IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MAIN SEAT)

CASE NUMBER 3352/2016
Reportable: NO
Interest to other Judges: NO
16 May 2022

THOBILE KHETHIWE MUCAVELE **PLAINTIFF**
Obo MPHO SIBONISO MUCAVELE
And

THE MEC FOR HEALTH, MPUMALANGA **DEFENDANT**
(Registration number: 2013/214353/07)

JUDGMENT IN RE: APPLICATION FOR LEAVE TO APPEAL

LEGODI JP

[1] On Wednesday 13 April 2022 an application for leave to appeal against the whole of the judgment handed down by this court on 17 March 2022, was laid before me. At the heart of the application for leave to appeal was that this court erred in finding that the fee agreement concluded between the plaintiff and Mr Joubert was illegal and unenforceable. Second, it was contended that this court erred in allegedly denying the plaintiff of the costs despite the parties having agreed on payment of party and party costs. Lastly, the contention was that the court erred in dealing with the conduct of attorney Joubert despite the fact that the issue of reservation, consultation and preparation fees became moot.

Illegality or otherwise of the fee agreement in question

[2] In this application for leave to appeal, Mr Hellens SC who appeared on behalf of the plaintiff (applicant in the present proceedings) sought to reinvent the wheel that was started by Mr Mullins SC in argument made in the proceedings before the

main judgment was handed down. The main judgment in question is the subject of the present application for leave to appeal. In attacking the reasoning and conclusion reached by this court in the main judgment, Mr Hellens SC made a somewhat long statement as follows:

> "*I was an attorney for 42 years ago and nothing has changed. If a client walks into your chambers, into your office and says I want you to do this case, and nothing more is said…and says I want you to do this case, the attorney is entitled…to accept the mandate. And nothing more is said… the terms of the mandate would be that the attorney would be paid…his normal or usual normal fee. And that the attorney's usual normal fee is attorney and client fee. There is obligation on him to take a deposit. And it is entirely… lawful for him to say that I will charge my fee only at the end of the case. There is nothing in the mandate on these papers before you that says that the attorney would only charge if successful…In addition there is no requirement to ask for a deposit as is often done…And that the client at the conclusion of the matter…if the client were to be successful, the client would owe the attorney his normal usual fees. The fact that client may be indigent affects the recoverability of the fees. The fact that the attorney is willing to take that chance because he believes the plaintiff's case…that the merits are strong…, does not affect the nature of the agreement as reflected above. It is certainly not…turned into a contingency fee agreement. And that is the heart My Lord of where you took wrong turn on the highway with respect… Everything flows from the misunderstanding of the legal position".*

[3] Of course and with respect, much has changed since '*42 years ago'* of Mr Hellens SC's experience as an attorney. The Contingency Fees Act has brought that change relevant to facts of the present case. The long statement quoted above has introduced a somewhat new argument and I find it necessary to contextualise it and deal with the statement, something that is ordinarily not necessary in an application for leave to appeal. In my view, if the logic of the statement quoted above was to be followed, then the Contingency Fees Act which made it possible to avoid the prohibition of contingency fee agreement at common law, will not worth the paper is written on. Suggesting that the statement quoted above is the law and that there is nothing wrong with the statement previously articulated by Mr Mullins SC during the

main hearing, would have the effect of side-stepping the prohibition at common law. It would also amount to side-stepping the imperative in the Contingency Fees Act. This Act is aimed at ensuring that those who would not ordinarily have been able to afford the costs of litigation, are not taken for a ride when time comes for accounting for the legal costs allegedly incurred by their legal practitioners, particularly where the client pays nothing or had no means of paying for legal fees except from the capital amount awarded upon successful litigation.

[4] In terms of section 17(1) of Superior Courts Act, leave to appeal may only be given *inter alia,* where the judge or judges concerned are of the opinion that, (a) (i) the appeal would have reasonable prospect of success; or (ii) there is some compelling reason why the appeal should be heard. This will be the test in dealing with the present application for leave to appeal.

[5] As I said, ordinarily, it would not be necessary to write a judgment in dealing with an application for leave to appeal. An order denying or granting leave to appeal should suffice because one would not want to deal with an application for leave to appeal as if one is dealing with the appeal itself or rewriting the judgment appealed against.

[6] However, seen in the context of the long statement made by Mr Hellens SC as quoted in paragraph [2] above, also taking into account the other two applications now laid in these proceedings and the affidavits submitted by the experts as per the order in the main judgment, it will be remiss of me not to deal with the statement and these other two applications. The statement "*If client walks into an attorney's office and says I want you to do this case, the attorney is entitled to accept the mandate and if nothing more is paid, the terms of that mandate will be the attorney is entitled to be paid his normal fee and the attorney normal fees is his attorney and client fees",* is simplistic, but fails to take into account the rules of the profession, the prohibition at common law and the object of the Contingency Fees Act.

