respondent has not acted in the best interest of the Trust and therefore, its beneficiary, the minor child. In the second place, the Applicant complains that instructing VZLR Attorneys to act on behalf of the

Respondent in circumstances where she is a director in that firm and simultaneously a trustee, is inimical to the discharge of her fiduciary duties towards the Trust. Turning to failure to act in the best interest of the Trust as per Section 20(1) of the Act. It appears that reliance is placed on the fact that the living and medical treatment of the minor child has not changed even though her claim was settled a while back.

[33] It is of course disconcerting and also inexcusable that so much time has lapsed since settlement of the claim without deployment of the funds towards improvement of the living conditions of the minor child. The lack of this enhancement of the living conditions of the minor child is attributable to the controversy between the parties, which is unacceptable because the minor child cannot do anything on her own to make life bearable. The Applicant is concerned that the Respondent is subjecting the minor child to examinations for which extortionate amounts are charged. She points out that the Respondent intends to spend R1 500 000.00 for evaluation in a period of 3 months. At Paragraph 3 of a letter penned by the Respondent, the expense of the aforesaid amount is attributed to the Applicant and M[....], which she says is incorrect. The Applicant maintains that during the course of the litigation, the minor child was examined by different medical experts. As such, those evaluations should be adequate making it unnecessary to incur further expenses in that regard.

[34] The approach adopted by the Applicant cannot find favour with this Court. While it could be true, to some limited extent, that the reports compiled prior to the settlement of the claim contain some pointers into what would be needed to make the minor child's life comfortable, it ought to be noted that those reports are by now stale. Besides, the accessories recommended are not custom-made for the minor child. An action plan cannot therefore be dispensed with as the Applicant would have this Court believe. Perhaps it is important to recall that the purpose of the action plan is the following:

34.1 Preparation of a budget for the trust;

34.2 Calculation of future medical expenses in order to –

34.2.1 budget for the rental of a house;

34.2.2 budget for the purchase of a motor vehicle;

34.2.3 allocate specified amounts to determined medical expenses;

34.2.4 how to invest surplus capital to allow for capital growth to occur.

[35] The Applicant and M[....] held a meeting on 16 September 2019 with Joubert during which they were advised that it was pressing for the minor child to receive medical intervention. Both the Applicant and M[....] seem to have understood this message because it was at that meeting and subsequent ones on November 2019, January and February 2020 that they agreed that the minor child could be admitted to a facility where she would be assessed and a plan for her treatment put together. It is thus disingenuous to suggest that the minor child’s continued treatment at public medical facilities is due to the Respondent.

[36] In any event, the Respondent explains that on the one occasion when the minor child had her tooth extracted at a public health facility, the Applicant had made a request to Joubert. The Applicant asked Joubert despite that she had been told by both Lejara’s personnel and the Respondent that she was at liberty to approach them at any time on the subject of the minor child’s treatment. The truth is that the Applicant and M[....] have been shifting ‘goal posts’ and this happened on at least three occasions – November 2019, January and February 2020. Had the minor child been admitted to a facility on any of the dates that were proposed, an action plan would have been compiled and the P[....]e requirements of the minor child would have been determined and implemented.

[37] It is manifest that the minor child’s continued delay for admission to a facility and lack of subsequent adoption of an action plan should be laid at the door step of the Applicant and M[....] whose co-operation was and continues to be critical to

accomplish the objectives of the Trust. The plans made by Lejara to have the patient treated by the StepMed therapists in Mbombela were rebuffed by the Applicant's lack of co-operation maintaining that everything be cancelled as she and M[....] were obtaining legal advice.

[38] The complaint concerning the bed, chair and suitable accommodation for the minor child too forms part of the medical action plan. The medical experts who assessed the minor child prior to the settlement of her claim might have identified the accessories that will be needed by the minor child but further evaluation is necessary because such equipments that they have recommended should be customized to suit the minor child. It certainly would have been imprudent and remiss for the Respondent to have purchased any accessories without any professional medical advice because while necessary they may not be custom-made for the minor child. The action plan is therefore critical prior to touching the future medical expenses award.

