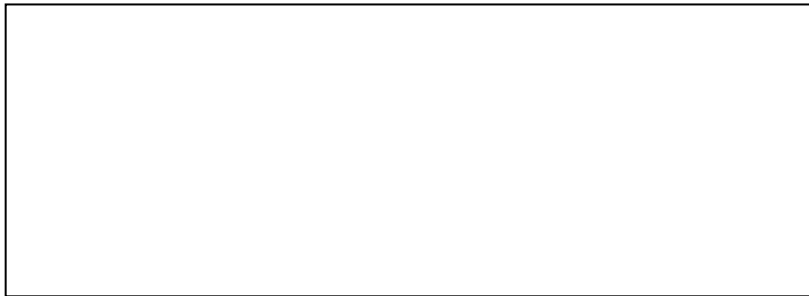


SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 022383/2022



In the matter between:

JOHANNES LOUIS OOSTHUIZEN N.O.

1st Applicant

(In his capacity as Trustee of the
Mosike Esther Ratabane Trust IT000277/2018(G))

ELIZABETH VORSTER N.O.

2nd Applicant

(In her capacity as Trustee of the
Mosike Esther Ratabane Trust IT000277/2018(G))

and

RENE FOUCHE INCORPORATED

1st Respondent

(Registration Number: 2015/132057/21)

GIDEON PETRUS SMITH

2nd Respondent

SARAH ALICE FOUCHE N.O

3rd Respondent

(In her capacity as the Executrix of the
Estate Late Rene Ian Fouche - Masters Ref 019411/2021)

THE MASTER OF THE HIGH COURT, JOHANNESBURG

4th Respondent

NTOMBIFIKILE QUITENESS RATABANE

(Identity Number: 7[...])

5th Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 26 July 2024

Summary

Contingency Fee Agreement – invalidity – substantive and procedural compliance required.

Contingency Fee Agreement - Determination of “normal fees” – application of “success fee” mark-up to work done before agreement concluded and work done after success achieved.

Constitution section 28(2) – pure waiver of a child's rights *ultra vires* the powers of the guardian.-

JUDGMENT

TURNER AJ

[1] This matter addresses the validity of a contingency fee agreement, the validity of an agreement in terms of which a child's guardian purported to waive the child's rights, the *locus standi* of the applicants to challenge those agreements and various other issues related to the fees charged by the attorneys appointed in a medical negligence matter involving a minor with cerebral palsy.

[2] MR (“the minor”) was born in September 2003 at a state hospital and was later diagnosed with cerebral palsy. In about August 2011, the minor's mother, NR (“the guardian”) consulted with Joe Hubbart Attorneys and Conveyancers (“JHA”) in

relation to a possible claim arising from the circumstances of the minor's birth at the hospital. Action proceedings were then initiated in late 2011 by JHA against the MEC for Health ("the MEC") with the guardian named as the plaintiff, in her representative capacity.

[3] Cerebral palsy is the term used for a group of disorders caused by abnormal brain development or damage to the developing brain. It can manifest in different ways and may affect a person's ability to move, maintain balance, her posture and the ability to control her muscles. It appears that the minor's cerebral palsy was the result of birth asphyxia caused by the negligence of employees of the state hospital at the time of her birth. Although no details of the minor's disabilities are provided in the current papers, she is described in the affidavits as being "severely disabled".

[4] In August 2016, a court order granted by Mojaelo DJP in this Court confirmed the liability of the MEC to the minor. In September 2017, a further court order granted by Mojaelo DJP confirmed the quantum of the MEC's liability to the minor in amount of R23,633,780.00, with more than R18 million allocated for future medical expenses. The September 2017 order included provisions creating a special trust to receive the funds to be paid out by the MEC.

[5] The applicants are the trustees of the special trust established for the minor pursuant to the September 2017 order.

[6] The first respondent is René Fouche Incorporated, the firm of attorneys that acted for the guardian (in her representative capacity) in 2016 and 2017 when litigating against the MEC. The second respondent was a director in that firm at the time; the third respondent is the executor of the deceased estate of the other director in that firm. I refer to the firm and its directors collectively as "RFI". The Master and the guardian are both cited as respondents for their respective interests in the matter but no relief is sought against them and neither participated in the hearing.

[7] The answering affidavit records that RFI was incorporated in 2015 with two directors, namely Gideon Petrus Smith and the late René Ian Fouche, both of whom had been employed as associates at JHA before RFI was formed. At some time in

2015, the guardian moved from JHA and became a client of RFI and Mr Smith continued to work on the minor's claim as a director at RFI (no longer as an associate at JHA). The answering affidavit also records that after the incorporation of RFI, RFI and JHA worked "in association" (without explaining the term).

[8] No details are provided in the answering affidavit as to the work done on the minor's claim against the MEC by JHA prior to 2015 or of the state of the proceedings when RFI took over from JHA. Limited details are provided in relation to what was done after RFI took over. The following chronology and details are extracted from what is set out in the affidavits and from what appears in the narrative on the "attorney and own client" bill¹ and the "Client disbursement sheet" produced by the respondents to justify the fees they charged the minor.

[9] The summons and the particulars of claim against the MEC were prepared and delivered by JHA in around December 2011. The particulars of claim, settled by counsel, was 10 pages. The MEC's plea was delivered in June 2012 (4 pages). Thereafter, JHA claim to have prepared a series of expert notices which appear to have been relatively limited, varying from 2 pages to 9 pages.

[10] The application for a trial date was delivered during July 2015, by which time approximately R80,000 in disbursements had been incurred by JHA. It appears that a separation of liability from quantum was agreed shortly before the trial.

[11] No details are provided by the respondents as to precisely when during 2015 RFI took over the matter from JHA. Further, no written agreement between JHA and the guardian has been disclosed recording how the transfer of the matter was managed and there are no documents recording any agreement between RFI and JHA as to how costs (and risk) that may have been incurred prior to the takeover would be handled.

¹ The bill of costs identifies the defendant as the Road Accident Fund, but I have assumed this to be a typo and an oversight.

[12] It appears that trial preparation (including consultations) took place in 2015 and the first half of 2016. The additional disbursements incurred between July 2015 and July 2016 (for legal related costs) amounted to approximately R20,000.

[13] Four and a half years after summons was issued and just one month before the trial date, on 20 July 2016, RFI arranged for the guardian to sign a "Contingency Fee Agreement" (the "CFA"). The details of the CFA are discussed further below. By this stage, all of the plaintiff expert reports were filed and I have not seen any indication that the MEC had filed an expert report disputing the plaintiff's position.

