

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 087032/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 29 April 2024 E van der Schyff

In the matter between:

HERCULES ALEXANDER SANDENBERGH N.O.

FIRST APPLICANT

[In his capacity as trustee to the Trusts hereunder
Identified to be established in terms of the court orders
hereinafter referred to.]

CONSTANT WILSNACH N.O.

SECOND APPLICANT

[In his capacity as trustee to the Trusts hereunder
Identified to be established in terms of the court orders
hereinafter referred to.]

and

THE MASTER OF THE HIGH COURT

FIRST RESPONDENT

THE ROAD ACCIDENT FUND

SECOND RESPONDENT

In re:

Case No. 84853/2017

E K SPANDEEL

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 66101/2016

JANEY CHERROL COETZEE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 7442/2016

ADV VAN ANTWERPEN N.O. obo SCHOLTZ, J

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 61612/2016

MAKARA, MJ obo I

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 20751/2016

ADVOCATE TROMP N.O. obo DICHABA, M A B

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 15265/2018

FANOO, MOHAMMED ZIYAAD

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 47003/2017

ADVOCATE VAN ANTWERPEN N.O. obo MOFITLE, PP

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 33999/2017

S P MASEKO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 85598/2017

ADV ROSS GRANT BOWLES obo YAYASE, S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 78186/2016

MATSHWELE, T J

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 86884/2016

ADV H R DU TOIT obo TSHEPO AMOS PHENYA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 88499/2016

THENGISILE GLORIA SIBIYA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 87201/2018

BALOYI, VONANI PENELOPE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 7415/2018

ADV MM TROMP obo MOTHLANE, ELIAS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 54278/2017

ADV MM TROMP obo LOWDEN DANTE RYGAARDT

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 93159/2015

ADV HR DU TOIT obo MASERAME NTHABISENG

RATSATSI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 27081/2017

ADV M VAN ANTWERPEN obo LETHEEA P

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

And

In re:

Case No. 36452/2016

ADV TROMP obo JF WILSON

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Van der Schyff J

Background

[1] Trusts are often created by order of Court where awards are made in claims for damages arising out of motor vehicle accidents where plaintiffs are minors or mentally incapacitated persons to protect the awards. In *In Re Protection of Certain Personal Injury Awards (Pretoria Society of Advocates and Others, Amici Curiae)*,¹ a Full Court of this Division confirmed that creating a trust as a protective mechanism is tenable in law. Trusts so created are, in essence, *sui generis* as they are solely created to protect awards and are referred to as protective trusts.

[2] *In Re Protection of Certain Personal Injury Awards* was born out of the Master of the High Court's twofold concern that (i) ambiguous court orders confused the Master's powers under the Administration of Estates Act 66 of 1965 (Administration of Estates

¹ 2022 (6) SA 446 (GP).

Act) with those under the Trust Property Control Act 57 of 1988 (TPCA), and (ii) the perceived attempt to circumvent the controls in the Administration of Estates Act by establishing trusts rather than appointing curators *bonis*. The court, amongst others, held that the provisions of the Administration of Estates Act are not applicable if a trust is established. The remuneration of trustees can thus not be dealt with by reference to the Administration of Estates Act. Unlike the position with curators *bonis*, no fallback statutory tariff applies to trustees.² Nor is the Master statutorily empowered to determine trustees' fees unless the trust instrument is silent regarding the remuneration of trustees' fees and a dispute arises regarding a reasonable trustee fee.³

- [3] The court held that both the appointment of a curator *bonis* and the creation of a trust can be used to safeguard damages awards. The solution lies in greater care being taken in deciding on the protective measure being implemented, i.e., in deciding on the appointment of either a curator *bonis* or the establishment of a trust. Where provision is made for creating a trust, the court ordering the creation of a trust, should be satisfied on the information provided by the parties that the proposed remuneration structure is appropriate. The remuneration of trustees should be commensurate with the complexity, time, and effort required by trustees to discharge their fiduciary duties in the administration of the trust funds.⁴ It should be comprehensively dealt with in the court order and/or trust instrument incorporated in the court order.⁵
- [4] The court stipulated that the method and basis for calculating the remuneration of the curator or trustee and the trust administration costs must preferably be set out clearly, unambiguously, and comprehensively in the application or proposed trust deed.⁶ At a minimum, sufficient evidence must be placed before the court to enable

² *In Re Protection of Certain Personal Injury Awards*, *supra*, at para [76].

³ See *In Re Protection of Certain Personal Injury Awards*, *supra* paras [30] and [76].

⁴ *In Re Protection of Certain Personal Injury Awards*, *supra*, at para [79].

⁵ *In Re Protection of Certain Personal Injury Awards*, *supra*, at para [78].

⁶ *In Re Protection of Certain Personal Injury Awards*, *supra*, at para [80].

it to include appropriate provisions in the court order.⁷ The court expressly held that the remuneration of trustees 'must perforce include the efforts required to administer a 17(4)(a) undertaking where the action lies against the RAF'.⁸ Guidance was given to practitioners in that the court explained:

'In matters against the RAF, it may be necessary for the plaintiff to adduce evidence regarding the remuneration of the curator *bonis* or trustee, particularly in relation to the undertaking, which will entail evidence as to the expectations regarding complexity, time, and expertise required to administer such undertaking. Much will depend on the facts of each case and the court must be provided with sufficient evidence to endorse the remuneration structure that is appropriate in each case.'⁹

- [5] The court highlighted that the evidence to be adduced regarding the proposed remuneration and administration fees for which provision must be made must cover the particular circumstances of the administration of the trust. The structure of the fees and remuneration permitted must be delineated clearly in the court order and trust instrument.¹⁰ In regard to out-of-pocket expenses, the trustee is necessarily entitled to incur costs on behalf of the trust, which may include, amongst others – premiums for the security bonds, rates, taxes, the costs of repair and maintenance of the property, accounting fees in relation to audited financial statements, costs properly incurred in employing expert assistance, such as financial advisers or medical experts, resources required to ensure that there is proper care and maintenance of the beneficiary, travelling costs incurred in attending meetings or conducting trust business.¹¹ The remuneration and out-of-pocket expenses, as well

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *In Re Protection of Certain Personal Injury Awards, supra*, at para [86].