[39] The meeting of 16 September 2019 suggests that it became necessary because the finances of the Trust became a subject of contention by M[....]. It was at this meeting that all the finance matters of the Trust were laid bare to the Applicant and M[....] by Joubert who also invited them to feel free to take up any issues pertaining to the finances of the Trust directly with him. On 31 January 2020, Joubert furnished the Respondent with all the documentation, which he had supplied to the attorney of the Applicant. The meeting of 16 September 2019 and the provision of documents to the attorney for the Applicant are not denied. The accusation that M[....] felt intimidated every time that he raised financial matters of the Trust with the Respondent must therefore be bereft of any truth as he knew that Joubert, and not the Respondent, was accountable.

[40] The Respondent is further accused of having been totally gripped with having the minor child admitted to her "partner's" facility. Prior to the meeting of 16 September 2019, Lejara had obtained quotations from three different facilities one of which was Little Germs, the least prohibitive and one in which Lejara had interest. While at the meeting of 16 September 2019 three quotations were presented and weighed up, when the facilities were subsequently inspected, Little Germs did not

form part of that inspection. In November 2019, Lejara identified Butterfly Haven as a suitable facility. She then recommended and arranged for the admission of the minor child at the facility. The evidence before court is that Lejara has interest in Little Germs and not Butterfly Haven. The accusation is therefore misguided and is rejected.

[41] With regard to the question of the overreaching of the minor child by VZLR Attorneys for which the Respondent is a director, the Applicant asserts that the attorneys have overreached the patient because their fee exceeds 25% of the award. The Respondent has failed to challenge the amount transferred to the Trust by VZLR Attorneys because of her directorship with them. The Respondent's counter to this is that her failure to challenge VZLR Attorneys' fees is not because of any conflict caused by her directorship with VZLR Attorneys. The reason for not doing so, she argues, is that the accusation is baseless.

[42] Contingency fees agreements are regulated by the Contingency Fees Act No. 66 of 1997 whose objective is to control the conclusion of contingency fees agreements between legal practitioner's and their clients. Section 1 of the Contingency Fees Act defines a legal practitioner as an attorney or an advocate. Since the advent of the Contingency Fees Act, conclusion of contingency fees agreements is closely regulated by the provisions of Section 2 in the Contingency Fees Act, which is headed: Contingency Fees Agreements.

[43] Section 2(1) provides that:

> *"Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-*
>
> *(a) That the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*

(b) That the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such service rendered, if such client is successful in such proceedings to the extent set out in such agreement.

2 Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the "success fees") shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount not, for purposes of calculating such excess, include any costs."

[44] It is common cause that the Applicant entered into a funding agreement with Astrea albeit that the Applicant does not volunteer this information. Evidence before court is that Astrea is a legal structure but I am not aware whether it is a company or a partnership. In *Price Waterhouse Coopers Inc. and Others v National Potato Co-Operative Ltd* **2004(6) SA 66 (SCA) at para [41],** it was found that an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void.

[45] The Applicant therefore concluded two discrete agreements. The one is a contingency fees agreement concluded with VZLR Attorneys, which is subject to the provisions of the Contingency Fees Act. The other is the funding agreement, which falls outside of the provisions of the Contingency Fees Act. The Respondent explains that the funding agreement was perused and approved by senior counsel who represented the curator ad litem and that she had no issues that it was legal as it was validly concluded with the Applicant. The mistake that the Applicant makes, it would appear, is that she lumps the amount charged by Astrea together with the fees of VZLR Attorneys.

[46] The upshot of doing so is the loss of distinction between the amounts charged by the two. The position is that only the amount charged as fees of VZLR Attorneys

is subject to the Contingency Fee Act. The fees of VZLR Attorneys, on the face of it, falls within the parameters of the Contingency Fees Act as it charged 0.076% of the capital award. That said, whether or not the amount raised by Astrea for funding the litigation is in accordance with the funding agreement between the parties is a matter that is not before this Court for consideration. As such, I am deliberately refraining from traversing the subject. Accordingly, the assertion that VZLR Attorneys has overreached the Applicant has no foundation and is rejected.