[14] The bill of costs claims fees for the trial on the merits for a period of three days on 4, 5 and 8 August 2016. However, no details are given of what happened in court on those days. All that is recorded in the answering affidavit is that *"the Defendant eventually capitulated, and an Order was granted by the Honourable Deputy Judge President Mojaelo on the basis that "the Defendant was liable for 100% of the ... agreed or proven damages"*. It is not clear whether a trial even commenced or whether the days were spent negotiating with an agreed outcome ultimately being made an order in the roll call by Mojaelo DJP.

[15] After the merits success, the right to obtain an interim payment of R2,000,000 from the MEC was secured. RFI's final accounting to the trust in 2022 indicates that the interim payment of R2,000,000 was received on 27 March 2017. There is an oddity though as RFI's bill of costs indicates that it instructed the Sheriff to attach and remove assets in execution three times during June and July 2017 (shortly before the quantum trial). RFI claims from the guardian in its bill of costs for paying the Sheriff R70,000 in June and two amounts of R140,000 in July 2017 - one amount for 10 July 2017 and the second amount for 12 July 2017. In the context of this matter, it seems strange for the attorneys to have spent R350,000 of the minor's funds on the Sheriff to attach assets where the quantum trial was set down just a few months later on 5 September 2017. None of this is explained by the respondents.

[16] After the merits order was handed down, RFI prepared Rule 36(9)(a) notices and went about consulting and arranging for medico legal reports to be prepared to address the quantum of the claim. After expert reports were exchanged and minutes

of expert meetings were prepared, the matter proceeded to court on 5 September 2017. The matter was finally resolved when an order was granted by Mojapelo DJP confirming that the MEC was liable to pay the net amount of R21,633,780.00 (being R23,633,780.00 less the interim payment of R2,000,000.00).

[17] The order granted by Mojapelo J on 5 September 2017 recorded *inter alia* that the MEC was required to pay the R21,633,780.00 over nine instalments from 5 October 2017 to 5 June 2018.

(1) The damages amount payable to the minor of R23,633,780.00 was calculated as set out in the “Statement of Agreed amounts” presented to the court as follows:

- General damages : R 1,600,000;
- Future loss of earnings R 1,655,714;
- Future medical expenses R 18,729,198;
- Costs of the trust (at 7.5%) R 1,648,868.

(2) Clause 8 of the order provided for RFI to disburse, on behalf of the minor, out of the funds received “medical and paramedical expenses incurred for treatment of the minor as well as any amounts reasonably required for the minor’s general wellbeing”. The amounts paid and fees charged for doing so are discussed below.

(3) Clause 9 called for the plaintiff’s attorneys to cause a trust to be established within six months of the order and for those attorneys to pay all monies held by them for the benefit of the minor to the trust after deduction of their fees, costs and disbursements.

(4) Clause 10 set out the basic requirements of the trust instrument.

(5) Clause 13 required the defendant to pay the plaintiff’s taxed or agreed costs on the party and party scale, including the costs of all of the plaintiff’s experts and the costs of preparing the eight sets of trial bundles.

[18] Notably, when the matter was called and the order sought before Mojapelo DJP in September 2017, no affidavit by the attorneys or the guardian was presented to the Court, so neither the terms (nor existence) of the CFA was disclosed . The

respondents provided a very sketchy account in the answering affidavit of what occurred on 5 September 2017 and, during argument before me, counsel was compelled to accept that the available evidence indicates that these documents were not handed up.

[19] The respondent has argued, in the answering affidavit and before me, that it was not necessary for the respondents to hand up these documents because the matter was not settled as contemplated by section 4 of the Contingency Fees Act ("the Act"). They argue that the parties' representatives made submissions to the Court which led to the order that was granted by Mojapelo DJP, that there was no signed settlement agreement nor an offer of settlement made by the MEC to be accepted. On this basis, the respondents contend that they were not required to meet the requirements of section 4 of the Act.

[20] To complete the chronology, I also deal with events which occurred after the September 2017 order before dealing with the issues in dispute.

[21] Additional entries in the bill of costs which deal with "medical expenses, financial support and aftercare" reveal additional amounts were paid by RFI before and after the court orders:

(1) From August 2015 until July 2016, an amount of approximately R850 per month was paid to Nkanyezi Stimulation Centre and RFI also made *ad hoc* payments to the guardian of approximately R2,850 per month. Prior to July 2016, it appears that an aggregate amount of approximately R15,000 was disbursed for medical expenses and R40,000 for financial assistance.

(2) From August 2016, after the order confirming the MEC's liability, the monthly amounts increased and additional *ad hoc* payments were made to service providers.

(3) After the quantum order in September 2017, more frequent and larger amounts were paid to the guardian and to other service providers as well as to retail stores Game and Bradlows, an "Auto Mechanical Service" and in November 2018, an amount of R123,000 was paid for the purchase of a motor vehicle. Between August 2016 and the end of 2018 the additional payments made by RFI for the minor/guardian amounted to approximately R700,000.

[22] In December 2017, three months after the September 2017 order, RFI prepared a document headed “Interim deed of settlement and mandate of instruction (subject to confirmation of costs)” which was signed by the guardian on 6 December 2017. (the “December 2017 agreement”). In the document, the guardian purports to confirm, retrospectively, that she authorised RFI and conferred the necessary authority on RFI “*to settle my action, in my representative capacity on behalf of ... the minor*”. It also purports to record her agreement and confirmation that the attorneys were entitled to deduct from the capital amount paid by the MEC: R311,667.40 in respect of advances made to the guardian; R1,300,000.00 in respect of the recommended house for the minor and the guardian; an interim contribution pending taxation of R895,546.00 in respect of counsel’s fees; and a provision in the amount of R6,879,573.70 in respect of RFI’s costs, fees and disbursements. I deal with the December 2017 agreement in detail below as its validity is challenged by the applicants.

[23] RFI paid funds over to the applicants to hold in special trust for the minor over the period 2018 to 2022.

