THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1102/2021

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

And

MKM obo KM and TM **RESPONDENT**

CENTRE FOR CHILD LAW ***AMICUS CURIAE***

and

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

and

NM obo CM and LM **RESPONDENT**

CENTRE FOR CHILD LAW ***AMICUS CURIAE***

Neutral citation: *Road Accident Fund v MKM obo KM and Another*; *Road Accident Fund v NM obo CM and Another (with Centre for Child Law intervening as Amicus Curiae)* (1102/2021) [2023] ZASCA 50 (13 April 2023)

Bench: MAKGOKA, MOTHLE and HUGHES JJA and NHLANGULELA and MALI AJJA

Heard: 4 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 13 April 2023 at 11h00.

Summary: Contingency Fees Act – whether s 4 imposes an obligation on the Road Accident Fund to ensure that a legal practitioner obtains judicial approval before it enters into a settlement agreement with such a practitioner – whether a settlement agreement concluded without such judicial approval is unlawful.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Fisher J, sitting as a court of first instance):

1 In respect of both matters, the appeal is upheld with no order as to costs.

2 Under case number **1677/2019**, the order of the high court is set aside and replaced with the following:

> '1 The contingency fees agreement entered into between Sonya Meistre Attorneys Incorporated (Sonya Meistre Attorneys) and the first plaintiff, is declared invalid;
>
> 2 Sonya Meistre Attorneys are directed to submit a bill of costs in respect of their attorney-and-client fees to the Taxing Master of this court (Gauteng Division, Johannesburg), within fifteen (15) days of this order.
>
> 3 Should the taxed fees be less than the amount debited as fees (25% of the capital amount) and already paid to Sonya Meistre Attorneys, the attorneys shall within seven (7) days of such taxation, pay the difference between the two amounts, into the Trust Account held on behalf of the first plaintiff.
>
> 4 The Registrar of this court is directed to:
>
> (a) to contact the first plaintiff and to explain to her the import of the judgment and the rights that it accords her and the minor children; and
>
> (b) to deliver a copy of this judgment to the Legal Practice Council;
>
> 5 The fees of the curator *ad litem* shall also be subjected to taxation by the Taxing Master before they are paid.
>
> 6 Sonya Meistre Attorneys are ordered to cause a Trust to be established within three months of this order in accordance with the

provisions of the Trust Property Control Act 57 of 1998 in respect of the minor children;

7 The Trust referred to above must be established in accordance with clauses 5.1 – 5.13, and 6 – 9 of the Draft Consent Order dated 20 January 2021;

8 Once the Trust is established, Sonya Meistre Attorneys are ordered to pay to the Trust, all monies received from the defendant, the RAF, and held in trust on behalf of the minor children;

9 Sonya Meistre Attorneys are ordered to report to the Registrar of Judge Fisher within 3 months of this order regarding the establishment of the Trust and the payment of the monies under clause 8 above.

10 The Registrar of this court is requested to bring a copy of this judgment to the attention of the Legal Practice Council regarding the conduct of Attorney Sonya Meistre, Adv Jonatan Johanan Bouwer, and Adv Liezle Swart.'

3 Under case number **1928/2019**, the order of the high court is set aside and replaced with the following:

'1 The contingency fees agreement entered into between Sonya Meistre Attorneys Incorporated (Sonya Meistre Attorneys), and the first plaintiff, is declared invalid;

2 Sonya Meistre Attorneys are directed to submit a bill of costs in respect of their attorney-and-client fees to the Taxing Master of this court (Gauteng Division, Johannesburg, within fifteen (15) days of this order.

3 Should the taxed fees be less than the amount of R66 625.75 debited as fees and already paid to Sonya Meistre Attorneys, the

attorneys shall within seven (7) of such taxation, pay the difference between the two amounts, to the first plaintiff.

4 The Registrar of this court is requested to bring a copy of this judgment to the attention of the Legal Practice Council regarding the conduct of Attorney Sonya Meistre and Adv Liezle Swart.'

JUDGMENT

Makgoka JA (Mothle and Hughes JJA and Nhlangulela and Mali AJJA concurring):

Introduction

[1] The two issues in this appeal are whether: (a) there is an obligation on the Road Accident Fund (the RAF) to ensure that a legal practitioner complies with s 4 of the Contingency Fees Act[1] before it can conclude a settlement agreement with a legal practitioner on behalf of a client; (b) a settlement agreement concluded without judicial approval in terms of s 4 of the Contingency Fees Act, and the RAF's payment of the capital to a legal practitioner pursuant to such a settlement agreement, are both unlawful.

[2] The Gauteng Division of the High Court, Johannesburg (the high court) answered both questions in the affirmative, and accordingly, declared the settlement agreements in the two matters before it to be unlawful, as they were concluded without judicial approval. In addition, in the first matter, the curator *ad litem* did not seek judicial approval to settle the matter as stipulated in a court

[1] Contingency Fees Act 66 of 1997.

order in terms of which the curator *ad litem* was appointed. For this reason, too, the high court declared the settlement agreement unlawful.