[47] Another issue that requires a closer consideration is whether or not the Respondent's instructions to VZLR Attorneys to represent the Trust puts her in a conflict of interest situation. The instructions to VZLR Attorneys occur against the background that firstly, the firm represented the Applicant in her claim of the minor child against the Department of Health: Mpumalanga. Secondly the Respondent was and remains a director of VZLR Attorneys. Thirdly, she is a trustee whose main objective is to protect the interest of the minor child.

[48] I raise this matter mindful that the Applicant has not fully taken issue with it. The only insinuation of a conflict of interest raised by the Applicant seems to be that the Respondent failed to question the amount paid over to the Trust by VZLR Attorneys because she was conflicted. I have already found that there is no merit in that argument because the Applicant combined the fees raised by the attorneys and the funder to conclude that the attorneys have overreached. That was incorrect for the funder and the attorneys are two separate entities whose charges for services rendered should be treated separately and differently.

[49] The instructions from the Trust, represented by the Respondent, to VZLR attorneys where the Respondent remains a director was injudicious. By giving instructions to VZLR Attorneys, the Respondent was in principle instructing herself to represent the Trust. The Trust has been formed specifically to protect the interest of the minor child. The parents of the minor child are the Applicant and M[....], the Respondent's erstwhile clients in the minor child's claim against the Department of Health: Mpumalanga.

[50] Understood in the context that the parents of the minor child and the

Respondent ought to co-operate in order to ensure that the interests of the minor are protected by the Trust the conflict of the Respondent is apparent. While this may not necessarily warrant the Respondent’s removal as a trustee, it is indubitably undesirable and is discourage. If the Respondent is to continue as a trustee, the instructions to VZLR Attorneys should be terminated and a different firm of attorneys instructed to represent the Trust.

[51] One of the prayers in the notice of motion is that new trustees be appointed and that if so appointed, that they be excused from providing security. The appointment of trustees is as per Paragraph 8 of the Trust Deed. I have already concluded that there is no merit in the Applicant’s prayer that the Respondent be removed as trustee. The ineluctable corollary of that decision is that it renders vain to consider the appointment of new trustees and whether or not they should provide security. Even if I were to consider the appointment, the Applicant’s evidence on the social and financial backgrounds of the individual proposed for appointment is woefully inadequate discouraging this Court to consider such prayer favourably.

COSTS

[52] Both parties pray that the costs of their litigation be borne by the Trust in the event of the other losing. The only fathomable reason in these circumstances is that the Trust has funds to cover the costs of the litigation. To discourage both of them taking each other to court even in circumstances where it is not warranted and to make these parties understand that they should co-operate to maximize the discharge of the duty of protection of the minor child’s interest, I shall make no cost order.

ORDER

[53] In the result, I make the following order:

1. The application is dismissed; and

2. There is no order as to costs.

COUNTERCLAIM

[1] To avoid confusion and purely to simplify matters, I shall refer to the parties as in convention. In this counterapplication, the Respondent seeks relief in the following terms:

> *"1. That JEANNE HELEN RABIE ("the trustee") be authorised to approach this court in terms of the provisions of s28 of the Children's Act Number 38 of 2005("the Act") to apply to this court for an order in terms of which the parental responsibilities and rights of N P[....] M[....]2 and M[....] M[....]3 N[....]1 be circumscribed alternatively terminated further alternatively suspended in terms of s28(1) of the Act.*
>
> *2. That L[....] A[....] L[....]2 M[....] ("the patient") be admitted to Butterfly Haven in Johannesburg for a period of no more than three months.*
>
> *3. That Butterfly Haven be authorised to:*
>
> > *3.1 Provide such services and therapy to the patient as they might be advised to provide to her by the professional medico-legal therapists and medical doctors employed and appointed by the trustee to treat the patient;*
> >
> > *3.2 Transport the patient to doctors and therapists approved by the trustee to provide required and necessary medical services to the patient;*
> >
> > *3.3 To compile a treatment action plan to serve as guide for the patient's treatment in Nelspruit.*
>
> *4. Butterfly Haven shall render these services subject to:*
>
> > *4.1 Acceptance by the trustee of their quotation rendered for*

those services;