[24] In July 2022, RFI provided its final accounting to the applicants in which it confirmed the following funds were received by RFI on behalf of the minor:

Total capital		R23,633,780.99
Interim (27.03.17)	R2,000,000	
Final (05.09.17)	R21,633,780	
Taxed PP		R1,863,087.12
Interest (trust investment)		R163,567.06
		R25,660,434.18

[25] Despite an enquiry directed by the applicants, no evidence of a taxed party and party bill of costs was presented in the evidence before me. For current purposes, I shall treat the amount of R1,863,087.12 as being the payment for costs made by the MEC following a taxation on a party and party basis. However, I do so without

making any finding in this regard as the existence of such a taxed bill may be an issue in future. I point out that this amount would have been the taxed amount recovered from the MEC, to include the costs of the advocates, attorneys and experts involved.

[26] Of the R25,660,434.18 received by RFI, the amount ultimately paid over by RFI to the trust was R14,763,029.96. After taking into account the disbursements paid as “financial assistance” and for “medical expenses, financial support and aftercare” (approximately R100,000 before July 2016 and approximately R700,000 after July 2016), a rough calculation indicates that the total amount retained by RFI as legal fees and disbursements exceeds R9,000,000 - in circumstances where the taxed party and party bill (including all fees, all expert costs and disbursements) is alleged to have been just R1,863,087.12.

The relief claimed and issues in dispute

[27] The applicants contend that RFI has withheld far more than it ought to have and that a far greater proportion of the R25,660,434.18 quantum awarded ought to have been paid to the trust for the benefit of the minor. In support of the claim for payment, the applicants contend that the CFA concluded in July 2016 is invalid and that RFI overreached on the fees charged even before applying the claimed 100% mark-up “success fee” in terms of the CFA. The applicants contend that RFI had a fiduciary duty towards the minor and that it breached that duty.

[28] In summary, the relief sought by the applicants, confirmed by Mr Arnoldi SC in argument, is the following:

1. That the Contingency Fee Agreement be declared invalid and unenforceable.
2. That the December 2017 agreement be declared invalid and unenforceable.
3. That the first, second and third respondents, jointly and severally, refund and pay back fees debited and taken by the first respondent to the applicants in the amount of R3,896,250.43² *alternatively* in such an amount as the Honourable Court deems reasonable.

² The calculation of this amount is addressed below

5. Costs of this application.

[29] While the respondents acknowledge their fiduciary duty, they deny the invalidity of the CFA and the allegations of overreaching. They also challenge the application on two grounds *in limine*: first they contend that the applicants do not have *locus standi* to bring this application and seek the relief they do; second, they contend that the terms of the December 2017 agreement constitute a bar to any subsequent challenge to the fee arrangement.

[30] In the respondents' heads of argument, they also launched an *in limine* attack on the attorney of record for the applicant, contending that the attorney had previously acted for the first respondent or its deceased director, Mr René Fouche and that his involvement constituted prejudicial a conflict of interest. No affidavits were filed to support these allegations and so there was no evidence to support or contradict these allegations. At the outside of the hearing, the respondents abandoned this objection.

[31] The principle underpinning both of the respondent's arguments *in limine* is that neither the Trustees nor the court should be entitled to interfere with the arrangement they concluded with the guardian, who they refer to as their client. In my view, these *in limine* defences can be given short shrift. Further, the fact that these arguments were raised and pursued by RFI indicate to me that RFI has not acknowledged or paid heed to the interests of the disabled minor at the centre of the dispute and so has not understood its constitutional or fiduciary duty at all in circumstances where a conflict of interest arose. I now deal with the merits of each of these objections.

[32] An evaluation of *locus standi in judicio* considers two elements: first, a party's capacity to litigate and second, the interest that the party has in the relief claimed or in the right to claim the relief. There is no dispute that the Trustees have the capacity to litigate in discharging their duties. The respondents challenge the *locus standi* of the Trustees on the second element. They argue that paragraphs 7 and 8 of the September 2017 court order contemplated the quantum being paid by the MEC into

their trust account, authorised them to make deductions from those funds for *inter alia* fees, costs and disbursements and then required them to:

“9.2 Pay all monies held in trust by them for the benefit of the minor to the trust after deduction of their fees, costs and disbursements.”

[33] The respondents argue that the trustees’ interest and involvement only commenced once they received payment into trust of the balance after the attorneys had made their deductions. They contend that because the trust only has an interest in the funds that were paid over to the trust after deduction of their fees, costs and disbursements, the trustees therefore have no right to interrogate the fees, costs and disbursements deducted before the monies were paid over. They say that up to that point, the only relationship that existed was the one between RFI and the guardian and consequently only the guardian had the right to challenge the validity of the CFA and the basis on which fees, costs and disbursements were deducted.

[34] They then contend that, in the December 2017 agreement, the guardian confirmed that they had deducted funds correctly. As a result of her signing the December 2017 agreement, so the argument goes, the guardian was precluded from challenging their fee deductions.

[35] The main problem with these arguments is that they have ignored the rights and interests of the party with the primary interest in determining the validity of the CFA, being the minor herself. That interest does not lie with her guardian. The role of the guardian is to assist the minor in exercising the minor’s rights, the minor’s rights do not become the rights of the guardian.³

[36] In all applications of the common law and statutory law, our courts (and legal practitioners) are obliged to ensure that the law is interpreted and applied in accordance with the Constitution. Section 28 of the Constitution deals with “Children” and confirms *inter alia*, that:

“28(1) Every child has the right

³ Christie's Law of Contract in South Africa 8th Ed 2022 p 290 -291 and the cases cited there

(h) to have a legal practitioner assigned to the child by the state, and at state's expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;

(2) A child's best interests are of paramount importance in every matter concerning the child."

[37] The September 2017 Court order granted by Mojapelo DJP recognised that the interests of the minor needed to be protected and the trust was established to safeguard the funds and interests of the minor after the quantum was awarded. The Trustees were required to receive into trust, for the benefit of the minor, the proceeds of the court order and then to manage those funds in the interests of the minor.

[38] Counsel for the respondent did not challenge the proposition that the trustees would have *locus standi* to pursue recovery proceedings, if the full capital amount due to the minor was not paid into the trust. Once one recognises that the challenge by the Trustees to the validity of the CFA has, as its central goal, the recovery by the Trustees of the full capital amount due to the minor – to be held in trust – then there is no doubt that the Trustees have the necessary interest and therefore *locus standi* to pursue the relief claimed. If fees and disbursements were deducted incorrectly or unlawfully by RFI, then the full capital amount has not been paid to the Trust.