[3] Consequently, the high court set aside the settlement agreements. In the first matter, it made several ancillary orders, including the suspension of the appointed curator *ad litem* and the appointment of a new one on behalf of the minor children. In the second matter, the high court nevertheless enforced the settlement agreement.

[4] The RAF appeals against these orders, with the leave of the high court. The respondents did not participate in this appeal. The Centre for Child Law, which was admitted as *amicus curiae* in the high court, made submissions in this Court in support of the high court's judgment and orders.

The settlement agreements

[5] The settlement agreements in question were in respect of claims for loss of support for minor children, who, in each case, had lost a parent due to fatal injuries sustained in a motor vehicle collision. The respondents represented the minor children in those claims against the RAF. Both respondents were represented by Ms Sonya Meistre (Ms Meistre) a director of Sonya Meistre Attorneys Incorporated (the attorneys), in prosecuting the claims on behalf of the children. The attorneys concluded a contingency fees agreement with each of the respondents, in terms of the Contingency Fees Act.

[6] The respondent in the first matter, under case number **1677/2019**, is Ms MKM, who acted on behalf of minor children KM and TM, following the death of their mother, Ms K (the deceased), who passed away on 3 August 2018. The deceased was Ms MKM's sister, and thus the minor children's aunt. Advocate Bouwer was appointed as curator *ad litem* on behalf of the minor children on 28

November 2019. In terms of paragraph 3 of the order in term of which he was appointed, he was 'not allowed to accept any offers or make any settlements without the permission of a Judge in chambers.'

[7] In the second matter, under case number **1928/2019**, the respondent, Ms NM acted on behalf of her minor children CM and LM, as their mother and natural guardian, following the death of their father, Mr JM,[2] who passed away on 23 July 2018. There was no curator *ad litem* appointed in the second matter, ostensibly as the minor children were represented by their biological mother.

The Contingency Fees Act

[8] It is convenient at this stage to set out the relevant provisions of the Contingency Fees Act. Section 4 thereof provides for judicial oversight in respect of settlement of matters where a contingency fees agreement has been concluded between a client and a legal practitioner pursuant to that Act. It reads as follows:

'**Settlement**

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating-

(a) the full terms of the settlement;

(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;

(c) an estimate of the chances of success or failure at trial;

(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;

(e) the reasons why the settlement is recommended;

(f) that the matters contemplated in paragraphs *(a)* to *(e)* were

explained to the client, and the steps taken to ensure that the client

[2] The high court determined through the evidence of Ms NM that the father of the minor children was a Zimbabwean national, Mr JM, who was using a fake South African identity document with the names of a South African.

understands the explanation; and

(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating-

(a) that he or she was notified in writing of the terms of the settlement;

(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and

(c) his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.'

[9] It is the non-compliance with these provisions that led the high court to hold that the settlement agreements were unlawful.

Factual background

[10] This is how the settlement agreements came about. Pursuant to their instructions, the attorneys instituted actions on behalf of the children in the high court in January 2019. In the first matter, the minor children's claims were R448 293 and R882 915 respectively. Ms MKM claimed R21 280 in her personal capacity for funeral expenses. In the second matter, the claims on behalf of the minor children were respectively, R110 144 and R154 220. Ms NM also claimed R174 141 for loss of support as the 'previous wife' of the deceased Mr JM.

[11] On 3 November 2020, the RAF made offers of settlement to the attorneys in the respective matters, which offers the attorneys eventually accepted. The first matter was settled for R1 345 252, and the second, for R482 483, which amounts were subsequently paid into the attorneys' trust account.

[12] It is common cause that when accepting the offers of settlement in both matters, the attorneys did not seek judicial approval in terms of s 4 of the Contingency Fees Act. Additionally, in respect of the first matter, the curator *ad litem* was neither involved in the settlement negotiations, nor was the settlement offer approved by a Judge in chambers as directed in the court order.

Applications to have the draft orders made orders of court

[13] Subsequent to the settlement of both matters, the attorneys prepared draft orders which recorded the terms of the settlement mentioned above, and made provision for payment of costs and the taxation thereof. The draft order in the first matter, in addition, makes provision for the creation of a Trust with the minor children as the sole beneficiaries, into which the monies received on their behalf would be paid. There are also detailed provisions for the management of the Trust for the benefit of the minor children. Lastly, the draft order in each matter sought to declare the contingency fees agreements between the attorneys and the respondents to be invalid.

[14] On 20 January 2021, the attorneys applied to the high court to have the draft orders to be made orders of court. The applications were unopposed. The Judge who considered the applications (Fisher J) was not satisfied with a number of aspects, and requested the attorneys and the RAF to provide explanations thereto. In particular, the Judge sought clarity on whether the RAF can competently enter into settlement agreements with the claimants *inter partes*, and make payment in terms thereof, without judicial oversight. The court postponed both matters for further submissions on these issues.