[7] Mr Hellens SC misses the point. The attorneys' profession is heavily regulated. This has to be so because there is a need to protect the unsuspecting clients. Transparency in the conclusion of a fee agreement is key and protects both

the attorney and the client. Anything short of this will expose the legal profession negatively. It would also open clients like the present indigent plaintiff to an abuse and unnecessary criticism for which the Contingency Fees Act is intended to avoid.

[8] It has become a long standing practice in the legal profession which is also envisaged to be reinforced in section 35 of the Legal Practice Act referred to in the main judgment, as to how attorneys should deal with their clients in concluding fee agreements. To conclude a fee agreement as Mr Hellens SC proposes in his statement quoted above, undermines the long standing practice. That is, a client should know upfront especially in litigious proceedings, what would happen when a mandate is terminated, an aspect that is common in matters concerning medical negligence. A client should also upfront be informed of the scope of work to be undertaken by an attorney, fee amount and payment terms should always form part of a valid and enforceable fee agreement and in particular, hourly rate. This is a norm and practice that has become one of the <u>ethical standards generally recognised by the legal as is contemplated in paragraph 3.3. 4 of the code of conduct</u>. Therefore, to suggest that a valid agreement is concluded when an attorney says to a prospective client that "*I will be entitled to be paid-normal fee and the attorney normal fees is attorney client fee",* cannot be correct and seeks to undermine the ethical standard general recognised by the very legal profession Mr Hellens SC has been in for more than 42 years. It will be a complete departure from the form and essence of entering into a valid fee agreement, something which Mr Hellens SC in his statement seems to ignore.

[9] The statement: "*No obligation to take a deposit and is entirely lawful for him to say I will charge my fee only at the end of the case*", is a statement that should worry everyone in the legal profession. This statement seen in the context of the following statement should even be more worrisome:

> "*There is nothing which says the attorney will or may not be able to recover his fees because he believes the merits are strong. This does not affect the nature of the agreement as reflected above. It is certainly not entering into a contingency fee agreement".*

[10] If what is stated above is the definition which Mr Helens SC attributes not to be a contingency fee agreement, then there will never be a contingency fee agreement as contemplated in Contingency Fees Act. In the process, the shield for the indigent persons envisaged in sections 2, 3 and 4 of the Contingency Fees Act, will be off line and of no use. I accordingly find that considering the main judgment and what is stated in the preceding paragraphs, there are no reasonable prospects of success on appeal. Regard being had to the background that preceded the Contingency Fees Act as sketched out in the main judgment and the clear wording of the relevant provisions thereof, I come to the conclusion that there are no compelling reasons why the appeal should be heard.

[11] One must not forget that in the Contingency Fees Act, it is required of the attorney to make assessment of whether the client's case carries the prospects of success before entering into a contingency fee agreement. This is what Mr Joubert did as alluded to in the main judgment and as conceded or confirmed by Mr Mullins SC who acted on behalf of the plaintiff on 9 February 2022. They conceded that Mr Joubert would not have accepted the instruction had the merits of the case not have been good. The concession is in line with section 2(1) of the Contingency Fees Act which provides that a legal practitioner may only enter into a contingency fee agreement with a client if he or she is of the opinion that the client has reasonable prospects of success in the proceedings.

[12] It is therefore a requirement that before entering into any fee agreement, a full and proper assessment of the client's prospects of being successful in the litigation should be undertaken. This was clearly spelled out in **Tjadi v Road Accident Fund and two similar case 2013 (2) SA 632 (GSJ) at para 16.** An assessment envisaged in section 2(1), will place the legal practitioner in a position to determine the nature of the issues in matter, the complexity and the expected volume of work. Having done the assessment as indicated in the main judgment, failure by Mr. Joubert to enter into a fee agreement that complies with the Contingency Fees Act, is therefore inexplicable. It is for this reason too that I hold that there are no prospects of success on appeal.

<u>The interest of the minor child in question and alleged denial of the plaintiff's costs</u>

[13] In paragraph 105 of the main judgment it is held that "*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".* Then, in paragraph 106.1 of the court order, is stated:

> *"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 <u>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 Practice Directive as amended"</u>.*

[14] Mr Hellens SC argued this ground of appeal under the discussion, as if it was his ace card in the application for leave to appeal. But he did so without making reference to paragraph [105] of the main judgment. Similarly, Mr Hellens SC in his submission made no reference to what is stated in paragraph 106.1 of the court order in particular, the underlined part thereof as indicated in paragraph 12 above. Instead, he only dealt with the first part of order in paragraph 106.1.

[15] Rule 41(4) of the Uniform Rules of Court provides that unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives <u>but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties</u>.

[16] As a start, no such application for judgment in terms of the settlement on at least five days' notice to all interested parties was made. Secondly, paragraph 15 of this Division Practice Directive referred to in paragraph 106.1 of the order, is very clear. In supplementing rule 41(4), paragraph 15.6.3 of the Directive provides that when a matter is enrolled on the settlement roll upon failure to carry out the terms of the settlement agreement between the parties, only the innocent party, his or her legal representative shall appear and be entitled to costs of the application and appearance provided a consent letter from the other party confirming the settlement

agreement as draft thereof is provided and that the defaulting party tenders costs of the application and appearance for judgment based on the settlement agreement.