[39] In support of the argument relying on the terms of the December 2017 agreement to avoid a challenge to their fees, the respondents rely on a confirmatory affidavit which was prepared for the guardian during October 2022 which, although not expressly stated to be the case, seems from the context to have been prepared for the guardian by RFI. The affidavit records that the guardian concluded the CFA and the December 2017 agreement on behalf of her child, that the Trustees seek to interfere with and override the "free consensus" between her and RFI and that she did not want the consequences of the agreements interfered with. In their heads of argument, the respondents argue strenuously that if the court rejects reliance on the December 2017 agreement, it would be undermining fundamental concepts of

consensus and reliance, a party's rights to "dignity and autonomy" and "cornerstones of the law of contract ... freedom ... sanctity ... and privity of contract".⁴

[40] In argument before me, Counsel for the respondents also argued that permitting interference by the Trustees with the December 2017 agreement would impermissibly allow the Trustees to supplant the decision-making authority of the guardian, as the child's mother. Counsel emphasised that the Trustee's role was restricted to managing the funds in trust and did not extend to making decisions in the interests of the child, which remained within the sole remit of the guardian.

[41] While it may be correct that the Trustees do not have the power to override the guardian's day-to-day decisions on the welfare and treatment of the minor, the current matter does not impinge on those matters. Instead, it invokes the Court's role as upper guardian of the minor and addresses the litigation and the costs of the litigation which are regulated by *inter alia* the Act and the need to provide for a person with a severe disability. At its heart are the fraught circumstances which arise in many matters where contingency fee agreements are used and where our courts have repeatedly recognised the potential for abuse.

[42] One need only consider the chronology of events, the conflict of interests and the relative power dynamic between RFI and the indigent guardian to recognise the cynical nature of this second *in limine* defence. By the time the December 2017 agreement was prepared by RFI for the guardian to sign, court orders on the merits and on the quantum of the claim had been obtained; RFI had not presented the CFA and affidavits to the court as required by the Act; approximately R10 million of the R23 million had already been paid by the MEC into the RFI trust account; RFI had arranged for the guardian to be paid approximately R1,3 million in respect of a "recommended house" and RFI was paying the guardian monthly – approximately R5,000 per month up to October 2017 and then an additional R48,000 during November and December 2017.

⁴ To this end, reliance is placed on *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC).

[43] All of the evidence indicates that the guardian was completely dependent on RFI during this period and, no doubt, was extremely grateful for the result that had been obtained for her daughter. It is completely improbable that the guardian would have challenged anything done by RFI at the time. The guardian was not resourced or qualified to evaluate the need for the December 2017 agreement, she was not resourced or qualified to assess the reasonableness or lawfulness of the fees charged and as a consequence, she was obliged to trust that everything done by RFI remained to be in the best interests of the minor.

[44] However, viewed objectively, there was no need for the guardian to sign the December 2017 agreement at all. The document does not generate any benefit for her or for the minor. All of the necessary Court orders had been granted by this stage, the payments from the MEC were being received and the trust was being established. The only reason that RFI would have prepared the December 2017 agreement would have been to try to secure its interest against the interests of the minor and the guardian.

[45] RFI's conduct thus created a direct conflict of interest. To discharge their fiduciary and professional duty, if the respondents believed there was a justification for the guardian signing the December 2017, they were obliged to recommend that the guardian obtained independent advice, to explain their conflict of interest and why such advice was required. Where the attorneys failed to do so, this would constitute a breach of the attorney's duties.

[46] Further, the nature of the December 2017 agreement and particularly the construction placed upon it by the respondents, amounts to little more than an attempt to waive the minor's rights. The operative elements of that agreement (which are now relied upon by RFI) do not regulate prospective arrangements for the benefit of the minor but merely purport to waive existing rights. Such an agreement is not in the interests of the minor and consequently, is *ultra vires* the powers of the guardian⁵

⁵ The guardian is only empowered to make an agreement for the minor that is in the interests of the minor.

and falls to be set aside by the court as upper guardian of minor children, applying the common law and section 28(2) of the Constitution.

[47] For these reasons, I dismiss the arguments *in limine* and find that the December 2017 agreement is invalid and unenforceable.

[48] In any event, it is also worth emphasising that, having regard to the authorities set out below and my findings on the validity of the CFA, the agreement concluded in December 2017 could never validate a CFA that was already invalid.

[49] Given the apparent conduct of RFI during December 2017 in the face of a clear conflict of interest, I direct that the matter should be referred to the Legal Practice Council for that professional body to consider whether action should be taken against RFI and its directors.

[50] I now deal with the main issue in dispute – the validity and enforceability of the CFA.

Legal principles on Contingency Fee Agreements

[51] The recent judgments in *MKM*⁶, *Mkuyana*⁷ and *Letsoale*⁸ record and confirm the principles applicable when dealing with contingency fee agreements and they deal extensively with the earlier judgements establishing these principles.⁹ For current purposes, it is sufficient for me to summarise the principles that are relevant to the current matter:

(1) Non-compliance with the Contingency Fees Act¹⁰ renders a contingency fee agreement invalid.¹¹ Compliance with both substantive and procedural requirements is required.

⁶ Road Accident Fund v MKM obo KM & Another 2023 (4) SA 516 (SCA) (“MKM”).

⁷ Mkuyana v Road Accident Fund 2020 (6) SA 405 (ECG) (“Mkuyana”).

⁸ Letsoale v Road Accident Fund 2023 (6) SA 533 (GP) (“Letsoale”).

⁹ E.g. PriceWaterhouseCoopers Inc and others v National Potato Cooperative Ltd 2004 (6) SA 66 (SCA); Ronald Bobroff and Partners Inc v De La Guerre 2014 (3) SA 134 (CC); Masango v RAF 2016 (6) SA 508 (GJ); Fluxmans Inc v Levenson 2017 (2) SA 520 (SCA).

¹⁰ Contingency Fees Act 66 of 1997.

(2) Substantive compliance includes ensuring that the “normal fees” recorded in the CFA can be justified according to principles of reasonableness.¹²

(3) Before the CFA is concluded, a full and proper assessment of the client’s prospects of being successful should be undertaken.¹³

(4) The CFA must be concluded at a sufficiently early stage of the proceedings so that the requirements of the Act are complied with. In particular, at the time that the agreement is concluded, there must be a risk of failure shared between client and attorney which justifies the “success fee” recorded in the CFA.¹⁴

(5) The “success fee” allowed by the Contingency Fees Act is not intended as compensation for funding the disbursements of the case or having to wait until a matter is concluded to receive payment. The purpose of the success fee is to compensate the attorney for the prospective risk of undertaking the litigation.¹⁵

(6) The entitlement under the Contingency Fees Act to “double” the normal fee (or increase by 100%) is not an automatic entitlement. The percentage allowed for the success fee should also be subjected to a principle of reasonableness, having regard to the risk and the assessment of the prospects of success.¹⁶ This assessment of risk and prospects is undertaken at the time the contingency agreement is concluded.