4.2 The oversight of the trustee and Mr Nick Fernandes.

5. Adv. PJ Nieman of the Pretoria Bar is appointed as the patient's curator ad litem with the power to investigate and report to this court on the following issues:

5.1 Whether it would be in the best interests of the patient if:

5.1.1 Any parental right and obligations of N P[....] M[....]2 and M[....] M[....]3 N[....]1 is suspended, alternatively terminated, further alternatively circumscribed in terms of the provisions of s28(1) of the Act and report to the court:

5.1.1.1 The extent to which the parental rights and obligations of the parents should be suspended, alternatively terminated further alternatively circumscribed;

5.1.1.2 Which person should be accorded the parental rights and obligations so suspended, alternatively terminated, further alternatively circumscribed.

5.1.2 A curator personae is appointed for the patient and report to the court on:

5.1.2.1 The powers that must be afforded to a curator personae;

5.1.2.2 Which person should be appointed as the curator personae for the patient.

6. That the costs of the counter application be paid by the trust unless the relief sought in the counter application is opposed by the applicant in which event the applicant should be ordered to pay the costs of the counter application.

7. Alternatively to the above and in the event of the court deciding to remove the trustee an order in terms of which:

7.1 The date upon which the trustee's appointment as trustee shall terminate is determined;

7.2 The third respondent is ordered to return the trustee's undertaking and bond of security to her no later than the date following the date upon which her appointment as trustee terminates;

7.3 The trustee is released from her obligation to provide security to the third respondent on the date her appointment as trustee terminates;

7.4 That the costs of the application and the counter application be borne by the trust, alternatively that a costs order which the court considers appropriate be issued."

[2] The first prayer in the counter application is founded on the provisions of Section 28 of the Children's Act, 38 of 2005. For that reason, it is necessary that the Section be reproduced in full. The section provides as follows:

"[Termination, extension, suspension or restriction of parental responsibilities and rights

(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-

(a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

(b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

(2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.

(3) An application for an order referred to in subsection (1) may be brought-

(a) by a co-holder of parental responsibilities and rights in respect of the child;

(b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;

(c) by the child, acting with leave of the court;

(d) in the child's interest by any other person, acting with leave of the court; or

(e) by a family advocate or the representative of any interested organ of state.

(4) When considering such application, the court must take into account-

(a) the best interests of the child;

(b) the relationship between the child and the person whose

parentalresponsibilities and rights are being challenged;

(c) the degree of commitment that the person has shown towards the child; and

(d) any other fact that should, in the opinion of the court, be taken into account."

[3] The position of the Respondent as a trustee of a Trust whose sole objective is to look after the interest of the minor child makes her eligible to launch these proceedings as she is a person contemplated in Section 3(b) of the Children's Act. This Court does not as such, doubt her *locus standi*. That said, I do not think it would be wise for this Court to grant prayer 1 of the notice of motion without ordering that investigations be conducted to establish the desirability of the prayer sought. The actions of the Applicant and M[....], somewhat unreasonable as they seem, are not obviously those on which this Court can readily conclude that they were engendered by lack of what is in the best interest of the minor child. On the contrary, they could have been brought about by a belief that the action of the Applicant and M[....] were in fact meant to protect the minor child's best interest. In other words, it is the opinion of this Court that it will be in the best interest of the minor child that such investigations be carried out so that an informed decision is made. Furthermore, I am acutely mindful of the cultural differences between the trustee and the Applicant and M[....]. This could be the cause of lack of co-operation manifesting itself as distrust. I will address this subject when examining whether or not an additional trustee should be appointed as set out in the trust deed.

[4] Turning then to prayers 2, 3 and 4 of the notice of motion. The evidence before court is that the action plan is critical. Besides, the minor child requires ongoing medical treatment, which she has not been receiving because of the lack of co-operation among the people expected to ensure that the Trust is operated in a manner that serves her best interest. The action plan must be drawn up because it will contain a prepared budget for the trust and Calculation of future medical expenses of the minor child.