[15] In the meanwhile, the Centre for Child Law applied, and was admitted, to intervene as *amicus curiae*. In due course, the respondents, the RAF, and the *amicus curiae* filed affidavits and made written submissions. From the

explanations given to the court's queries, it emerged, among others, that during the settlement negotiations, the attorneys did not disclose to the RAF that both respondents had signed contingency fees agreements.

[16] Furthermore, as far as the capital payments were concerned, the following was revealed: In the first matter, upon receipt of the monies in their trust account, the attorneys took 25% of the capital as their fees. However, no pay-out was made to Ms MKM, and the capital remains in the attorneys' trust account. In the second matter, the attorneys took R66 625.75 as their fees and paid out the balance of R361 877.25 to Ms NM, which she invested on behalf of the children.

The orders of the high court

[17] The applications by the attorneys to have draft orders made orders of court, were eventually heard on 12 March 2021, and judgment was delivered on 7 April 2021. As mentioned already, the high court declared the settlement agreements in both matters unlawful, and made the following orders, respectively:

In the first matter:

'1. The application is postponed sine die.

2. The settlement agreement is declared to be invalid.

3. Adv Nomvula C Nhlapho is appointed as curator ad litem for the purposes of investigating the circumstances of the minor children and providing a report which deals with the Section 4(1) provisions of the CFA as set out in this judgment.

4. Adv Nhlapho shall have the power to:

4.1 Conclude a settlement agreement with the RAF on behalf of the children;

4.2 Place such settlement agreement before this court for approval;

4.3 Seek the court's directive in relation to what is to happen to the funds currently held in trust by Ms Meistre;

4.4 Approach this court for interim relief as far as the needs and requirements of the children are concerned, should she see fit to do so.

5. The RAF shall pay the fees of Adv Nhlapho directly to her within 30 days of receipt of an invoice from her.
6. Mr Bouwer's curatorship is suspended pending the final determination of this matter and/or this Court's further directives.
7. Until such further directives of this Court in relation to Mr Bouwer's curatorship, he is not entitled to charge or collect any fees for his services in this matter.
8. The monies paid to Ms Meistre by the RAF pursuant to the putative settlement concluded between Ms Meistre and the RAF are to remain in trust with Ms Meistre pending this Court's further direction.
9. Ms Meistre is to produce to this Court a draft bill of costs as to her fees in this matter within 15 days of this order.
10. A copy of this judgment is to be placed before the LPC and the conduct of Ms Meistre, Adv Bouwer and Adv Swart is referred to the LPC for investigation.
11. The costs of the matter are reserved before me.'

And in the second matter:

1. The matter is postponed sine die.
2. It is directed that the amount of R 428 503-00 paid by the RAF under the putative settlement agreement in this matter is allocated as follows:
a. R 164 141 is the amount due to Ms MN (First Plaintiff) personally.
b. R 110 142 is the amount due to C (Second Plaintiff)
c. R 154 220 is the amount due to L (Third Plaintiff)
3. Ms [Meistre] is to produce to this court a draft bill of costs as to her fees in this matter within 15 days of this order.
4. The conduct of Ms Meistre and Adv Swart is referred to the LPC for investigation.
5. The costs of the matter are reserved before me.
6. A copy of this judgment in relation to both cases is to be delivered by the Registrar to the NDPP and the Minister of Transport.'

Analysis

[18] I turn now to consider whether the high court was correct in making these orders. In each of the matters, summons was issued in January 2019. The offers of settlement were made in November 2020. The matters were therefore before

court as envisaged in both ss 4(1) and 4(3) of the Contingency Fees Act. Thus, pursuant to those provisions, the attorneys were undoubtedly obliged to obtain judicial approval before accepting the offers of settlement agreements from the RAF. As mentioned already, it is common cause that the attorneys did not comply with this requirement. Two questions arise from this non-compliance.

[19] First, does the RAF bear any obligation to ensure that a legal practitioner complies with s 4 of the Contingency Fees Act? Second, does non-compliance with those provisions by the legal practitioner invalidates the settlement agreement concluded between the RAF and the claimant, and the payment made pursuant to it? I consider these, in turn.

Does the RAF bear obligation to ensure compliance with s 4 of the Contingency Fees Act?

[20] The high court answered this question in the affirmative. It concluded that the RAF acts contrary to its functions and powers when it enters into a settlement agreement with a claimant's attorneys without judicial oversight, and that payment pursuant to such a settlement agreement, is unlawful. It reasoned as follows:

'[T]he validity of a contingency fees agreement is integral to the RAF's ability lawfully to enter into a settlement agreement. The provisions of the Contingency Fees Act permeate the entire settlement process for litigious claims in the RAF environment and the contractual and other relationships which operate in the field of the RAF claim can only be understood with reference to CFA.'