(7) Judicial oversight is required in all cases where the matter to which the contingency fee agreement applies is before the court and is settled. Such judicial oversight is a necessary procedural step given the inherent risk of abuse and incentive to profit that contingency fee agreements carry with them.¹⁷

(8) The Act is not intended to be a mechanism for a legal practitioner to charge fees that are unreasonable or to unjustifiably increase his fee

¹¹ MKM para 36.

¹² Letsoale paras 7 – 10.

¹³ Tjati v RAF 2013 (2) SA 632 (GSJ) para 23; Letsoale para 19.

¹⁴ Letsoale para 13; Mkuyana para 17.

¹⁵ Mkuyana para 17; Letsoale para 15.

¹⁶ Letsoale paras 37 – 39; Mkuyana paras 17 and 18. Mkuyana para 20; PriceWaterhouseCoopers para 41. Mkuyana paras 29 – 36.

¹⁷ Mkuyana paras 15 and 16; MKM paras 8 and 36; Letsoale para 12 - 13.

simply to place him in a position to recover the maximum of the success fee which the Act allows.¹⁸

(9) An invalid agreement cannot be replaced by a subsequent agreement which seeks to improve or replace aspects of the invalid prior agreement.¹⁹

[52] In the paragraphs below, I consider whether there has been compliance with the Act. I also assess how RFI has determined its “normal fee” and applied the “success fee” in charging the guardian, on behalf of the minor.

Settlement contemplated by section 4 of the Contingency Fees Act

[53] The primary defence raised by RFI to resist the arguments of invalidity of the CFA is that the content of section 4 of the Act is not applicable on a proper interpretation and application of section 4. RFI argues that the provisions of section 4, requiring production of the CFA and affidavits, would only have been triggered if there was a formal offer of settlement made by the defendant and accepted by the plaintiff. They say that in the current matter, the MEC’s legal representatives could not get a formal instruction to settle and so, in accordance with a practice developed in the Johannesburg High Court, a Statement of Agreed Facts and a Statement of Agreed Amounts (determined by the experts for both parties) was handed up in Court, and these statements were relied on by Counsel addressing the Court in support of the order being granted. They say that by following this procedure where Counsel had to address these statements rather than merely hand up a settlement agreement, there was no “offer of settlement” as contemplated by the Act and so there was no obligation on RFI to comply with the requirements of section 4.

[54] There was some uncertainty during argument as to the onus or evidential burden carried by each party in a matter such as this, where the validity and enforceability of a CFA is challenged. The default common law position is that contingency fee agreements that do not comply with the Act are unlawful and so, in

¹⁸ Letsoale para 18; Mkuyana para 14.

¹⁹ Letsoale para 9; Tjati paras 24 – 25.

my view it follows that, an agreement purporting to be a contingency fee agreement must be regarded as invalid in the absence of evidence to establish compliance and validity. An attorney who wishes to rely on and enforce a contingency fee agreement must therefore produce the evidence necessary to show substantive and procedural compliance with the Act.

[55] Further, given the conflict of interest inherent in these matters and the opportunity for abuse, as well as the fact that the attorney would have been at the centre of all litigation and settlement activities, the attorney should always have the necessary evidence. If the attorney does not produce evidence to show compliance with the Act, then the attorney suffers the consequence of invalidity.

[56] In the answering affidavit, the deponent (an attorney) states the following when dealing with what occurred on 5 September 2017:

“36. The parties’ legal representatives, accordingly, prepared and presented the Statement of Agreed Facts to the Honourable Justice Mojapelo whereafter the Honourable Justice gave judgment as per a draft order, which draft order the Honourable Justice Mojapelo made an order of court. In view of the aforesaid, section 4 of the Contingency Fees Act No. 66 of 1997 (‘the CFA’) was not applicable to the latter. This aspect will be addressed [sic] in full hereafter.

37. The matter was not settled between the parties. The Court Order was granted subsequent to the parties presenting their respective cases, with reference also to the Statement of Agreed Facts.”

[57] First, RFI did not produce the “Statement of Agreed Facts” that was allegedly handed up in these proceedings, notwithstanding direct requests for its production from the applicants and from me, during argument. What was produced was the “Statement of Agreed Amounts” which, in terms, confirms that the quantum was agreed before the trial.

[58] The amounts that were recorded in the “Statement of Agreed Amounts” were amounts reached through deliberations and agreement by the experts appointed by RFI and the MEC. It reflected the amounts which both parties’ representatives accepted as resolving the dispute. To suggest that this procedure permits avoidance

of section 4 of the Act flies in the face of all the established authority which requires judicial oversight of contingency fee agreements. The SCA in *MKM* has made it clear that even where there is no formal offer of settlement, the attorney must still comply with section 4 of the Act where an order is granted without contestation. When interpreting the Contingency Fees Act, like any other document, one must have regard to the text, context and the purpose of the legislation²⁰ and if the respondents' approach were to be adopted, this would undermine the purpose of the Act requiring judicial oversight to protect indigent persons.

[59] Second, along with other documents prepared contemporaneously, RFI's own bill of costs (item 967) records the attendance on 5 September 2017 as follows: *"Attend court – matter stood down pending settlement negotiations – matter settled – settlement made an Order of Court."*

[60] Third, the December 2017 agreement prepared by RFI for the guardian to sign, records that the guardian conferred the necessary authority on RFI *"to settle my action, in my representative capacity on behalf of ... the minor"*. This also shows that, in December 2017, RFI considered that they had been involved in the settlement of the action.

[61] Last and in any event, no consideration has been given to how the merits were resolved in August 2016. The language used in the answering affidavit is vague and no details are given as to whether a trial actually proceeded and witnesses were led and cross-examined. In my view, the description given by the respondent of what happened at the merits stage in 2016 – namely that the MEC "eventually capitulated" – reflects a likely settlement of the merits in that the MEC agreed to settle the merits on the basis that the Department would be liable for 100% of the minor's agreed or proved damages. Such a settlement would also have required production of the CFA and the affidavits required by section 4.