[17] On the other hand, paragraph 15.6.4 provides that should the other party refuse to provide such a letter or to tender costs for the application, the defaulting party or his or her legal representative shall be obliged to attend court on the date of the hearing of the application for judgment in terms of sub-rule (4) of rule 41 and shall run the risk of forfeiture of appearance fee and special costs order relating to the application in question including payment out of own pocket.

[18] Paragraph 15.8 of the Practice Directive deals with compliance with section 4(1) of the Contingency Fees Act. This matter was laid before me not as application in terms of rule 41(4), neither was it a matter laid before me in terms of section 4(1) of the Contingency Fees Act. Paragraph 106.1 of the order which is now the subject of the attack has to be seen in context. Paragraph 15.8 of the Practice Directive provides that as contemplated in section 4(1) of the Contingency Fee Act, no offer of settlement made to any party who has entered into a contingency fee agreement, may be accepted unless after the legal practitioner has filed an affidavit with the court stating what is required in terms of subsection (1) (a) of section 4 if the matter is before the court.

[19] When this matter was initially laid before me, it could not have been so laid in terms of section 4(1) read with paragraph 15.8 of the Practice Directive because throughout, it was the contention of the plaintiff's attorney that no contingency fee agreement was concluded. So, in whatever way one looks at it, approaching this court as the plaintiff did, was pre-mature as indicated in paragraph 106.1 of the main judgment and this is also relevant to the alleged misdirection by the court in not making an order of costs in favour of the plaintiff.

[20] In any case, rule 41 (1)(b) of the Uniform Rules of courts provides that a consent to pay costs referred to in paragraph (a), <u>shall have the effect of an order of court for costs,</u> which rule, the Taxing Master will take into account when bill of costs on a party and party scale is submitted to him or her. I therefore come to the

conclusion that on this ground of appeal too, there are no reasonable prospects of success. I now turn to the last issue.

The conduct of the Attorney, Mr Joubert

[21] Mr Hellens suggested that it was inappropriate to deal with the conduct of Mr Joubert after he has indicated in his affidavit that the issue of reservation, qualifying and preparation fees for experts has become moot. When he was referred to the quotation in paragraph [94] of the main judgment read with paragraph [91] and [84] thereof, he concluded by saying it was up to the court to decide whether or not to report Mr Joubert to the Legal Practice Council. The initial contention by Mr Hellens SC was almost like there was nothing wrong which Mr Joubert did. In the main judgment I dealt extensively with Mr Joubert's conduct and it is not my intention to revisit what is already held therein except where necessary seen in the context of the affidavits now filed by the experts.

[22] In paragraph 106.11 of the order, the 23 or 24 experts were to file affidavits and were directed to deal with the issues as stated in the order. All experts complied with the order and one is thankful to them as they have now spoken for themselves. The aspects raised by all of them, are concerning regarding the conduct of Mr Joubert; which I find it necessary to deal with herein insofar as Mr Helens wished to criticise the order in the main judgment regarding the conduct of Mr Joubert.

[23] In his affidavit deposed to on 8 February 2022, Mr Joubert alleged as quoted in paragraph [94] of the main judgment. Of importance is the suggestion that the orders as quoted in paragraphs [92] and [94] of the main judgment were brought to the attention of the plaintiff's experts. For example, in his affidavit deposed to 1 February 2022 and quoted in paragraph [93] of the main judgment, he stated that '*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 experts as directed'.* This statement under oath gives the impression that he tried or told the experts of the order of the court but because they were allegedly busy, they could not furnish the affidavits. What I say herein is fortified by the statement: "*What I was able to do is to request the final accounts from each expert",* meaning he did

talk to the experts after the order or directive for the filing of affidavits by them, was made*.*

[24] It is these two statements which gave the court the impression that Mr Joubert in his affidavit of 1 February 2022 wanted the court to believe that the experts were told of the order to file affidavits by not later than 12h00 on 2 February 2022. The court had its own doubts whether Mr Joubert was communicating with the experts and whether the experts were being told of the order which was supposed to be complied with by 2 February 2022. It was due to this that the order in paragraph 106.11 of the main judgement was made. This was due to what Mr Joubert deposed to in his affidavit on 8 February 2022.

[25] In the affidavit of 8 February 2022 quoted in paragraph [94] of the main judgment, Mr Joubert alluded to the fact he '*contacted the experts in endeavouring to obtain affidavits as requested'.* Here he was clear. He allegedly told the experts that they were ordered or required to file affidavits. The statement: "*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*", was even more worrying that professional people can resort to ignoring an order of court.