[21] The views expressed by the high court are simply not correct. The Contingency Fees Act came into operation on 23 April 1999. Its history, statutory context, and purpose were considered in the report of the South African Law Commission *(South African Law Commission,* Project 93 '*Speculative and Contingency Fees*' November 1996) and *Price Waterhouse Coopers v National*

Potato Co-operative[3] (*Price Waterhouse Coopers*). There is nothing in that report or *Price Waterhouse Coopers* that suggests that the contingency fees agreements in claims against the RAF occupied the minds of those responsible for the enactment of the Contingency Fees Act.

[22] The Contingency Fees Act is a legislation of general application and is not aimed only at contingency fees agreements in the context of claims against the RAF. Thus, there is no single reference to road accident fund claims in the Contingency Fees Act. It was thus impermissible for the high court to carve out a special dispensation in respect of contingency fees agreements where claims are against the RAF.

[23] Furthermore, the RAF discharges its mandate in terms of the Road Accident Fund Act[4] (the RAF Act). That Act, in s 4(1)(*b*), sets out as one of the RAF's powers and functions, 'the investigation and settling' of claims arising from loss or damage caused by the driving of a motor vehicle. This section does not subject the RAF's power to any judicial approval, and there is nothing in the Contingency Fees Act that this changed with the advent of the latter Act.

[24] The RAF's power to settle matters (without judicial approval) before litigation is given impetus by s 24(6)(*a*) and (*b*) of the RAF Act, which provides:

'No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent –

(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and

(b) before all requirements contemplated in in section 19*(f)* have been complied with:

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[3] *Price Waterhouse Coopers v Inc and Others v National Potato Co-operative Ltd* [2004] ZASCA 64; 2004 (6) SA 66 (SCA); [2004] 3 All SA 20 (SCA) (*Price Waterhouse Coopers*) paras 26-46.

[4] 56 of 1996.

Provided that the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be.'

[25] Historically, the RAF has used this window period of 120 days to consider and investigate claims. Similarly, there is no suggestion that with the advent of the Contingency Fees Agreement, the RAF can now only exercise this power subject to compliance by a legal practitioner with the provisions of s 4 of the Contingency Fees Act.

[26] The high court also said:

'In short, where there is a [contingency fees agreement] (and this would rationally be the case in all RAF matters where action is instituted using the services of an attorney) the RAF is not empowered to make an out of court settlement.'

and

'[A]s part of its administrative function, [the RAF] has a duty to see to it that the provisions of [the Contingency Fees Act] are strictly adhered to when it comes to settling claims.'

Also,

'The making of payment without a court order, is incompetent and contrary to the statutory scheme which binds the RA. Without a valid settlement it has no basis to pay out on the claim and such payment is technically made *ultra vires*.

[27] I disagree with these pronouncements and findings. It must be borne in mind that a contingency fees agreement is a bilateral agreement between a legal practitioner and his or her client. It has nothing to do with a party against whom the client has a claim – the RAF in this instance. By its very nature, it is confidential and privileged between the client and his or her legal practitioner. Thus, ordinarily, a third party against whom a claim is prosecuted (such as the RAF), would not know about its existence, and has no right, nor an obligation, to enquire about its existence or its contents.

[28] The effect of the high court's judgment is that in each claim against it, before it makes an offer of settlement, and pays in terms of the subsequent settlement, the RAF must enquire from the claimant's legal practitioner whether there is a contingency fees agreement. If there is, the RAF must insist that the legal practitioner must obtain judicial approval in terms of s 4(1) of the Contingency Fees Act before it concludes a settlement agreement with him or her. If it does not, and it settles the claim, and pays out the capital amount without the legal practitioner having obtained judicial approval, it acts unlawfully.

[29] That is untenable. There are no textual or contextual indications in the Contingency Fees Act that the RAF bears any obligation to insist on a legal practitioner to obtain judicial oversight before it concludes a settlement agreement with such a practitioner. As the short title of the Contingency Fees Act makes plain, the Act was enacted:

'To provide for contingency fees agreements between legal practitioners and their clients; and to provide for matters connected therewith.'

[30] It is practically not clear how the RAF can force the legal practitioners, who act on behalf of its opponents, to comply with s 4 of the Contingency Fees Act. The high court, by a fiat, impermissibly imposed an obligation on the RAF not contemplated in the Contingency Fees Act. It did so, purportedly on the basis of a 'purposive interpretation' of the Contingency Fees Act. This, with respect, is not interpretation, but legislation, which is not within a court's remit.

[31] I therefore conclude that there is no obligation on the RAF to ensure that the legal practitioner complies with the provisions of s 4 before it concludes a settlement agreement with him or her. It may well be salutary, where a contingency fees agreement is in place, for the RAF to enquire whether there has been compliance with s 4 of the Contingency Fees Act before it concludes a

settlement agreement with a legal practitioner. But that does not equate to a statutory or legal obligation.