[5] The evidence relating to the drawing up of an action plan and the minor child requiring urgent medical attention is common cause. I have already mentioned that the Applicant and M[....] had agreed to allow the minor child to be admitted to a facility on three occasions, November 2019, January and February 2020, for that very purpose albeit that they later reneged from their agreement. The report of StepMed dated 13 December 2019 accentuates the significance of immediate medical intervention. The report also underscores the fact that the applicant and the grandmother are not coping with the minor child's treatment and that they need training.

[6] It appears from evidence that the minor child has neither been subjected to proper treatment regime nor received ordinary medical treatment since September 2019. It is not denied that the Applicant and M[....] refused StepMed to administer any treatment to the minor child in January 2020 and there has not been any indication that the minor child has since been treated subsequent to her parents' refusal. If the treatment of the minor child was urgent and vital in December 2019, the lapse of two years must mean that the minor child is medically in bad shape and that her treatment cannot be delayed a day longer.

[7] In prayer 5 of the notice of motion the Respondent seeks relief that Adv. Niemann be appointed as a *curator ad litem* for the minor child. The need for this to happen cannot be overemphasized especially having regard to the number of attempts made to admit the minor child to a facility and the time it has taken since. There is indeed a dire need to determine whether or not it would not be in the best interest of the minor that she be cared for in a facility either permanently or intermittently.

[8] Additionally, it is necessary to also determine whether or not it would be in the best interest of the minor child that decisions regarding her care should not be made by someone other than the parents who is properly qualified to take such decisions soberly and objectively. That said and given the sensitivity of the matter particularly that the ultimate recommendation might be exceptionally intrusive to powers generally enjoyed by biological parents of a minor child, I would suggest that

the curator ad litem be proposed and appointed by an independent party such as the family advocate.

[9] the person to assume the duties that the curator ad litem is to investigate will be appointed as curator personae for the minor child. The general powers of a *curator personae* are described in *Ex parte Hill* as follows:

> *"While the curator bonis is concerned with the patrimonial affairs of the patient, the curator to the latter's person is concerned with matters relating to his person, such as where he is to live, e.g. whether he is to be consigned to an institution or to live at home, his health, e.g. whether he is to have particular treatments such as an operation and by when it is to be performed, and generally the control over his personal regimen. It is open to the Court to appoint a curator to the person of a patient without defining or restricting the general powers referred to above. (See: Powrie's case, supra). On the other hand, it may appoint a curator to the person of a patient ad hoc and for a specific purpose, e.g. to give permission for an operation to be performed on such patient (Ex parte Dixie,* ***1950(4) SA 748 (V\1;*** *Ex parte Baker (unreported CPO 26.11.1960). The appointment to a patient of a curator with general powers clearly involves a serious inroad upon the personal liberty of such person and accordingly a Court would be guarded in the exercise of its jurisdiction to make such an appointment and would do so only when a clear case is made out that the circumstances relating to the patient require it. Martinson v Brown, 1961(4) SA 107 (C) and Ex parte Powrie, supra at p. 300."*

[10] In the circumstances of this matter, it is fitting that The curator ad litem should investigate whether or not a *curator personae* with general or limited or adhoc powers should be appointed for the minor child. Reasons for the appointment of a curator ad litem to investigate the relevance of a curator personae have been advanced above. The most prominent is of course that the Applicant and M[....] have refused to co- operate in circumstances where doing so prejudices the interest of the minor child. It is obvious that the minor child, being physically and mentally challenged, cannot fend for herself.

[11] The court directed that a trust whose broad objective would be the safeguard of the best interest of the minor child by controlling and administering the capital amount awarded to the minor child be created. The order also prescribes that the Respondent and Jacobus Albertus van Zyl be appointed as professional trustees of the Trust. The proposed trustees were required to provide security prior to assuming their positions of trusteeship. The Master of the High Court could not effect the appointment of Mr Van Zyl as he failed to furnish security.