[26] It was this latter statement which prompted the court during the hearing on 9 February 2022 to enquire from Mr Mullins SC who was acting for the plaintiff at the time whether the experts were entitled to defy the court. It was the unsatisfactory explanation given by Mr Mullins which resulted in the order made in paragraph 106.11 of the main judgment*.*

[27] Paragraph 3.1 of the Code of Conduct for legal practitioners provides that 'legal practitioners, candidates legal practitioners and juristic entities <u>shall maintain the highest standards of honesty and integrity.</u>' Paragraph 3.3.4 thereof provides that the conduct of legal practitioners shall subject always to the maintenance of the ethical standards prescribed by the code of conduct and any ethical standards generally recognised by the profession.

[28] The synonyms of "integrity" referred to in paragraph 3.1 of Code of Conduct as I see it, is honesty, uprightness, honour, good character, principles, ethics, morals, righteousness, scrupulousness, sincerity, truthfulness etc. On the other hand, in terms of paragraph 3.5 of the Code of Conduct, legal practitioners shall refrain from doing anything in a manner prohibited by law or by the code of conduct which places or could place them in a position in which client's interest conflict with their own or those of other clients.

[29] I now turn to deal with the affidavits deposed by the experts as per paragraph 106.11 of the order of 17 March 2022. The affidavits were apparently settled and deposed to with the assistance of the plaintiff's attorney. I say so because the affidavits are similar in articulation and they were all filed by Mr Joubert himself. All the 23 expert's affidavits deal with paragraph 106.11.3 of the order which requires of the experts to indicate whether the directive quoted in paragraph [92] of the main judgment was ever brought to their attention by Mr Joubert and if so why they did not comply therewith. In so doing, they were also required to have regard to the assertions made by Mr Joubert in paragraphs [93] and [94] of the main judgment.

[30] As a start, all the experts for the first time spoke for themselves under oath, and all of them deposed to the fact that the directive quoted in paragraph [92] of the main judgment was never brought to their attention. The effect of these assertions by all the 23 experts suggest that Mr Joubert under oath was not telling the truth in his affidavits of 2 and 8 February 2022 as quoted in paragraphs [93] and [94] of the main judgment. I am however not making a final determination in this regard. It is for the Legal Practice Council to do so. In addition, all the experts who had filed the affidavits as per the order in paragraph 106.11.3 of the main judgment, stated that the questions as quoted in paragraph [84] of the main judgment were never brought to their attention.

[31] Lying under oath is a criminal offence. Giving misleading information which have now been clarified by the experts is of a grave concern to this court. This is not an issue that can be ignored. It is necessary that what has now been clarified by the experts regarding Mr Joubert's earlier assertions under oath should be brought to the

attention of the Legal Practice Council to investigate and take such professional action as the Council may deem fit. It is not for this court to make a final determination on the conduct of Mr Joubert.

Further issues of concern clarified in affidavits of some experts

[32] There is another issue which is also of grave concern to this court as so clarified by the experts. As it would appear from the main judgment, Mr Joubert initially asserted entitlement to fees of experts for preparation, consultation and reservation of the 23 experts. This assertion of entitlement was based on his email of 9 September 2021 which was sent to all the experts who had previously provided medico-legal reports. This appears in his affidavit deposed to on 24 January 2022 in particular paragraph 21.1 thereof. According to Mr Joubert, as his practice, he notifies all relevant parties to a matter the moment he receives a trial date. He does not issue subpoenas against his own experts unless such experts refuse to attend court. According to Mr Joubert in his affidavit of 24 January 2022 all experts were reserved and all experts "*accepted the reservation and undertook to make themselves available to testify".*

[33] His assertions in this regard under oath has to be seen in the context of what the experts have now clarified in their affidavits. I will not refer to all of them but to the affidavits of some of the experts. Dr Juter, a clinical psychologist in his affidavit deposed to on 6 April 2022 alluded to the fact that he was not consulted by the plaintiff's legal practitioners for trial or pertaining to their schedule of costs. He did not prepare for trial after completion of his report. Dr Onselen, Ophthalmologist in his affidavit deposed to on 10 April 2022 also says the same and so is the same story by other experts; all of them asserting to the fact that they were never reserved or consulted for trial.

[34] Ms Lourens for example, in her affidavit deposed to on 5 April 2022 alludes to the fact that when she usually receives notification of trial dates from Mr Joubert, he does not or they do not make specific reference to reservation. All what she does is to take note of the date, but she does not reserve herself. Then in paragraph 3.3 of her affidavit she states:

"In light of the fact that I had not heard from Mr Joubert again after delivery of my report, I assumed that I could not be needed at the trial".

[35] This clearly contradicts Mr Joubert's suggestion that all experts were reserved after having informed them of the date of trial and that all experts "<u>accepted the reservation and undertook to make themselves available to testify"</u> as is his practice in dealing with the experts. The statement was apparently made in order to convince the court <u>to authorise</u> reservation, consultation and preparation fees for all experts, even in circumstances where it was not justified. As indicated in the main judgment, once such authorisation is made, all what would be left for the Taxing Master is to determine the reasonableness of fees and not who is entitled to fees as such entitlement would have been authorised by an order of court even in circumstances not justified for such an order.