Does non-compliance with s 4 invalidate the settlement agreement?

[32] In terms of s 4(1) of the Contingency Fees Act, once an offer of settlement is made to a claimant who has concluded a contingency fees agreement with a legal practitioner, such a practitioner is not entitled to accept the offer of settlement without the approval of the court, if it is a litigious matter, or the professional controlling body, in case of a non-litigious matter.

[33] In the context of claims pursuant to the RAF Act, provided a contingency fees agreement has been concluded, the Contingency Fees Act would find application in two instances envisaged in s 4(1) of that Act. First, if the RAF makes an offer of settlement during the period of 120 days envisaged in s 24(6)*(a)* of the RAF Act. The second instance would arise after the expiry of the 120 days or where the RAF had, before the expiry of that period, repudiated liability, and in each case, a claimant has served a summons in terms of the proviso to s 24(6) of the RAF Act.

[34] In each of the two instances, the claimant's legal practitioner has an obligation to seek approval of the offer of settlement from the professional controlling body or the court, as the case may be, depending on whether the matter is litigious or non-litigious. The legal practitioner has no discretion in this regard. To obtain such approval, s 4(1) requires such a legal practitioner to file an affidavit stating the factors referred to in that section. In terms of s 4(2), such an affidavit must be accompanied by the confirmatory affidavit of the practitioner's client. To put the issue beyond doubt, s 4(3) provides that '[a]ny settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.'

[35] According to the high court, non-compliance with these provisions invalidates the underlying settlement agreement, and payment pursuant to such settlement agreement is unlawful. It seems to me that the high court conflated two issues that should be kept separate and distinct – the non-compliance by the legal practitioner with s 4 of the Contingency Fees Act on the one hand, and the validity of a settlement agreement, on the other. In my view, the invalidity of the former does not affect the validity of the latter. There are consequences for the legal practitioner if there is non-compliance with s 4, which I consider next.

[36] It is trite that a contingency fees agreement that is not covered by the Contingency Fees Act, or which does not comply with its requirements, is invalid.[5] Thus, the effect of non-compliance with s 4 of the Contingency Fees Act is that as between the legal practitioner and his or her client, the agreement is unenforceable. Thus, the legal practitioner would not be entitled to charge the client higher fees set out in the contingency fees agreement, but only to his or her reasonable attorney and client fees. As explained in *Tjatji and Others v Road Accident Fund*:[6]

'As both the initial and new contingency fee agreements are invalid the common law will apply. Under the common law, the plaintiffs' attorneys are only entitled to a reasonable fee in relation to the work performed. Taxation of a bill of costs is the method whereby the reasonableness of a fee is assessed. The plaintiffs' attorneys are therefore only entitled to such fees as are taxed or assessed on an attorney and own client basis.'[7]

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[5] *Ronald Bobroff & Partners Inc v De La Guerre* [2014] ZACC 2; 2014 (3) SA 134 (CC); *Masango v Road Accident Fund* [2016] ZAGPJHC 227; 2016 (6) 508 (GJ) para 1; *Fluxmans Incorporated v Levenson* [2016] ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA) para 27; *Mostert and Others v Nash and Another* [2018] ZASCA 62; 2018 (5) SA 409 (SCA) para 54; *Mfengwana v Road Accident Fund* [2016] ZAECGHC 159; 2017 (5) SA 445 (ECG) (*Mfengwana*) para 12; *Mathimba and Others v Nonxwba and Others* 2019 (1) SA 591 (ECG) para 118.1.

[6] *Tjatji and Others v Road Accident Fund* [2012] ZAGPJHC 198; 2013 (2) SA 632 (GSJ).

[7] Ibid para 26.

[37] But it does not follow that because the contingency fees agreement is invalid, the underlying settlement agreement concluded between the RAF and the legal practitioner on behalf of his or her client, is also invalid, as suggested by the high court. As explained in *Price Waterhouse Coopers*, the fact that a litigant has entered into an unlawful agreement with a third party to provide funds to finance his case is a matter extraneous to the dispute between the litigant and the other party and is therefore irrelevant to the issues arising in the dispute, whatever the cause of action.[8]

[38] Consistent with that approach, in *Mfengwana v Road Accident Fund*[9] (*Mfengwana*) the court declared the contingency fees agreement invalid, but still made the settlement agreement an order of court. Plasket J adopted an admirably practical approach, which, with respect, I endorse. He remarked:

'I am able to make an order, in the absence of compliance with s 4(1) and s 4(2) of the Act, to settle Mr Mfengwana's claim against the RAF. I do so because, it seems to me, [the claimant] will be prejudiced by any further delay, which is not of his making, and because, having been seized of the matter, I have satisfied myself (to the extent that I am able) that the settlement is fair. . .'[10]

[39] To protect the interests of the plaintiff, the court in *Mfengwana* built into its order some safeguards. The order provided that the plaintiff's attorneys could only recover from him, their attorney and client costs after such costs had been taxed. The Registrar was also requested: (a) to contact the plaintiff and to explain to him the import of the judgment and the rights that it accords him; and (b) to deliver a copy of the judgment to the professional controlling body (the Cape Law Society at the time).