[12] Clause 5.2 of the trust instrument provides as follows:

> *"In the event where it is not possible for the Trustee to take the appointment or to continue with her duties for whatever reason, her successor will be her successor in practice, or failing him/her a co- director nominated by the managing director of VZLR Inc., or failing this a person nominated by the Master of the High Court, for the purpose of this Deed of Trust."*

[13] So, the court envisaged a trust run by two trustees. As such, it would have thought that a trust run by two trustees would be in the best interest of the minor child. I agree that the Master of the High Court's refusal to ratify the appointment of Mr Van Zyl did not paralyse the Trust. The Trust still came into existence and has and continues to be run and operates with the Respondent alone as its trustee. This situation attracted the invocation of Clause 5.2 of the trust deed described above.

[14] The facts of this matter, it would seem, suggest that the attitudes of the Applicant and M[....] are characterized by cynicism and resentment toward the Respondent. The appointment of a second trustee in such a situation becomes idyllic and vital. Such a trustee might in fact assist to bridge the schism that has developed between the Respondent and the parents. The suggestion of this Court is that such a trustee be a person who, to some degree, shares cultural heritage and traditions with them to avoid their feeling of resentment and alienation.

[15] Insofar as costs are concerned, I am not willing to order the Trust to pay the costs of the successful party, the Respondent. This is merely to discourage litigation

by either party against the other with the hope that the Trust' whose main objective is to control and administer the funds of the minor child becomes a source of income for them. It is not the minor child who is litigating here. Given that situation, why should the funds of the Trust finance the litigation?

[16] Against that background, I make the following order.

1. The Applicant, M[....] and the Respondent must, within 30 days of the date on which the Master of the High Court appoints the second trustee of the Trust, present the minor child, L[....] A[....] L[....]2 M[....], to Butterfly Haven in Johannesburg for admission;

2. Butterfly Haven shall admit the minor child for a period of not more than 3 months during which it is authorised and directed to:

2.1 provide such services and therapy to the minor child as they may be advised to administer to her by professional medico-legal therapists and medical doctors employed and appointed by the trustee to treat the minor child;

2.2 transport the minor child to doctors and therapists approved by the trustees to provide required and necessary medical services to the minor child;

2.3 to compile a treatment action plan to serve as guide for the minor child's treatment in Mbombela.

3. Butterfly Haven shall render these services subject to:

3.1 acceptance by the trustees of their quotation rendered for those services;

3.2 the oversight of the trustees and Mr Nick Fernandes.

4. Should the Applicant, M[....] and the Respondent, for any reason, not present the minor child to Butterfly Haven, the family advocate or a person designated by the family advocate is authorised to present the minor child to Butterfly Haven which shall admit her for a period of not more than 30 days for the purpose identified above;

5. The family advocate is directed to appoint an advocate who has been practicing for not less than 10 years to act as *curator ad litem* with power to investigate and report to this court on the following issues:

5.1 whether it will be in the best interest of the minor child that:

5.1.1 any parental rights and obligations of the Applicant and M[....]3 N[....]1 M[....] should be suspended, alternatively terminated, further alternatively, circumscribed in terms of the provisions of Section 28(1) of the Childrens Act, 38 of 2005 and report to this Court:

5.1.1.1 the extent to which the parental rights and obligations of the Applicant and M[....] should be suspended alternatively terminated, further alternatively circumscribed;

5.1.1.2 which person should be accorded the parental rights and obligations so suspended, alternatively terminated, further alternatively circumscribed.

5.2.1 a *curator personae* is appointed for the minor child and report to this Court on:

5.2.1.1 the powers that must be afforded to a *curator personae;*

5.2.1.2 which person should be appointed as the *curator personae* for the minor child.

6. Utilising the criteria described at Paragraph 14 of the counterclaim, the Master of the High Court is directed to appoint a trustee within 15 days of the date of this order;

7. The trustee so appointed shall act as the second trustee of the Trust;

8. VZLR Attorneys are directed to withdraw as the attorneys of record of the Trust and/or the Respondent in this matter;

9. Each party is to pay its own costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 January 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv. LP Zwane**
Instructed by:	**Nkosi Attorneys**
Counsel for the Respondents:	**Adv. EP Van Rensburg**
Instructed by:	**VZLR Attorneys Inc.**
Date of Judgment:	**18 January 2022**