[36] I find it difficult to understand Mr Joubert in his dealing with this court. On Tuesday, 5 April 2022 at 13:41 he caused an email to be sent to Professor Coetzer, a plastic and reconstructive and aesthetic surgeon. In the email he stated as follows:

"Kindly inform to us if Prof Coetzee would be able to assist us with a medico-legal report for client.
Kindly note that we need to file reports by the 16th April 2021.
We hereby look forward to your urgent response".

[37] I take it reference to 16th April 2021 was meant to be 16th April 2022. But why a medico-legal report should be filed as per the email of 5 April 2022 to Prof Coetzer, only Mr Joubert knows. The matter was long settled and judgment was handed down on 17 March 2022 with an order requiring the experts to file affidavits and not reports as per paragraph 106.11 of the order. I suspect it is for this reason that on the same day of the email to Prof Coetzer an affidavit was deposed to. Of relevance, Prof Coetzer stated in his affidavit:

"On 9 September 2021 I was informed by VZLR Attorneys that the matter had been set down for trial on 22 November 2021. <u>No formal instruction to</u>

reserve myself for trial was accompanied, and I merely took note of the trial date and did not reserve myself for same in accordance with normal protocol and arrangement in my medical-legal practice".

[38] Here gloves are off. What Mr Joubert asserted was his practice, that is, he informs the experts of the date of trial and by so doing they are all reserved or they reserve themselves is clearly contradicted by Prof Coetzer. It was Mr Joubert's asserted practice that worried me from the onset and thus further enquiries as it appears in the body of the main judgment. In paragraph 3.4 of his affidavit, Prof Coetzer states: *"In the light of the fact that I had not heard from Mr Joubert to the contrary, I assumed that I would not be needed at the trial".*

[39] Professor Coetzer like all other experts alluded to the fact M Joubert never drew his attention to questions posed in paragraph [84] of the main judgment and the directive quoted in paragraph [92] of the judgment. He then concluded by apologising for not having filed the affidavit by 4 April 2022 as the main judgment only came to his attention late. He also stated in paragraph 6 of his affidavit that as he understands the main judgment, VZLR Attorneys may not be able to recover fees and disbursements in the matter by way of the nature of the order given and that in such an instance he was more than willing to write off his charges for the convenience of the parties concerned. The point I make is that the conduct of Mr Joubert should further be reported to the Legal Practice Council.

Application in terms of rule 12

[40] The attorneys for the plaintiff applied to intervene in this application for leave to appeal as contemplated in rule 12 which provides that any person entitled to join as plaintiff or liable to be joined as a defendant in any action may on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application, make such order, including any order as to costs and give such directions as to further procedure in the action as to it may deem meet.

[41] Seen in the context of the order made by this court in the main judgment, I have no problem in granting the application and is accordingly so granted. As regards to the issue of costs, in this application for leave to appeal, the defendant did not participate. I therefore find no need to make a costs order regarding the application in terms of rule 12.

Application in terms of section 18 (2) and (3) of the Superior Courts Act

[42] Subsection (2) of section 18 of the Superior Courts Act provides that subject to subsection (3) unless the court under exceptional circumstances order otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or an appeal, is not suspended pending the decision of the application or appeal.

[43] One can therefore accept is common cause that the nature of the court order appealed against is interlocutory and thus the reason for the present application in terms of section 18(2). The plaintiff has been caused, I want to believe through the advice of her attorney of record to depose to an affidavit regarding the application in terms of section 18 (2) of the Superior Courts Act. In paragraphs 5.1, 5.2 and 5.3 of her affidavit, she states as follows referring to the order in the main judgment:

> *"5.1 It does not award party and party costs in favour of my disabled child's successful claim against the defendant.*
>
> *5.2 It does not ensure the best interest of my minor child where I had entered into an agreement to only pay the reasonable fees of the attorney and not a higher fee.*
>
> *5.3 It prevents the timeous establishment of the trust and requires the trust to be established by a new attorney with costs I cannot afford."*

[44] Starting with the latter ground, first, it is not clear what is the basis on which new attorney will charge costs which the plaintiff cannot afford. It is expected that the nature of the work to be done by the new attorney would be exactly within the

scope of work that would have been done by Mr Joubert in the establishment of a trust as so proposed in the draft order. Furthermore, the statement "costs I cannot afford" is made as if Mr Joubert agreed on any fee with the plaintiff and as if the plaintiff is capable of paying any amount of money without relying on the capital amount. The plaintiff's attorneys in this application for leave to appeal state that they are willing <u>to stand in for the costs for the appeal</u>. This appears to display conflict and an act of desperation to lay their hands on the plaintiff's capital amount awarded. In addition, one must be mindful of the fact that the nature of the order made is that the fee agreement is unlawful and unenforceable. Meaning, the plaintiff is not obliged to pay anything to his attorneys unless the Legal Practice Council decides otherwise. One wonders whether this was clearly explained to her before she deposed to her affidavit under discussion.