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[8] *Price Waterhouse Coopers* fn 3 para 48.
[9] *Mfengwana* fn 4.
[10] Ibid para 30.

[40] The effect of non-compliance with s 4 of the Contingency Fees Act on settlement agreements and court orders arose squarely in *Theodosiou v Schindlers Attorneys.*[11] The first defendant, a firm of attorneys, had represented the plaintiffs in several litigious matters and had agreed to do so on a contingency basis. Settlement agreements were concluded in some of the matters and were made orders of court. The plaintiffs thereafter sought to set aside two court orders, one incorporating the two settlement agreements and the other, the consent to a monetary judgment, due to non-compliance with the Contingency Fees Act. They contended that as the contingency fees agreement was illegal and void due to the said non-compliance, all agreements and orders flowing from that agreement were also void.

[41] The court concluded that while non-compliance with the Contingency Fees Act rendered the contingency fees agreement invalid and void, this does not invalidate any related settlement agreement made an order of court without *justus error*, fraud, or public policy considerations.

[42] In my view, this holding is, with respect, undoubtedly correct. It accords with the general principle of our law as articulated in *Price Waterhouse Coopers* and applied in *Mfengwana.* Thus, the contrary holdings by the high court cannot be supported.

The high court's residual pronouncements and ancillary orders

[43] Before I conclude, I am constrained to comment on some of the high court's pronouncements with regard to claims involving minor children. First, the high court suggested that the RAF has an added responsibility when it comes to claims on behalf of minor children. The high court said:

[11] *Theodosiou and Others v Schindlers Attorneys and Others* [2022] ZAGPJHC 9; [2022] 2 All SA 256 (GJ); 2022 (4) SA 617 (GJ).

'The administrative function of the RAF is thus all the more important where it is entering into settlement negotiations with a person representing a child. Before it pays, the RAF has the duty to satisfy itself that a proper case has been presented on behalf of the child. It cannot do this in the context of its function unless it is allowed a sense of the merits. This will entail a proper case as to the claim being placed before the RAF.'

[44] While one cannot quibble with the general thrust that the minor children's best interests ought to be considered in all matters concerning them, in claims pursuant to the RAF Act, it is generally not the duty of the RAF to secure such interests. That duty falls on those entrusted with the task to look after the interests of the minor children, like the legal practitioners appointed on their behalf, and curators *ad litem*, where they have been appointed. Ultimately, the duty rests on the court as the upper guardian of the minor children.

[45] The RAF, it must be borne in mind, is a litigant whose interests are not always aligned with those of the minor children. It can, for example, only consider a claim on behalf of a minor child as it receives it from those who represent the minor child. Thus, it can only investigate the claim as presented to it, and cannot be expected to go beyond that. It could be that in certain instances the RAF would be expected to play a more proactive role in a claim on behalf of a minor, for example, where a person who lodges a claim on behalf of a minor is not legally represented. But that was not the situation in either of the two matters before the high court, and the high court's discussion on this aspect was with respect, not necessary.

[46] More so, there was no suggestion that any of the minor children's claims were under-settled. On the contrary, it appears that both matters were settled very close to what was originally claimed. In the first matter, R1 354 488 was initially claimed. It was settled for R1 345 252. In the second matter, the initial claim was R438 505, which was settled for R482 483.

[47] The high court also purported to prescribe additional factors to those set out in s 4(1)*(a)–(g)* of the Contingency Fees Act, when judicial approval is sought to accept an offer of settlement made in respect of a minor child's claim. The high court held that, in addition to those factors, the legal practitioner's affidavit should also contain the following factors: (a) the relationship between the plaintiff and the child, and the duration thereof; (b) the circumstances that led to the plaintiff caring for the child; (c) the interests of the plaintiff; (d) the financial circumstances of the plaintiff and his or her ability to safeguard and administer the money; (d) the personal and financial circumstances of the child including his or her home circumstances and maintenance needs; (e) a justification for the vehicle agreed to administer the funds and why such a vehicle is preferable to the other possibilities; and (f) the views and wishes of the child concerned, where appropriate.

[48] The high court was influenced in this regard by its view that 'the provisions of the Contingency Fees Act permeate the entire settlement process for litigious claims in the RAF environment.' I have demonstrated that this is not so. In any event, the additional factors suggested by the high court are among those which, ordinarily, would be contained in a report to the court by a curator *ad litem* where such has been appointed. And this would inevitably be the case in all matters where minor children are represented by persons other than their biological parents.