¹⁰ *In Re Protection of Certain Personal Injury Awards, supra*, at para [88].

¹¹ *In Re Protection of Certain Personal Injury Awards, supra*, at para [89]

as a basis for their calculation, must be expressly set out in the court order or trust instrument.¹²

- [6] By the time *In Re Protection of Certain Personal Injury Awards* was decided, a plethora of judgments were handed down that provided for the creation of trusts that had not yet been registered. The court orders and trust deeds do not accord with the Full Court's directive that no reference should be made to the Administration of Estates Act and the position of curators *bonis*, when the remuneration of trustees and the basis on which it stands to be calculated is dealt with in the court orders and trust deeds. Since the Full Court's judgment was handed down, several variation applications were launched to amend existing court orders to bring them in line with *In Re Protection of Certain Personal Injury Awards*. The general tenor of these variation applications is to remove references to the Administration of Estates Act and to set out the trustees' remuneration in detail. This application is but one of these variation applications.

The parties before the court

- [7] The applicants in this application, Messrs. Sandenbergh and Wilsnach (herein referred to as the Trustees although trusts have not yet been registered in the matters consolidated in this application), stand to be appointed as trustees in the respective matters. They approached the court for similar relief under the abovementioned case numbers. The Master of the High Court and the Road Accident Fund (RAF) are cited respectively as first and second respondents.
- [8] The Master initiated the litigation in *In Re Protection of Certain Personal Injury Awards*, and the trust created will be administered under the Master's watchful eye. The RAF's direct interest in the subject matter of the litigation is that it may be ordered to fund the bill for the trustees' remuneration. The remuneration of the trustees and the administration costs of trusts created by order or court in RAF

¹² *In Re Protection of Certain Personal Injury Awards*, *supra*, at para [90].

matters¹³ may be recoverable in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 in accordance with the certificate of undertaking provided by the RAF.¹⁴

- [9] The State Attorney filed a somewhat ambiguous notice to abide, and it initially seemed that both respondents abide by the court's decision. The respondents' position was clarified later to be that while the first respondent, the Master of the High Court, abides by the court's decision, the second respondent, the Road Accident Fund (RAF), holds a different view than the applicants regarding the basis on which trusts' administration costs and the remuneration of trustees are to be determined.

The relief sought by the applicants

- [10] The Trustees, in addition to seeking condonation for the late registration of the respective trust deeds, seek the variation of the court orders in the different matters referred to. The variation entails deleting impugned provisions in the orders where the Administration of Estates Act is referenced and inserting the basis on which the trust administration costs and remuneration of trustees are to be determined in the respective court orders and trust deeds.
- [11] In all the matters, the Trustees want the court to supplement the existing orders by inserting the following paragraphs:

- 3.1 'In addition, the undertaking shall include the costs of the creation of a trust referred to below, the costs of annually obtaining a security bond as required, and costs of the trustee in respect of the administration of the trust.'

¹³ The term RAF-matters is used to denote litigation against the RAF in terms of s 17 of the Road Accident Fund Act 56 of 1996.

¹⁴ The principle stated in *Reynecke NO v Mutual and Federal Insurance Co Ltd* 1992 (2) SA 417 (T) was confirmed in *In Re Protection of Certain Personal Injury Awards, supra*, at para [84]. In the latter case the court stated that this should be expressly stated in each court order. In para [92] the court reiterated that the RAF stands to be materially affected by the provisions of the remuneration of trustees and trust administration costs insofar as it incurs a liability to pay such costs.

AND

- 3.2 'The trustees are authorised to recover from the Road Accident Fund for the benefit of the trust all costs incurred by them which are payable by the Road Accident Fund under its undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, including the costs of the creation of a trust and the costs of furnishing security.'

AND

- 5.1 'REMUNERATION AND TRUST ADMINISTRATION FEE AND COSTS
- i. A once-off drafting fee for documents necessary for the formation of the trust in the sum of R4 900.00 plus VAT;
 - ii. A once-off 0.5% fee calculated on the trust capital to establish and register the trust and for acceptance of the appointment as trustee;
 - iii. An annual management fee calculated at 1% on the trust capital in any given year;
 - iv. There is no minimum fee applicable;
 - v. Administration costs and disbursements shall be calculated and include the following:
 - a. Accounting and auditing fees in relation to the audited financial statements, in the sum of R8 000.00 plus VAT per annum subject to reasonable inflationary annual increases in charges by the relevant auditor / accountant;
 - b. The annual cost of the bond of security calculated as 0.69% of the trust fund;
 - vi. A once-off termination fee of 1% of the residual capital under administration on termination of the trust;
 - vii. The aforementioned fees and disbursements, as well as collection commission calculated at 6% on all amounts recovered from the defendant in terms of the section 17(4)(a) undertaking, shall be recoverable from the defendant in terms of the said undertaking.'