[45] The alleged prevention of the timeous establishment of a trust as the basis for the application in terms of section 18, is also a statement boggling one's mind. The appeal process to the Supreme Court of Appeal for which the attorneys for the plaintiff are willing to foot the bill, is likely to take much longer time than allowing the order made by this court to take its course. The plaintiff or her attorneys must not forget that exceptional circumstances have to be shown before an order to suspend the operation of interlocutory order can be granted as envisaged in subsection (2) of section 18.

[46] As regards the ground that the order made does not award party and party costs in favour of the plaintiff's disabled child's successful claim against the defendant, a finding has already been made earlier in paragraphs [13] to [20] of this judgment. Even if I was to be wrong with regard to the finding I made therein, this court would in any event be entitled to invoke the provisions of rule 42 (b) or (c).

[47] Sub-rule (b) of rule 42 in question provides that the court may, in addition to any other powers it may have, *mero motu* – rescind or vary an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission. Now seen in the context of paragraph 105 of the main judgment read with paragraph 106.1 of the order, this court would be seized with the powers to invoke the provisions of paragraph (g), should it have become

necessary to do so. The nature of the order made by this court in essence and also as it appears to be common cause, is interlocutory. When the matter is again laid before me as is so envisaged in the order, such an order with regards to costs may still be made. I therefore find that no exceptional circumstances have been established regarding the application in terms of section 18 (2).

[48] Turning to the other ground of the application in terms of section 18 (2), it is interesting that the issues of paying reasonable fees of the attorney and not a higher fee, is raised again in paragraph 5.2 of the plaintiff's affidavit referred to in paragraph [43] above. This issue has been dealt with in the main judgment. Judging by the statement made by Mr Hellens SC quoted in paragraph [2] of this judgment, it looks like the plaintiff's attorney still sees nothing wrong with the structure and content of the fee agreement they relied on. It is for this reason that I find it necessary to deal with other case law relevant to the issue at hand. I do so despite the fact that I am dealing with an application in terms of section 18(2) where the issue of reasonable fees is alleged and is used as the basis for the suspension of the order made by this court.

[49] The Contingency Fee Act provides an incentive for legal practitioner concerned by allowing him or her to charge an increased fee[1]. This Act is not intended to be a licence to plunder up to 25% of any award paid to a client who had entered into a contingency fee agreement, and who is usually indigent[2].

[50] The purpose of the Act is to enhance access to justice by enabling litigants who would otherwise not have been able to afford it, to engage the services of a legal practitioner[3]. The plaintiff is one such litigant. Contingency fee agreements facilitate access to justice as they enable litigants to obtain legal representation to prosecute their claims where the litigants may otherwise have been unable to do by reason of the prohibitive costs of litigation. However, such agreements carry with

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[1] Nowetu Mkuyana v Road Accident Fund (case number 4000/2017) ZAECGHC 4/2016
[2] Erasmus v Williams 2016 JDR (ECG 3364/2016, 8 December 2016 at para [13]; see also Mathimba v Nontuba 2019 (5) SA 530 (ECG) at para [101]
[3] See Mkuyana *supra* at para 14

them the inherent risk of abuse and the incentive to profit. The undesirable features of contingency fee agreements were expressed in other case law[4].

[51] The first is that they (referring to contingency fee agreements) compromise the lawyer's relationship with his clients by introducing conflicts of interest, and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with financial interest in the outcome of the case, which may adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding 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.[5]

[52] The facts of the present case as indicated in the main judgment and this judgment after the experts had filed affidavits show features of that conflict and abuse as articulated in the case law referred to above. This fortifies the statement that 'unregulated contingency fee agreements have the potential for earnings by legal practitioners which are excessive and disproportionate to the labour and risk invested. This will negatively impact on the public confidence in the legal system. The legislature was clearly conscious of the risk of exploitation when it legitimated contingency fee agreements. What the Act therefore sets out to do is to carefully regulate the extent to which a legal practitioner may agree with his or her client for payment of fees[6].

[53] Prior to the passing of the Act, contingency fee agreements were deemed to be *contra bonos mores* and were prohibited at common law. They can now only be entered into in accordance with the provisions of the Act. Due to the risk of the abuse attendant to contingency fee agreements, it is trite that the intention of the

[4] See Mkuyana at para 15
[5] 2013(2) SA 583 (GNP)
[6] See para 16 in Mkuyana supra

legislature is that contingency fee agreements must be carefully and strictly controlled[7].

[54] The contingency fee agreements are accordingly subject to judicial oversight and intervention. This is consistent with the right vested in the costs at common law to determine the propriety of any agreement entered into between an attorney and his client with regard to fees. The authority of the court to set aside a fee agreement is founded upon considerations of the court over the conduct of its own officers and of the court's right and reputation[8]. (My emphasis).