[49] It is certainly not for the courts to prescribe additional factors to the legislative scheme of the Contingency Fees Act. That is for the Legislature. In my view, the high court impermissibly trenched upon the tenet of separation of powers, and improperly trespassed on the exclusive domain of the Legislature.

As explained in *National Treasury v Opposition to Urban Tolling Alliance*,[12] courts must refrain from entering the exclusive terrain of the Executive and the Legislative branches of State unless the intrusion is mandated by the Constitution itself. This is not the case here.

[50] The high court also embarked on a consideration of various vehicles to protect monies claimed on behalf of minor children pursuant to the RAF Act. After a lengthy excursus, the high court concluded that the Guardian's Fund offered 'a safe, reliable, accessible and free service and it should not be overlooked by a court as a possible vehicle for protecting children's monies, based only on apocryphal reports of inefficiency in the Master's Office.'

[51] To my mind, this was not necessary in the present case. There was no suggestion that the funds received on behalf of the minor children were not properly secured in their interests. As mentioned already, in the first matter, provision had been made for the creation of a Trust with the minor children as the sole beneficiaries, into which the monies received on their behalf would be paid.

[52] In its judgment, the high court did not state what is objectionable about the envisaged Trust, which is a standard practice in matters such as this. On the face of it, this appears to be in the best interests of the minor children. In the second matter, the mother of the minor children had responsibly invested the funds on behalf of the minor children, and the high court was satisfied with this arrangement. In my view, this should have been the end of the matter.

[53] In light of the above, the high court should have separated the enquiry into the best interests of the minor children, from its concerns about the conduct of the

[12] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para 48.

legal practitioners and the curator *ad litem*. It could have made orders referring their conduct to the Law Practice Council, without holding back payment of the monies for the benefit of the minor children in the first matter. As mentioned already, on the face of it, the claim was fairly settled – close to what was initially claimed. A Trust was to be created to regulate the management of the funds on behalf of the minor children.

[54] On the facts before it, the best interests of the minor children dictated that the high court should have ratified the processes in respect of the settlement of the minor children's claims. Instead, the high court adopted a pedantic and unnecessarily formalistic approach. As a result, the minor children in the first matter, have to date, still not received the benefit of the funds received on their behalf. This is prejudicial, and not in their best interests.

[55] It is worth pointing out that none of the wide-ranging and far-reaching orders made by the high court were sought by any of the parties. Just to recap, what was before the high court, and which the high court was called to adjudicate upon, were unopposed applications to have the draft orders made orders of court. Much of what was traversed by the high court in its judgment was not germane to the issues and the facts before it. I have already alluded to the high court's extensive consideration as to whether the Guardian's Fund was a possible vehicle to protect monies claimed on behalf of minor children. For the reasons already mentioned, this was irrelevant on the facts of these matters.

[56] I briefly turn to examine the orders granted by the high court and their appropriateness or desirability.

Appointment of a new curator ad litem

[57] In the first matter, the court postponed the matter *sine die* and appointed a new curator *ad litem* with ancillary orders. In my view, this was unnecessary. As mentioned already, the matter had been settled in what appeared to be a fair amount, and a Trust was envisaged to be created to manage the monies on behalf of the children. The new curator *ad litem* was appointed ostensibly on the court's holding that the settlement agreement concluded between the RAF and the attorneys was invalid, hence the new curator *ad litem* was to 'conclude a settlement agreement with the RAF on behalf of the children' and 'place such settlement agreement before this court for approval'.

[58] Having concluded in this judgment that the settlement agreement is valid, the substratum for the appointment of a new curator *ad litem* unravels. This order should accordingly be set aside. On the available facts, I am satisfied that the minor children's interests would be served by paying the monies on their behalf into the Trust to be created. I find nothing worrisome in the provisions of the envisaged Trust regarding the interests of the minor child are concerned.

[59] In his three reports, the originally appointed curator *ad litem* confirmed that, contrary to the court order in terms of which he was appointed, he did not obtain the court's approval before accepting the settlement agreement. His explanation therefor was that this occurred during the lockdown period as a result of the Covid-19 pandemic. He explains that no Judges were available at court, and thus could not approach a Judge in chambers for that purpose. However, he was satisfied that the settlement agreement was in the best interests of the children. He, therefore, ratified the settlement agreement and requested the court to 'condone' his non-compliance with the court order.

[60] In my view, this explanation is unconvincing. During the Covid-19 lockdown period, court administration was not halted. There is nothing that prevented the curator *ad litem* from requesting the Deputy Judge President to designate a Judge to consider the settlement and give his or her approval, without physical contact. Having said that, the overriding consideration is whether it was in the best interests of the minor children for the high court to nevertheless condone the curator *ad litem*'s failure to obtain judicial approval of the settlement offer.

[61] I am of the view that the high court should have acceded to the curator *ad litem*'s request, and approved the settlement agreement, which appears to be in the best interests of the minor children. Thus viewed, the appointment of a new curator *ad litem* was not necessary. The order in terms of which she was appointed, and its ancillary provisions, should be set aside. I am alive to the fact that the new curator *ad litem* may well have performed some work in terms of the high court's order. To that extent, she should be remunerated for her services, despite us setting aside her appointment.