The Road Accident Fund's proposal

- [12] The RAF filed an answering affidavit to provide the court with a holistic view of the administration and management of trusts from the RAF's perspective and the costs implications that flow from it. The RAF contends that the creation and administration of a trust is solely for the protection and growth of funds for the benefit of minors and should not be a money-making exercise.
- [13] The RAF categorically accepts that it is liable in terms of the section 17(4) undertakings for the administration and establishment costs of a trust, including the tendering of security and accounting and auditing fees. Such costs must, however, be reasonable. The RAF submits that trusts of different capital values should be treated 'somewhat differently' only in the sense that the administrative and other charges align with the value of the trust capital.
- [14] The RAF does not contest the deletion of the impugned paragraphs in the existing orders, but seeks its replacement with the following:

3.1 'In addition the undertaking shall include the costs of the creation of a trust referred to below, the costs of annually obtaining a security bond and costs of the trustee in respect of the administration of the trust.'

AND

3.2 'The trustees are authorised to recover from the Road Accident Fund for the benefit of [the] trust all costs incurred by them which are payable by the Road Accident Fund under its undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 including the costs of the creation of a trust and the costs of furnishing security.'

- [15] Regarding the proposed insertion of paragraph 5.1, which deals with the remuneration and trust administration fees and costs, the RAF, for the most part,

contends for a different approach. The RAF's proposal, which is discussed in more detail below, is ostensibly premised on the 2022 Fee Schedule used by Nedbank.¹⁵

- 15.1 While the RAF has no objection to a once-off drafting fee of R4 900 plus VAT, it submits that where documents have already been drafted for the formation of a trust and such trust has not been registered for any reason, there must not be a duplication of costs once an order has been made in this application. The only further costs that the RAF contends it should be liable for concerning the trust documents is where any amendments must be made consequential to the order granted in this application.
- 15.2 Where the Trustees seek a once-off 0.5% fee calculated on the trust capital to establish and register the trust and for acceptance of the appointment as a trustee, the RAF contends that there should not be a percentage of the capital calculated but rather an onboarding fee. This onboarding fee should encompass the costs of registering the trust with the Master as well as the costs of acceptance of the trust. The RAF submits that it is reasonable to determine a standard onboarding fee because the costs of registering a trust do not change based on the capital amount involved. Based on Nedbank's 2022 Fee Schedule, the RAF submitted that a once-off fee of R5000.00 would be a fair and equitable once-off onboarding fee.
- 15.3 The Trustees seek an annual management fee calculated at 1% of the trust capital in any given year. The RAF proposes that the annual management fee be calculated on a sliding scale based on the capital amount in the trust per annum. The sliding scale approach, RAF contends, would not only keep the management costs of the trusts low but also serve as an incentive for the proper and effective management of the capital investment to prevent wasteful and

¹⁵ Nedbank Group is a financial services group in South Africa offering wholesale and retail banking services as well as insurance, asset management, and wealth management.

unnecessary expenditure. With reference to Nedbank's fee structure, RAF proposes the calculation of a management fee of 0.30% for capital in the range of R2 000 000.00 – R3 000 000.00, 0.35% for capital between R1 000 000.00 – R2 000 000.00 and a specific amount for capital investments over R5 000 000.00.

- 15.4 The RAF contends that a minimum fee must be applicable. The RAF submitss that if there is no minimum fee applicable, there is no incentive for the proper management and administration of the trust. If there is a minimum fee applicable, the management fees can be capped to that which is actually required for the proper management of the trust. The fee structure RAF recommends provides a minimum annual trust administration fee of R2 500.00, which will apply in cases where the gross value of the trust assets is less than R1 000 000.00.
- 15.5 Regarding the Trustees' proposal of accounting and auditing fees, the RAF has no objection to the proposed figures but submits that the fee should, by implication, include the costs of submitting tax returns as well.
- 15.6 The RAF seeks to avoid a scenario where it is paying a 'blanket fee' for administration costs for fees and disbursements. Nedbank's suggested fee structure is a fee of R10 000-00 per annum for non-charitable trusts, which includes, amongst other things, payment of beneficiaries, bank account reconciliation, maintaining the minute book and compliance file, maintenance of the trust, etc.
- 15.7 The RAF has no objection to the once-off termination fee of 1% of the residual capital under administration on termination of the trust.
- 15.8 The RAF opposes the levying of a collection commission calculated at 6% on all amounts recovered from it in terms of the section 17(4)(a) undertaking.

Discussion

[16] It is trite that in an adversarial system, in motion proceedings, an applicant must make out its case in the founding affidavit. *In casu*, the court is considering a variation application in terms of Rule 42. The application is necessitated because the Master of the High Court refuses to register trust deeds that do not comply with the principles set out in *In Re Protection of Certain Personal Injury Awards*. In all the matters consolidated in this application, the court has already ordered that trusts be created to administer the respective damages award to the benefit of the respective plaintiffs. The basis on which the trustee's remuneration is to be determined was also included in the respective trust deeds. In the majority of the matters cited in this consolidated application, the court orders and/or trust instruments contain clauses to the following effect:

‘ ... costs and administration shall be limited to the amount of costs and fees chargeable by curator bonis in terms of the Administration of Estates Act 66 of 1965 as amended.’

and

‘...however, that such costs shall not exceed the costs which would otherwise be payable in law in respect of a curator *bonis*.’