²⁰ *University Of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)

[62] In my view, whether the order granted was expressly agreed with the authority of the MEC or granted based on submissions that the lawyers and experts involved had jointly motivated the pre-determined outcome, the attorneys were required to comply with the provisions of section 4 of the Act. In this case, where the affidavits and CFA were not handed up, RFI failed to comply with the requirements of section 4 of the Act. For this reason alone, I find that the CFA is invalid and unenforceable.

[63] Given the arguments made before me and potential future disputes that may be raised by the respondents, it is necessary to set out additional reasons why RFI could not rely on the CFA or claim the full fees they do in terms of the draft Attorney Client bill of costs.

[64] At the time that the merits were resolved in August 2016, the ink on the CFA had hardly dried since the CFA was concluded less than a month beforehand. Counsel for the respondent argued before me that an attorney was only entitled to conclude a contingency fee agreement when there is a reasonable prospect of success and so I should accept in this case, that RFI was only in a position to make this determination in July 2016. This argument has no merit at all. First, the attorney has not produced any evidence to support such an argument. Second, the bill of costs indicates that the pleadings were exchanged and experts were appointed years earlier. The fact that both JHA and RFI pursued the matter indicates (at least *prima facie*) that they considered the matter had reasonable prospects of success from an early stage.

[65] Taking account of the authorities referred to above, it appears clear to me that if the CFA had been presented at Court in 2016 (or in 2017), it would not have been accepted as a valid and enforceable agreement. It was concluded far too late in the proceedings and at a time when the risk in the litigation was likely significantly reduced. There particularly was no justification for RFI to conclude an agreement extracting a 100% mark-up from their indigent client at such a late stage where there appears to have been little or no substantive opposition to the merits of the minor's claim.

[66] A further argument raised before me by the respondents was directed at trying to distinguish between a practice that had apparently developed in this court which differs from the practice in the Gauteng Division, Pretoria. The way in which the point was addressed in the answering affidavit is as follows:

“72.2 At the time in question, the practice in the above Honourable Court, was that a Court Order will only note when no valid contingency agreement was entered into or where the Presiding Judge declared the same to be invalid, where draft orders in settled matters were presented to the court. I understand this was the opposite of the practice in the Gauteng Division of the High Court, Pretoria.

72.3 In other words, in matters where the Presiding Judge was of the view that there were valid contingency agreements, in settled matters no inscriptions were made on the court orders. In such matters the contingency fee agreement and the affidavits had to be handed up to the Presiding Judge who would then consider same.”

[67] In argument, counsel suggested that the practice relieved RFI from the obligation to hand up the affidavits required by section 4.

[68] The fundamental problem with this line of argument is that a practice cannot excuse non-compliance with the Act. The views expressed by Mojapelo DJP himself in *Masango*²¹ and the consistent views expressed in this and other Courts over the requirement to disclose the CFA and affidavits in any settled matter, means that there would be no lawful basis for a practice that permits attorneys to rely on a CFA but withhold disclosure of the CFA and affidavits when a matter is settled.

The fees and disbursements charged

[69] I now consider the details of how RFI charged the minor (represented by the guardian) relying on the provisions of the CFA. I do so first, to express my displeasure as to what appears to have been a flagrant abuse of the Act and second, to avoid doubt over my views on the remaining disputes. This additional part of the judgment is also included following submissions made by counsel for the respondent

²¹ *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ)

to the effect that it was not in the interests of the minor for me to find in favour of the trustees because (and I summarise): RFI would appeal and challenge all attempts by the trustees to enforce the judgment; that RFI would drag out procedural matters such as taxations etc. with the result that the trustees would spend more of the minor's funds on litigation and not on the minor. This thinly veiled threat, suggesting that it was in the minor's interest for the applicants to abandon funds unlawfully retained by RFI, is no doubt the product of counsel's instructions and shows the wholly inappropriate approach that has been and is adopted by RFI.

[70] My first concern in relation to the CFA and the manner in which it was applied by RFI arises in respect of the period during which the "success fee" mark-up was applied to attorney's fees. RFI applied the success fee to all fees charged on the matter from 2011(before their involvement commenced) to the end of their involvement (long after the September 2017 order was granted).

[71] I agree with the applicant that the starting point for charging a "success fee" mark-up should be the date on which the CFA was concluded. In the absence of very exceptional circumstances that are explained and motivated, there would ordinarily be no justification for an attorney applying a success fee mark-up to fees incurred prior to the date on which the contingency fee agreement was concluded. The fees incurred during an earlier period would have been incurred in terms of a different regime and not in terms of the CFA.

[72] This also applies to the alleged "normal fee" for time-based charges. The Bill of Costs relied on by RFI reflects that RFI has charged R5,000 per hour for all attendances, including the attendances at JHA, with a total fee on a time basis of R1 280 683.

[73] Even if a valid CFA had been concluded in July 2016, there was no basis for RFI to charge what it contended was its agreed "normal fee" in 2016 of R5000 per hour for time related matters, to attendances prior to July 2016. Even if R5000 per hour was an acceptable "normal fee" when the agreement was signed in 2016, there is no evidence to support any agreement to charge a R5000 fee for the period prior to 2016.

[74] Inexplicably, RFI even applied its alleged 2016 “normal fee” of R5000 and the success fee mark up of 100% (making it R10,000 per hour) to fees incurred from 2011 to 2015, while the matter was being run by a different firm, JHA. These fees are charged for work done by JHA, before RFI was even incorporated. RFI has provided no basis to justify charging for work done by JHA and no justification for charging elevated fees and a mark-up on these charges. Again, this is something that should be considered by the Legal Practice Council’s disciplinary committee.

[75] There also appears to me to be no justification for an attorney applying a success fee mark-up to fees incurred after the quantum of the claim has been awarded. After that date, the attorney does not carry any litigation risk. The work done in collecting a debt or paying out disbursements to the minor and guardian is very different from work done in preparing a case for trial. During the period after the quantum award, there is no risk to the attorney in not being paid for undertaking the residual work. The attorneys can recover their normal fees for debt recovery or for work done in finalising the matter.

[76] The anomalies that arise if this principle is not applied are apparent from the facts of this case, discussed below.