[55] The contingency fee agreement that is not covered by the Contingency Fees Act, or which does not comply with the requirements stipulated therein, is invalid[9]. Therefore, whatever way one looks at facts of the present case, the fee agreement concluded between the plaintiff and Mr Joubert constituted a contingency fee agreement and is invalid at common and for non-compliance with the requirements of the Contingency Fees Act. This then brings me to deal with the suggestion that the suspension of the order in main judgment must be granted because the attorney and client agreed to charge a normal or reasonable fee. This appears in paragraph 5.3 of the plaintiff's affidavit quoted in paragraph [43] of this judgment

[56] The point of departure of any enquiry into the enforceability of an agreed contingency fee is therefore the base fee which the Contingency Fees Act requires to be the attorney's normal fee that must be set out in the agreement[10]. In the present case, no normal fee has been specified as an hourly rate or as a global fee during 2006 when the mandate was first accepted. Furthermore, nothing to this effect is said in any of the affidavits filed to date by the plaintiff and her attorney. Section 1 of the Contingency Fees Act seeks to define such "normal fees". On the reading of section 2 and the definition of "normal fees" in section 1, it is clear that the

[7] See para 20 in Nkuyana and the case law cited therein
[8] Cambridge Plan AG v Cambridge Diet (Pty) Ltd 1990 (2) SA 574 T 600- A-E and Muller v The Master and others 1992 (4) SA 277 (T) at 284 B-C, see also para 21 in Mkuyana supra
[9] Ronald Boshoff & Partners Inc v De Le Guerre 2014 (3) SA 134 (CC); Masango v RAF 2016(6) 508 (GT) at para (1); Fluxmans Inc v Levenson 2017 (2) SA 520 (SCA); Mostert and Others v Nash and Another 2018(5) SA 409 (SCA) at para (54); Mfengwana v RAF 2017 (5) SA Nash (ECG) at para [12]; and Mathimba and others v Nonxuba and others 2019 (1) SA 591 (ECG) at para and also see para 22 in Mkuyana supra.
[10] See para 30 in Nkuyana *supra*

base fee must be a fee that is reasonable for the services of the practitioner. Consistent with the common law position, it establishes "reasonableness" of the standard by which the base fee must be judged. A reasonable fee is a fee that is fair. A fee is fair if it is appropriate for the work performed by the practitioner <u>and falls within a range of fees that is usually charged for the same work.</u> On a reading of the definition of "normal fees" in section 1 of the Act, this is exactly what the legislature had in mind[11]. That range of fees despite the opportunity to do so has not been defined or spelled in the present case and the plaintiff is effectively in the dark regarding what would be chargeable by her attorney once the capital amount is paid.

[57] The fact that the reasonableness of the base fee is assessed in the absence of a contingency fees agreement as the plaintiff seeks to convey, does not make the fee agreement not to be a contingency fee agreement governed by the Act. What it means is that unlike in a case of an express or implied agreement in respect of fees where the starting point of the court's analysis is the agreed fee, the determination of the practitioner's normal fee in terms of the Act is an independent valuation of a reasonable fee. It is not necessary for the normal fees in the contingency fee agreement to reach a degree of unreasonableness to the extent that it would amount to overreaching and unprofessional conduct on the part of the legal practitioner concerned before it constitutes unreasonable fee for the purpose of the Act. In other words, a determination of the reasonableness of the base fee is separate from the ethical basis of the right of judicial intervention in fee agreements between an attorney and his client where the enquiry is focused on the extent of the unreasonableness of the fee so as to constitute abuse, impropriety, or overreaching and therefore unprofessional conduct[12].

[58] So, the suggestion that the order made by this court does not ensure the best interest of the minor child where a fee agreement is to pay only the reasonable fees of the attorney and not a higher fee and nothing more, should be seen as being subject to an abuse. I say so because despite the opportunity at their disposal, the plaintiff's attorneys to date elected not to disclose their hourly fee rate or fixed fee

[11] See para 31 in Mkuyana *supra*
[12] See para 34 in Mkuyana *supra*

rate or estimation thereof. This is where an oversight occurred and intervention of the court is required.

[59] A determination of the reasonableness of the attorney's normal fees for purposes of the Contingency Fees Act therefore requires an objective assessment of what is appropriate in the circumstances of a particular case. Factors to be considered with regard to the nature of the work to be performed, would amongst other things include the nature and subject matter of the case, its complexity and the time and effort likely to be spent on it. Factors relevant to the practitioner who will perform the work may in turn include amongst others, experience, the skills level and expertise that is required to perform the work in question and fees charged in jurisdictional area by practitioners with comparatively the same level of skill and expertise. The relevance of any of these factors and weight to be given thereto, will be determined by the facts and circumstances of any particular case and the aim of achieving a measure of consistency and certainty in the determination of the reasonableness of the fee charged[13].

[60] In the present case, the plaintiff and her attorney as I said, elected to be scanty or silent with regards to the nature, extent and form of their fee agreement. This is the approach they undertook up to the present application, the only thing said being the agreement "*to only pay reasonable fees of the attorney and not a higher fee*". What may not be a higher fee to Mr Joubert, may actually be a higher fee amounting to unreasonableness.