and

‘...payment of reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee being appointed as curator *bonis*’

and

‘...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust’

and

‘...remuneration and costs shall not exceed the equivalent amount to which the curator bonis would have been entitled in terms of and determined by the Administration of Estates Act 66 of 1965 as amended and the prescribed tariff applicable to curators contained in Government Gazette Notice R1602 of 1 July 2019, more specifically paragraphs 3(a) and 3(b) of the Schedule thereto.’

and

‘... with regard to services rendered by the Trustee for the general administration of the Trust and arrangements which he/she will make with regard to the care of the mentioned xxx, the Trustee will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa’.

and

‘... the fees and administration costs shall be determined on the basis of the directives pertaining to curator’s remuneration and furnishing of security in accordance with the Administration of Deceased Estate’s Act 66 of 1965 as amended from time to time ...’

and

‘The costs of the trust in administering the capital amount as determined by section 84(1)(b) of the Administration of Estates Act 66 of 1965 as amended according to the prescribed tariff applicable to curators as

reflected in Government Gazette Notice R1602 of July 1991 specifically paragraphs 3(a) and 3(b) of the Schedules thereto.'

- [17] In *In Re Protection of Certain Personal Injury Awards*,¹⁶ the Full Court held that court orders of this nature conflate the power of the Master under the Administration of Estates Act and the Trust Property Control Act and are contrary to the provisions of the Administration of Estates Act. In light of the *stare decisis* principle, I am bound to the Full Court's judgment. Herein lies the common error that justifies dealing with the trust administration costs and the remuneration of trustees in terms of a Rule 42 variation application.
- [18] The Trustees' approach in determining the proposed basis on which trust administration costs and trustees' remuneration are to be calculated in the 18 matters that are consolidated in this application, is to rely on established practices and adopt the position referred to with approval by the Full Court in *In Re Protection of Certain Personal Injury Awards*,¹⁷ with the exception of providing for a 1% once-off termination fee instead of a 2% once-off termination fee, and adding collection commission of 6% on any amounts recovered annually in terms of the section 17(4)(a) undertaking.
- [19] While the founding affidavit deals in detail with the court's power to consolidate the actions, and to vary the existing court orders in terms of Rule 42 of the Uniform Rules of Court, identifies the 'common mistake', and sets out the impugned paragraphs in the orders and draft trust deeds in the respective matters, it contains no explanation as to why the Trustees deem the proposed model for the calculation of administration costs and the remuneration of the trustees appropriate. It is only in the replying affidavit that the Trustees explain that the proposed fixed fee percentage has, on various occasions, been deemed appropriate by the court and was, in some cases, agreed to by the RAF. Reliance is also placed in the replying affidavit on

¹⁶ *In Re Protection of Certain Personal Injury Awards* at paras [63] – [66].

¹⁷ *In Re Protection of Certain Personal Injury Awards* at para [82].

curators *bonis*' entitlement to a 6% fee on all funds reflected in the income account of an annual curators' account.

- [20] In reply, the Trustees state that managing the complexity of protective trusts is a monumental task. Mr. Sandenbergh explains that his office employs more than 15 people dedicated solely to administering the day-to-day needs of each individual Road Accident Fund claimant. The administrative burden imposed outweighs any commercial trust. The Trustees highlight that this reality is substantiated by the fact that Nedbank's 2022 Fee Schedule under paragraph 4 of its terms and conditions to the trust fee schedule contains a qualification, providing that:

'Fees are not applicable to Road Accident Fund trusts, medical negligence trusts and trusts holding interests in private entities. The fees for these trusts will be quoted and agreed on a case-by-case basis.'

- [21] The Trustees submit that, in the ordinary sense, the administration of a traditional trust flows with relative ease. Trustees, furthermore, don't have the additional administrative burden of interacting with a 'recalcitrant paymaster' such as the second respondent. This is juxtaposed with the administration of protective trusts.
- [22] The Trustees regard the sliding scale approach to calculate trust administration costs as proposed by the RAF as inappropriate. They contend that curators *bonis* are entitled, in terms of the Administration of Estates Act, to 'recoup collection commission' at 6%. The administration of undertakings is a service the Trustees provide to the trust beneficiaries. This service is not readily afforded to trust beneficiaries by their trustees in the commercial sphere and justifies collection commission being levied.
- [23] Having regard to the nature of this application, the relief sought by the Trustees, and the RAF's approach of not filing a counter-application but merely requesting the court to have regard to its explanatory affidavit wherein it proposes an alternative approach, I have regard to the Trustees' case as set out in the founding and replying affidavit.

- [24] In *In Re Protection of Certain Personal Injury Awards*,¹⁸ the Full Court held that the formula used by ABSA Trust Ltd to determine trust administration costs and the remuneration of trustees is 'a very convenient formula and that the percentages could be altered in accordance with the evidence and specific requirements of each trust.' Mr. Bowles, for the Trustees, submitted with reference to several orders granted in this Division, that a precedent has been set for the 'basic formula' referred to by the Full Court to be utilised, and if the complexity and of a particular matter requires a different percentage award, that the percentages be altered in accordance with the evidence and the specific requirements of each case.
- [25] The RAF's reliance on Nedbank's 2022 Fee Schedule did not assist. It is evident from the proviso in the schedule brought to the court's attention by the Trustees that the proposed fee structure does not apply to trusts created to protect damages awards made in litigation against the RAF.
- [26] The Full Court was clear that the basis on which the remuneration of trustees must be calculated should be determined on a case-by-case basis. *In casu*, I had regard to the respective awards in the respective matters consolidated in this application in considering whether it would be fair and reasonable for the remuneration of trustees to comprise the percentages of the annual value of the trust assets as sought in the notice of motion. I also had regard thereto that where protective trusts are concerned, the value of the estate administered does not increase. The trustees concerned are rendering a professional service, and evidence was submitted to the Full Court in *In Re Protection of Certain Personal Injury Awards*,¹⁹ that the custom in the fiduciary industry is for trustees to charge 1% to 1.5% of the value of assets under administration with a sliding scale in which the charge is lowered with the increasing value of the estate.²⁰ In the respective applications concerned, it is reasonable and equitable to allow trustees to calculate the trusts' administration costs on the basis as sought, except for the 6% collection commission.