[77] My second concern relates to how RFI set its “normal fee”. In describing RFI’s “normal fee” for attendances charged on a time/hourly basis, the CFA records that the “normal” hourly fee can change, depending on the “full enforceable value” of the claim. The CFA records that RFI can charge R1,000 per hour for claims below R100,000; R2,500 per hour for claims exceeding R100,000 but less than R2,000,000; R3,500 per hour for claims exceeding R2,000,000 but less than R10,000,000 and R5,000 per hour for claims exceeding R10,000,000. Apparently, the scale of charges would only be determined at the end of the case as this would be the point at which the “full enforceable value” of the claim is apparent. In other words, the same work carried out by the same person within the firm will ultimately be charged to the client at either R1,000 per hour or R5,000 per hour, depending on the eventual result.

[78] This formulation reflects that not only the success fee mark-up but also the amount charged as a “normal fee” is triggered by the success of the litigation as the attorney receives a greater benefit (higher hourly fee) if a higher quantum is achieved. In my view, this undermines the intended function of the “normal fee” in the Act, which is to reflect the fee that is normally charged to paying clients whether the case is won or lost.

[79] In this case, there is no evidence of an agreed “normal” hourly rate for work done on a time basis at the outset of the case. As a consequence, this form of agreement does not provide any certainty in relation to a “normal fee” for work carried out. In my view, an attorney cannot rely on a template formulation such as this. It must, in each case, at the beginning of a case and before work is done, provide the specific fees that are normally be charged for work done by each professional (or rank of professional) in the firm.

[80] Further, on the principles set out in the above authorities and in the absence of exceptional circumstances, it seems to me that there would seldom be a justification for charging a 100% success fee mark-up on fees incurred after the point that success has been achieved on the merits, particularly where an interim payment is secured. In most of those cases, like the current one, the risk of litigation and the risk of recovery will have dissipated.

[81] My third concern relates to the “normal fee” charges for attendances that are not calculated on a time basis. For these attendances, RFI records its “normal” charge as being a multiple of the party and party tariff prescribed by the Uniform Rules of Court, again on a sliding scale : 1,5 times the tariff on claims that do not exceed R100,000; 2 times the tariff for claims between R100,000 and R2,000,000; 2,5 times the tariff on claims between R2,000,000 and R10,000,000; and 3,5 x the tariff on claims exceeding R10,000,000.²² Again, the applicable scale is determined only at the end of the litigation and based on the quantum ultimately ordered. As noted above, this impermissibly elides the determination of the “normal fee” with the success of the litigation.

²² In fact, RFI claimed after multiplying the tariff rate by 4

[82] These attendances involve work such as making copies of documents for experts or counsel; perusing invoices or statements of account received from experts or the Sheriff; attending to service and filing of documents, etc. On a review of the bill of costs presented by RFI, it appears that this is the area where the most significant abuse has taken place. It is not clear to me at all, and remains unexplained, why the time spent copying a document in a R10,000,000 matter is worth more than double the time spent copying a similar document in a R100,000 matter.

[83] The manner in which the surcharge to produce the “normal fee” has been applied in the bill of costs is as follows.

(1) The bill of costs was prepared in accordance with the party and party tariff. At the end of the bill, all of the attendance-based fees (charged at the tariff rate) from 2011 to 2018 are aggregated.

(2) Then a premium is added as a “Surcharge Fee (4x)”, multiplying the tariff total by four, to determine the total of the alleged “normal fee”. In this application, RFI acknowledge that the surcharge was not applied in accordance with its own interpretation of the CFA – a multiple of 4x was applied instead of the agreed 3,5x.

(3) After that the time-based fee is added to the(overstated) “normal” attendance-based fee and the “success fee” mark-up is applied by doubling the total.

[84] I set out a few attendances based items from the bill of costs below to highlight how these calculations are implemented and the anomalous results that arise:

(1) Item 322 – Drawing application for a trial date. This is a standard notice, irrespective of the size of the matter. The party and party tariff for preparing the notice is R105.50. RFI contends that its “normal fee” for such an attendance if the matter has a low value is R211. However, in the current matter, it charged R844 ($R105.50 \times 4 \times 2$).

(2) Item 350 – attendance to service and filing (21km), time taken 1 hour. This is a simple delivery of papers which will not be any different in a big or small matter. The party and party tariff is R243. RFI contends that its “normal fee” for

such an attendance if the matter has a low value is R486. However, in the current matter, it charged R1 944 (R243 x 4 x 2).

[85] The prejudicial and ultimately abusive consequence of RFI's approach is also exposed through the disbursement payments made to Nkanyezi Stimulation Centre. (Bill Items 1029 to 1097).

(1) R850 was paid to the Centre on approximately 35 occasions for treatment to the minor. Making a payment is an administrative task and does not involve any legal complexity. Further, most of the payments were made after the merits order was granted and when there was no risk at all to the attorneys.

(2) The bill of costs reflects that the party and party tariff for an attendance to pay a bill is R158.50. Applying the stated multiple of 3.5 times, this value becomes R554.75 (on the 4 times multiple actually applied, it was R634). In effect, RFI says its "normal" fee for making each such administrative payment of R850 is R554.75 (or R634).

(3) Applying the "doubling" mechanism, this fee then increases to R1,109.50 or R1,268.

(4) Effectively, without making an alternative arrangement that might be beneficial to the minor once the merits were resolved and an interim payment was received, RFI charged the minor R1,268 on each occasion merely to make a payment of R850 with the minor's own money.

[86] On the evidence before me, RFI has not provided any justification for charging the "normal" fee it has sought to charge for non-time attendances. In circumstances where the contingency fee agreement has been declared invalid, there is no contractual basis to have charged those fees. RFI has not put up any other basis on which it should be entitled to the surcharge of 3,5x (or 4x).

Taxation of the Attorney and Own Client bill of costs

[87] There is a section in the respondents' heads of argument dealing with the "authority of the Taxing Master" and the inability of the court to interrogate a bill of costs without setting aside the taxation on review. However, all of these arguments are misplaced as there is no evidence in this matter that the attorney/ client bill value

deducted from the capital amount was subjected to taxation. In argument, counsel for the respondent confirmed that the attorney/client bill has not been taxed and so there is no decision of the taxing master to be reviewed.