[61] The full court in **Mkuyana** had the opportunity to deal with the question whether the plaintiff's attorney's hourly fee disclosed in the fee agreement with the plaintiff was a reasonable fee as envisaged in the definition of a normal fee in section 1 of the Act. In paragraph 38 of its judgment in **Mkuyana**, the full court stated:

> *"The issue is before us and we have been placed in a position to deal therewith to finality. The issues have been fully ventilated on the evidence and the court should not lightly and without good reason refuse to exercise*

[13] See para 35 in Mkuyana *supra*

its supervising duties and functions alluded to earlier when it is placed in a position to do so. Further, as will appear more fully hereafter, the premise on which the attorney proceeded to determine his normal fee, was fundamentally flawed… Another reason for us to decide the matter is that the contingency fee agreement is also invalid for other reasons which fall outside the mandate and authority of the professional controlling body"

[62] The conclusion was reached as quoted above, when the full court was dealing with the request that the matter be referred to the Legal Practice Council to determine the reasonableness of fees as contemplated in section 5 of the Legal Practice Act. There was also another request by the amicus in the matter wherein the court was asked to refer the matter to the Taxing Master to determine the reasonableness of the fee in accordance with the full court judgment in **Mkuyana.**

[63] In the main judgment regarding the present case, the issue was not referred to the Taxing Master because the agreement was found to be illegal and unenforceable. It was instead referred to the Legal Practice Council after having made a finding that the agreement was illegal.

[64] I am unable to understand why it is said the order does not ensure the best interest of the minor. Paragraph 105 of the main judgment read together with the order made in relation thereto seeks to take care of the interest of the minor child. This application and pursuit of the appeal that might follow can only serve to frustrate payment of the capital amount in the interest of the minor child. In fact, what is not in the interest of justice is the appeal process, in particular, the manner in which it is being pursued. The application in terms of section 18(2) is destined to fail.

[65] The suggestion that '*the capital funds be paid to different attorneys and be administered by different trustees, especially when these fees can only be recouped from the funds earned for the minor child'* in my view, makes no sense. As indicated earlier in this judgment, the fact that the funds would be paid to attorneys proposed by the professional body, would make no different in terms of costs implications. What her preferred attorney could have done with the funds would be the same

scope of work to be done by different attorneys as may be appointed by this court on the advice of the Legal Practice Council.

[66] Similarly, the new trustees envisaged to be appointed wold do the same scope of work as it would have been performed by those recommended in the draft, unless there is something about those recommended by the plaintiff's attorneys which not been disclosed to this court. They too will have to consider the same voluminous papers. In any event it is expected that the trustees will have to read every document in the litigation. They will be confined to administering the funds in the interest of the minor child. Clearly, the issues relating to different or new attorneys and or trustees having negative effect in assisting the minor child, is speculative with no facts to substantiate the perceived prejudice to the minor child.

[67] Consequently an order is made as follows:

67.1 The plaintiff's attorneys are hereby allowed to intervene in these proceedings as contemplated in rule 12 of the Uniform Rules of Court.

67.2 Application for leave to appeal regarding the alleged legality of the fee agreement and an alleged refusal to make an order for costs as in paragraph 106.1 of the court order, is hereby dismissed as there are no reasonable prospects of success and there are no some other compelling reasons why the appeal should be heard.

67.3 The application in terms of section 18(2) read with subsection (3) thereof is hereby dismissed as neither the plaintiff nor her attorneys succeeded in showing exceptional circumstances and failure to show that the plaintiff will suffer irreparable harm if the court order granted on 17 March 2022 is not suspended.

67.4 The order of 17 March 2022 remains operative and valid and must therefore be complied with as is not suspended and any petition to the Supreme Court of Appeal shall not affect its operation and effectiveness.

67.5 The Registrar of this court is hereby directed to bring a copy of this judgment to the attention of the Legal Practice Council both National and Provincial to consider further investigating Mr Joubert seen in the context of the affidavits provided by the experts in line with paragraph 106.11 of the order in the main judgment and also seen in the context of the order in paragraph 67.4 above.

67.6 No order as to costs is made as the defendant did not participate in this application for leave to appeal.

LEGODI JP

DATE OF HEARING: : 13 April 2022

DATE OF JUDGMENT : 16 May 2022

FOR THE APPLICANT ADV HELLENS SC / ADV VENTER
INSTRUCTED BY VZLR INC
THE PINNACLE BUILDING
TEL: 012 435 9444
3RD FLOOR, 1 PARKIN STREET
MBOMBELA
REF: W LOUW
Email: willeml@vzlr.co.za

FOR THE DEFENDANT : NO APPEARANCE
ADENDORFF THERON INC
MBOMBELA
REF: DCU RAATH / ES/C00539
TEL: 013 752 3902
Email: dricus@adendorffs.com