¹⁸ *In Re Protection of Certain Personal Injury Awards* at para [82].

¹⁹ *In Re Protection of Certain Personal Injury Awards* at para [83].

²⁰ *A.D. and Another v MEC for Health and Social Development, Western Cape Provincial Government* (27428/10) [2016] ZAWCHC 180 (7 September 2016) at para [646].

- [27] The remaining aspect that needs to be discussed is the 6% collection commission sought on all amounts recovered from the RAF in terms of the section 17(4)(a) undertaking.
- [28] Protective trusts are created to benefit minors or persons mentally incapacitated as a result of a motor vehicle accident. The purpose of these protective trusts, as explained by the Full Court in *In Re Protection of Certain Personal Injury Awards*,²¹ is to protect the damages awards made by the court to ensure that the 'award should be available as an ongoing source of financial support for the remainder of the plaintiff's lifetime'. The administration of the section 17(4)(a) undertaking is an indispensable ancillary function that can only be undertaken by a trustee if the court order and trust instrument specifically empower the trustee to fulfill that function.
- [29] The Trustees submit that collection commission calculated at 6% on all amounts recovered from the defendant in terms of the section 17(4)(a) undertaking, be added as a component to the administration costs of the trusts. The Trustees submit that allowing them collection commission is justified in light of the fact that the Administration of Estates Act empowers curators *bonis* to 'recoup collection commission at the rate of 6%.' This service, they explain, that is provided by the Trustees to trust beneficiaries, is not readily afforded to trust beneficiaries by their trustees in the commercial space. They submit that in the commercial sphere, Regulation 47 of the National Credit Act, as amended, regulates collection costs in terms of '(i) the Supreme Court Act, 1959, (ii) the Magistrate's Court Act, 1944, (iii) the Attorneys Act, 1979 (repealed) or (iv) the Debt Collectors Act (*sic.*).'. The Trustees contend that, although not applicable to the facts at hand, these Acts and Regulation 47 of the National Credit Act illustrate a confirmed practice of regulating collection commission in respect of outstanding debts. Since the Trust Property Control Act is silent on such provision as opposed to the Administration of Estates Act, the Trustees submit that it is necessary to curtail and limit the collection fees associated with future medical expenses in terms of the section 17(4) undertaking to a rate of 6%.

²¹ *In Re Protection of Certain Personal Injury Awards* at para [1].

- [30] The Trustees justify the determination of the administration costs of the trust and the remuneration of the trustees based on the percentages mentioned in the notice of motion as against the RAF's sliding scale proposal by explaining, albeit in reply, that in a protective trust, more is required from the trustee than in a commercial trust. The 'higher' fee, in comparison with what was proposed by the RAF, encompasses the general administration costs of the trust. Therefore, the management fee of 1% of the value of the trust capital under management includes the administration of the section 17(4)(a) undertaking unless a case is made out for the court to expand thereon in a specific case. The necessary case needs to be made out, on affidavit, why, in a particular case, collecting the medical accounts and submitting them under cover of a letter to the RAF necessitates adding another layer to the trust administration costs. Such a case was not made out in any of the matters consolidated in this application.
- [31] The trust deeds in the respective matters consolidated in this application, amongst others, contain a clause to the effect that where a trustee practices a profession and, in such capacity, performs any other act or service on behalf of the trust in such capacity, the trustee will be remunerated for his professional services rendered without limiting or reducing his right to remuneration as stipulated in the trust deed. Where the need arises to collect overdue payment from the RAF on behalf of the trust in terms of the section 17(4)(a) undertaking, and legal action needs to be undertaken, whether the trustee undertakes it in his professional capacity or whether the trustee instructs another legal entity to collect the overdue amounts, the principle applies that costs follow success. The RAF will be liable for the costs associated with the collection of overdue amounts. The amounts must, however, first be overdue.
- [32] The Trustees' reliance on the basis on which the remuneration of curators *bonis* is determined is misplaced. Trustees' remuneration and the remuneration of curators *bonis* are determined on completely different bases. It is incorrect to classify a curator *bonis*'s income as collection commission, as the term is utilised during the process of debt collection.

Costs

- [33] As far as the costs occasioned by this application are concerned, the RAF is liable for the applicants' costs in that the applicants were successful, except for the inclusion of collection commission in the administration costs of the trusts.

Miscellaneous

- [34] The Master of the High Court requires court orders that provide for the creation of trusts and the draft trust deeds to be stamped by the Registrar of the High Court on the same day. To facilitate the registration of the trusts, and because the respective trust deeds need to reflect the terms of the amended court orders, separate amended orders need to be prepared and delivered to my chamber together with the amended trust deeds in each matter.
- [35] In the matter under case no: 61612/2016: Makara, MJ obo L v Road Accident Fund, the Trust Deed is incomplete. I drew the parties' attention to this. The applicant subsequently filed a lost document affidavit. I afforded the respondent the opportunity to indicate any objection to me accepting and considering the lost document affidavit. No objection was raised. I thus accept that the unsigned Word copy of the Trust Deed in this matter is a true copy of the Trust Deed attached to the order granted by Raulinga J.