[88] Having recognised the fragility of its CFA, the respondents contend that if the CFA is rendered invalid and that they are only entitled to recover normal fees, they should be entitled to re-draw the attorney-client bill of costs that was prepared previously. This is resisted by the applicants, who contend that this is an opportunistic tactic to extract additional amounts. The applicants rely on a series of judgments to resist this attempt.²³

[89] I agree with the applicants that no contractual or legal basis has been set out to justify redrawing of the bill. The respondents have not identified which items they contend would be amended, which items have been omitted from the original bill but would now be included, or why one this Court should consider that the original bill was not correct or not reasonable.

[90] If, after receiving this judgment, the parties are unable to settle the remaining disputes (through mediation or otherwise), then the question of residual liability will be determined by taxation of the existing bill of costs. In performing that taxation, the taxing master should have regard to the party and party bill taxed with the MEC as paragraph 13 of the September 2017 order records the costs payable by the MEC to the guardian (obo the minor) should have included the attorney tariff costs and the costs of the expert reports delivered, the qualifying fees of the relevant experts, costs of senior and junior counsel and the reasonable travelling expenses to and from medico legal appointments. The party and party bill should therefore deal comprehensively with the disbursements incurred by the attorneys.

Amount repayable

[91] RFI has argued that no payment can be ordered in these proceedings because any amount recoverable would not be a liquidated amount and would have to be

²³ Hershen Sohn v Martins 1915 NPD 310; Ramsay Webber Inc v Anastassopoulos 2022 JDR 2127 (GJ).

determined on evidence in different proceedings. As I understand the substance of the argument, RFI contends that it would only be liable to pay funds to the applicants if the applicants could prove the precise extent to which the minor had been overcharged and until then, they would not be liable to pay over any amount.

[92] This argument also does not withstand scrutiny. In circumstances where the agreement relied on to charge and withhold the funds is invalid, there is no basis on which to have charged those fees in the first place. The amount of R3,896,250.43 claimed by the applicants is the difference between the amount charged as fees by RFI after charging the success fee - being R5 715 245,16 -and the amount of R1 818 994.73 which is calculated with reference to the RFI attorney- client bill of costs: allowing R5 000 per hour for time related work and the standard tariff for non-time related attendances.

[93] The applicants contend that payment of this amount of R3 896 250.43 can be ordered in these proceedings because it is calculated using RFI's own bill of costs. They have reserved their rights to pursue recovery of additional amounts in the future, by challenging individual line items on the bill, if the bill of costs is subjected to taxation.

[94] In my view, this approach is consistent with the interests of justice. There is no reason to delay ordering payment of the amount of R3,896,250.43 to the applicants, for the benefit of the minor. Having declared the contingency fee agreement invalid and made my findings on the fees charged above, there is no contractual or other basis on which the applicants would be entitled to retain this amount.

[95] If either party sought to subject the RFI attorney-client bill to taxation, the taxing master would determine *inter alia* :whether the fee of R5 000 per hour was justified and if not, the amount due to RFI would decrease; whether all of the items (including disbursements and fees for prior to 2015) on the bill were justified and if not, the amount due to RFI would decrease; whether a premium should be allowed on the tariff for non-time related attendances, in which case the amount due to RFI would increase . Consequently, that process may deliver slightly more or less for RFI, but until that taxation is finalised, there is no justification for RFI retaining these funds. If

the matter is not settled and after taxation takes place it is found that RFI is owed an additional amount, the trustees at the time would be in a position to pay that difference on behalf of the minor.

Conclusion

[96] In the circumstances, I find that the applicants have *locus standi* to bring the current application in their capacities as Trustees of the special trust established for the benefit of the minor.

[97] The applicants have established that the relevant affidavits were not presented to the court when they ought to have been. Consequently, the CFA is invalid and unenforceable. The CFA is also invalid and unenforceable due to its late conclusion (just one month before the trial) where RFI claimed a full 100% success fee and because the fees charged as a “normal” fee by RFI are not justified on the evidence.

[98] The evidence also indicates overreaching by RFI. There is no evidence to justify RFI charging the minor for work done by JHA. Further, the imposition of a success fee mark-up of 100% on fees during periods before the conclusion of the CFA and also during the period after the Court orders were granted, when there was no longer a litigation risk, is also unreasonable and unenforceable.

[99] Having regard to all of these findings, the applicants have established that they are entitled to the relief they seek, including payment of R3,896,250.43. No claim was made for interest and so no order for interest is made.

[100] The bill of costs prepared by RFI as an “attorney and own client” bill for purposes of charging the guardian (obo the minor) was not subjected to taxation. It remains open to either party to submit this bill to taxation. When assessing the bill, the Taxing Master is required to consider the authorities referred to herein and in particular, *Mkuyana*²⁴ and the cases referred to in paras 26 – 36 of that judgment. To

²⁴ *Mkuyana v Road Accident Fund* 2020 (6) SA 405 (ECG).

avoid doubt, I confirm that RFI is required to make payment of the R3,896,250.43 immediately and is not entitled to withhold payment pending the taxation of the bill.

[101] As to costs, if the respondents had engaged in this litigation *bona fide* and in accordance with their fiduciary duties to the minor, they would not have raised the defences that have been raised. In my view, the defences raised by the respondent cannot be justified and all were directed at attempting to prevent transparency into the manner in which the minor's affairs were managed by RFI. This justifies a punitive costs order.

[102] In the circumstances, I make the following order:

2

- (1) The Contingency Fee Agreement dated 20th July 2017 (Annexure JL4 to the Founding Affidavit) is declared invalid and unenforceable.
- (2) The Interim Settlement Agreement and Mandate Instruction dated 6th December 2017 (Annexure JL 5 to the Founding Affidavit) is declared invalid and unenforceable.
- (3) The 1st, 2nd and 3rd Respondents, jointly and severally the one paying the other to be absolved, are ordered to pay to the applicants, for the benefit of the minor, the amount of R3 896 250,43
- (4) Costs of this application are to be paid by 1st, 2nd 3rd Respondents on an attorney and client scale, jointly and severally the one paying the other to be absolved;
- (5) A copy of this judgment is to be sent to the disciplinary committee of the Legal Practice Council to investigate and determine whether disciplinary action should be taken against RFI and its directors.

DA TURNER AJ

Gauteng Division, Johannesburg

Counsel for the applicants: Adv F Arnoldi SC; Adv L Keijser

Instructed by: Vorsters Inc

Counsel for the 1st, 2nd & 3rd respondents: Adv M Letzler

Instructed by: Rene Fouche Inc

Date of hearing: 24 January 2024

Date of Judgment: 26 July 2024