ORDER

In the result, the following order is granted:

1. Condonation for the late registration of the below Trust Deeds, as amended, is granted, and the first respondent is authorised to accept same, where indicated.
2. The following wording in the Court Orders referred to hereunder is deleted *in toto*:

2.1 Case No: 84853/2017: E K Spandeel v Road Accident Fund, Judgment handed down by Mr Justice Mbongwe on 2 February 2022.

2.1.1 Clause 3.2.11: *“... and which costs of administration shall be limited to the amount of costs and fees chargeable by curator bonis in terms of the Administration of Estates Act 66 of 1965 as amended.”*

2.1.2 Clause 4.2: *“... however, that such costs shall not exceed the costs which would otherwise be payable in law in respect of a curator bonis.”*

2.2 Case No: 66101/2016: Coetzee, J C v Road Accident Fund, the court order granted by Mr Justice Kollapen on 19 May 2021.

2.2.1 Clause 6.1: *“...in accordance with the provisions of the Administration of Deceased Estates Act, 66 of 1965 as amended ...”*.

2.2.2 Clause 6.3: *“...payment of reasonable costs which the defendant would have had to pay regarding the appointment, remuneration, and disbursements had the trustee being appointed as curator bonis.”*

2.3 Case No: 7442/2016: Advocate Van Antwerpen N.O. obo Scholtz, J v Road Accident Fund, the court order granted by Justice Bertelsmann on 6 November 2019.

2.3.1 Clause 3.1: *“... curator’s remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 ...”*.

2.4 Case No: Makara, MJ obo L v Road Accident Fund, the court order granted by Mr Justice Raulinga on 2 May 2019.

2.4.1 Clause 5.1: *“... pertaining to a curator’s remuneration and the furnishing of security in accordance with the provisions of the Administration of Estates Act 66 of 1965 as amended from time to time”.*

2.4.2 Clause 5.3: *“... all the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay in respect of the appointment, remuneration and disbursement had the trustee been appointed as curator bonis.”*

2.5 Case No: 20751/2016: Advocate M M Tromp N.O. obo Dichaba, M A B v Road Accident Fund, the court order granted by Acting Justice Meersingh on 26 October 2022.

2.5.1 Clause 2.1: *“... determined on the basis of directives pertaining to curator’s remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 as amended from time to time.”*

2.5.2 Clause 2.3: *“All the abovementioned costs shall be limited to the payment of the reasonable costs which the defendant would have had*

to pay regarding the appointment, remuneration, and disbursement had the trustee has been appointed as a curator bonis.”

2.6 Case No: 15265/2018: Fanoo Muhammed Ziyaad v Road Accident Fund,
the court order granted by Acting Justice Maubane on 25 May 2022.

2.6.1 Clause 2.1: “... *the fees and administration costs shall be determined on the basis of the directives pertaining to curator’s remuneration and furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 as amended from time to time ...*”.

2.6.2 Clause 2.3: “... *All the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding the appointment, remuneration and disbursements had the trustee been appointed as curator bonis.*”

2.7 Case No: 47003/2017: Advocate Van Antwerpen N.O. obo Mofitle, P P v Road Accident Fund, the court order granted by Justice Potterill on 4 February 2020.

2.7.1 Clause 3.1: “... *the fees and administration costs shall be determined on the basis of the directives pertaining to the curator’s remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 as amended from time to time ...*”.

2.7.2 Clause 3.3: *“... abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursement had the trustee been appointed as a curator bonis.”*

2.8 Case No: 33999/2017: S P Maseko v Road Accident Fund, the court order granted by Justice Munzhelele on 24 February 2022.

2.8.1 Clause 3: *“... with remuneration and costs shall not exceed the equivalent amount which the curator bonis would have been entitled in terms of and as determined by the Administration of Estates Act 66 of 1965 as amended and the prescribed tariff applicable to curators contained in Government Gazette Notice R1602 of 1 July 2019 and more specifically paragraphs 3(a) and 3(b) of the Schedule thereto.”*

2.9 Case No: 85598/2017: Advocate Ross Grant Bowles obo Yayase, S v Road Accident Fund, the court granted by Acting Justice Gianni on 3 September 2020

2.9.1 Clause 2.2.3: *“... the fees and administration costs shall be determined on the basis of the directives pertaining to the curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, 66 of 1965 as amended from time to time”.*

2.9.2 Clause 2.2.4: *“All the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee been appointed as curator bonis.”*

2.10 Case No: 78186/2016: Matshwele, T J v Road Accident Fund, the court order granted by Justice Tolmay on 23 June 2020.

2.10.1 Clause 3.1: *“... the fees and administration costs shall be determined on the basis of the directives pertaining to curators’ remuneration and furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 as amended from time to time ...”*.

2.10.2 Clause 3.3: *“... abovementioned costs shall be limited to the payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee been appointed as a curator bonis.”*.

2.11 Case No: 86884/2016: Advocate H R du Toit N.O. obo Tshepo Amos Phenya v The Road Accident Fund, the court order granted by Justice Sardiwalla on 2 June 2022.

2.11.1 Clause 4.3: *“The costs of the trust in administering the capital amount as determined by section 84(1)(b) of the Administration of Estates Act*

66 of 1965 as amended according to the prescribed tariff applicable to curators as reflected in Government Gazette Notice R1602 of July 1991 specifically paragraphs 3(a) and 3(b) of the Schedules thereto.”

2.12 Case No: 88499/2016: Thengisile Gloria Sibiya v Road Accident Fund, the court granted by Justice Mali on 3 February 2022.

2.12.1 Clause 5: *“... The defendant is ordered to pay reasonable remuneration of the reasonable costs incurred by the trustee of the Trust to be formed in administering and managing the capital amount referred to in paragraph 1 above, which remuneration and costs shall not exceed the equivalent amount which the curator bonis would have been entitled to in terms of and as determined by the Administration of Estates Act 66 of 1965 as amended and the prescribed tariff applicable to curators contained in Government Gazette Notice R1602 of 1st of July 1991 and more specifically paragraphs 3(a) and 3(b) of the Schedule thereto.”*

2.13 Case No: 2018/87201: Baloyi, Vonani Penelope v Road Accident Fund, the court order granted by Deputy Judge President Ledwaba on 30 November 2021.

2.13.1 Clause 2.2.3: *“The fees and administration costs shall be determined on the basis of the directives pertaining to the curators’ remuneration and the furnishing of security in accordance with the provisions of the*

Administration of Deceased Estates Act 66 of 1965 as amended from time to time.”

2.13.2 Clause 2.2.4: *“All the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee been appointed as curator bonis.”*

2.14 Case No: 7415/2018: Adv MM Tromp obo Mothlane v Road Accident Fund, the court order granted by Justice Raulinga on 21 February 2022.

2.14.1 Clause 8.1: *“The fees and administration costs shall be determined on the basis of the directives pertaining to the curators’ remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 as amended from time to time.”*

2.14.2 Clause 8.3: *“All the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee been appointed as curator bonis.”*

2.15 Case No: 54278/2017: Adv M Tromp obo Lowden Dante Rygaardt v Road Accident Fund, the court order granted by Madam Justice Neukircher on 5 August 2020

2.15.1 Clause 5.1 thereof with reference to the following: *“... the fees and administration costs shall be determined on the basis of the directives pertaining to the curator’s remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, 66 of 1965 as amended from time to time”.*

2.16 Case No: 93159/2015: Adv HR Du Toit obo Maserame Nthabiseng Ratsatsi v Road Accident Fund, the court order granted by Justice Holland-Muter on 21 July 2023

2.16.1 Clause 4.3: *“The costs of the Trust in administering the capital amount as determined by section 84(1)(b) of the Administration of Estates Act, 66 of 1965, as amended, according to the prescribed tariff applicable to curators, as reflected in the Government Gazette Notice R1602 of July 1991, specifically paragraphs 3(a) and 3(b) of the schedules thereto;”*

2.17 Case No: 27081/2017: Adv M van Antwerpen N.O. obo Letheea P v Road Accident Fund, the court order granted by Justice Tolmay on 15 February 2022

2.17.1 Clause 6.1: *“The fees and administration costs shall be determined on the basis of the directives pertaining to the curators’ remuneration and the furnishing of security in accordance with the provisions of the*

Administration of Deceased Estates Act 66 of 1965 as amended from time to time.”

2.17.2 Clause 6.3: *“All the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee been appointed as curator bonis.”*

2.18 Case No: 36452/2016: Adv Tromp NO obo Wilson v Road Accident Fund,
the court order granted by Justice Potterill on 28 October 2019

2.18.1 Clause 4.1: *“The fees and administration costs shall be determined on the basis of the directives pertaining to the curators’ remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act 66 of 1965 as amended from time to time.”*

2.18.2 Clause 4.3: *“All the abovementioned costs shall be limited to payment of the reasonable costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the trustee been appointed as curator bonis.”*

3. The deleted wording in the Court Orders referred to in paragraphs 2.1 to 2.18 hereabove is supplemented by inserting, (as new paragraphs with the appropriate corresponding clause numbers) the content provided for in paragraphs 3.1 and 3.2 here below:

- 3.1 *“In addition, the undertaking shall include the costs of the creation of a trust referred to below, the costs of annually obtaining a security bond as required, and costs of the trustee in respect of the administration of the trust.”*
- 3.2 *“The trustees are authorised to recover from the Road Accident Fund for the benefit of the trust all costs incurred by them which are payable by the Road Accident Fund under its undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 including the costs of the creation of a trust and the costs of furnishing security.”*
- 4 The following wording in the Trust Deeds referred to hereunder is deleted *in toto*:
- 4.1 Case No: 84853/2017: E K Spandeel v Road Accident Fund, Judgment handed down by Mr Justice Mbongwe on 2 February 2022 incorporating Trust Deed:
- 4.1.1 Clause 4 of the trust deed: *“...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust.”*
- 4.2 Case No: 66101/2016: Coetzee, J C v Road Accident Fund, the court order granted by Mr Justice Kollapen on 19 May 2021 incorporating Trust Deed:

4.2.1 Clause 16 of the trust deed: *"...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator Bonis."*

4.3 Case No: 7442/2016: Advocate Van Antwerpen N.O. obo Scholtz, J v Road Accident Fund the court order granted by Justice Bertelsmann on 6 November 2019 incorporating Trust Deed:

4.3.1 Clause 16 of the trust deed: *"...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator Bonis."*

4.4 Case No: 61612/2016: Makara, MJ obo L v Road Accident Fund, the court order granted by Mr Justice Raulinga on 2 May 2019 incorporating Trust Deed:

Clause 16 of the trust deed: *"... the Trustee will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa"*

4.5 Case No: 20751/2016: Advocate M M Tromp N.O. obo Dichaba, M A B v Road Accident Fund, the court order granted by Acting Justice Meersingh on 26 October 2022 incorporating Trust Deed:

4.5.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would*

have received if they had been administrators administering a testamentary trust.”

- 4.6 Case No: 15265/2018: Fanoo Muhammed Ziyaad v Road Accident Fund, the court order granted by Acting Justice Maubane on 25 May 2022 incorporating Trust Deed:

4.6.1 Clause 16 of the trust deed: “...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator Bonis.”

- 4.7 Case No: 47003/2017: Advocate Van Antwerpen N.O. obo Mofitle, P P v Road Accident Fund the court order granted by Justice Potterill on 4 February 2020 incorporating Trust Deed:

4.7.1 Clause 16 of the trust deed: “...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator Bonis.”

- 4.8 Case No: 85598/2017: Advocate Ross Grant Bowles obo Yayase, S v Road Accident Fund, the court granted by Acting Justice Gianni on 3 September 2020 incorporating Trust Deed:

4.8.1 Clause 16 of the trust deed: *"...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa."*

4.9 Case No: 78186/2016: Matshwele, T J v Road Accident Fund the court order granted by Justice Tolmay on 23 June 2020 incorporating Trust Deed:

4.9.1 Clause 16 of the trust deed: *"...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator Bonis."*

4.10 Case No: 86884/2016: Advocate H R du Toit N.O. obo Tshepo Amos Phenya v The Road Accident Fund, the court order granted by Justice Sardiwalla on 2 June 2022 incorporating Trust Deed:

4.10.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust."*

4.11 Case No: 88499/2016: Thengisile Gloria Sibiya v Road Accident Fund the court granted by Justice Mali on 3 February 2022 incorporating Trust Deed:

4.11.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust."*

4.12 Case No: 2018/87201: Baloyi, Vonani Penelope v Road Accident Fund the court order granted by Deputy Judge President Ledwaba on 30 November 2021 incorporating Trust Deed:

4.12.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust."*

4.13 Case No: 7415/2018: Adv MM Tromp obo Mothlane v Road Accident Fund the court order granted by Justice Raulinga on 21 February 2022 incorporating Trust Deed:

4.13.1 Clause 16 of the trust deed: *"...the TRUSTEE will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator bonis."*

4.14 Case No: 54278/2017: Adv M Tromp obo Lowden Dante Rygaardt v Road Accident Fund the court order granted by Madam Justice Neukircher on 5 August 2020 incorporating Trust Deed:

4.14.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust."*

4.15 Case No: 93159/2015: Adv HR Du Toit obo Maserame Nthabiseng Ratsatsi v Road Accident Fund the court order granted by Justice Holland-Muter on 21 July 2023 incorporating Trust Deed:

4.15.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust."*

4.16 Case No: 27081/2017: Adv M van Antwerpen N.O. obo Letheea P v Road Accident Fund the court order granted by Justice Tolmay on 15 February 2022 incorporating Trust Deed:

4.16.1 Clause 16 of the Trust Deed: *"... the Trustee will be entitled to a yearly fee as stipulated in the relevant legislation of the Republic of South Africa pertaining to a Curator Bonis."*

- 4.17 Case No: 36452/2016: Adv Tromp NO obo Wilson v Road Accident Fund
a court order granted by Justice Potterill on 28 October 2019 incorporating
Trust Deed:

4.17.1 Clause 4 of the trust deed: *"...and shall be entitled to charge such fees and to recover from the Trust such remuneration as he would have received if they had been administrators administering a testamentary trust."*

5. The deleted wording in the Trust Deeds referred to in paragraphs 4.1 to 4.17 hereabove is supplemented by inserting, (as new paragraphs with the appropriate corresponding clause numbers and heading) the content provided for in paragraphs 5.1 to 5.1.7 here below:

5.1 REMUNERATION AND TRUST ADMINISTRATION FEE AND COSTS

5.1.1 *"A once-off drafting fee for documents necessary for the formation of the trust in the sum of R 4 900.00 plus VAT."*

5.1.2 *"A once-off 0.5% fee calculated on the trust capital to establish and register the trust and for acceptance of the appointment as trustee."*

5.1.3 *"An annual management fee calculated at 1% on the trust capital in any given year."*

5.1.4 *"There is no minimum fee applicable."*

5.1.5 *"Administration costs and disbursements shall be calculated and include the following:*

5.1.5.1 *Accounting and Auditing fees in relation to the audited financial statements, in the sum of R 8 000.00 plus VAT per annum subject to reasonable inflationary annual increases in charges by the relevant auditor / accountant.*

5.1.5.2 *The annual cost of the bond of security calculated at 0.69% of the trust fund."*

5.1.6 *"A once-off termination fee of 1 % of the residual capital under administration on termination of the trust."*

6. The Second Respondent is ordered to pay the Applicants' taxed costs in respect of the Application filed under case no. Case No: 087032 / 2023.

7. Amended orders and amended trust deeds in the respective matters must be delivered in hard copy to Van der Schyff J's chambers.


/ E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicants:
Instructed by

Adv. R Bowles
Adams and Adams

For the second respondent:

Instructed by:

Date of the hearing:

Date of judgment:

Adv. K. Kollapen

Mpoyana Ledwaba Attorneys

26 February 2024

29 April 2024