Referral to the National Director of Public Prosecutions and the Minister of Transport

[62] It is not clear from the judgment why the high court deemed it necessary to bring the judgment to the attention of the National Director of Public Prosecutions and the Minister. The referral to the National Director of Public Prosecutions suggests that the Judge held a prima facie view that there was some criminal conduct by someone in the matter. However, nowhere in the judgment does the Judge identify such prima facie criminal conduct and 'the culprit' to be investigated. As regards the referral to the Minister, I assume that this was predicated on the court's holding that the RAF acted unlawfully in settling the matter with the attorneys without complying with s 4 of the Contingency Fees

Act. I have clarified that the RAF did not act unlawfully. Consequently, this order should be set aside in both matters.

Allocation of the capital amount: second matter

[63] The second matter was also postponed *sine die*, and the court directed how the capital of R 428 503-00 paid by the RAF should be allocated between the respondent and the minor children. In light of the fact that the money had already been paid, and the minor children's portion had been invested to the satisfaction of the court, these orders seem superfluous and should be done away with.

Bills of costs

[64] In both matters, the high court ordered the attorneys 'to produce to the Court a draft bill of costs as to her fees in this matter within 15 days of this order.' For what purpose, it may be asked? Suppose such a bill of costs is presented to the court and upon perusal, it questions some of the items. What would it do about it? Not much, because whether a legal practitioner's fees are reasonable or not, is not within a court's remit. That is the function of the Taxing Master. This order should be set aside and replaced with a suitable order in terms of which the attorneys' bills of costs would be subjected to taxation by the Taxing Master before presenting them to the respondents for payment.

Referral to the Legal Practice Council

[65] In seeking approval to have the draft orders made orders of court, the legal representatives gave the court the impression that the payments to the attorneys would be made once the orders were made. They failed to disclose to the court that in both matters: (a) capital had already been made; (b) the attorneys had already taken their fees without any taxation of such fees. Thus, the court was effectively misled. This conduct on the part of the legal practitioners should be brought to the attention of the Legal Practice Council. So should the conduct of

the curator *ad litem* in failing to seek judicial conduct before accepting the offer of settlement. Thus, this referral was, in my view, appropriate, and should be retained.

A court should confine itself to the issues

[66] Before I conclude, it is necessary to say something about how the high court went about adjudicating these matters. As interesting as some of the issues raised by the high court might be, they simply did not arise on the papers before it, and it was therefore not necessary for it to pronounce on them. This Court has emphasised the need for courts to confine themselves to the issues before them. In *Fischer v Ramahlele* this Court cautioned:[13]

'[I]t is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. . . . [T]here may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that, it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'[14] (Footnotes omitted. Emphasis added.)

[67] Recently, it became necessary for this Court to repeat the admonition in *Advertising Regulatory Board v Bliss Brands*[15] *(Bliss Brands).* That case concerned an advertisement dispute between Bliss Brand and the Advertising Regulatory Board (ARB). The high court in that matter (incidentally Fisher J),[16] had *mero motu* questioned the constitutionality of the powers of the ARB, and

[13] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All 395 (SCA).
[14] Ibid para 13. Received the imprimatur of the Constitutional Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 234. See also *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88; [2020] 4 All SA 1 (SCA); 2020 (6) SA 69 (SCA); 2021 (1) SACR 44 (SCA) para 26.
[15] *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] 2 All SA 607 (SCA); 2022 (4) SA 57 (SCA) (*Bliss Brands*).
[16] The same Judge in the present matter.

issued a directive that the parties submit arguments on the issue, and other issues identified *mero motu* by the court.

[68] After referring to the passage in *Fischer v Ramahlele* (above) this Court in *Bliss Brands* said:

'This admonition [in *Fischer v Ramahlele*], regrettably, was disregarded by the high court. Bliss Brands' submission to the jurisdiction of the ARB should have put paid to any challenge to jurisdiction, or to the constitutionality of the Code or MOI. Instead, the issuance of the directive resulted in virtually an entirely new case for decision.'[17]

In this case, too, the admonition was regrettably disregarded.

Conclusion

[69] In all the circumstances, I am satisfied that the appeal must succeed. There should not be any costs order.

Order

[70] The following order is made:

1 In respect of both matters, the appeal is upheld with no order as to costs.

2 Under case number **1677/2019**, the order of the high court is set aside and replaced with the following:

> '1 The contingency fees agreement entered into between Sonya Meistre Attorneys Incorporated (Sonya Meistre Attorneys) and the first plaintiff, is declared invalid;
>
> 2 Sonya Meistre Attorneys are directed to submit a bill of costs in respect of their attorney-and-client fees to the Taxing Master of this court (Gauteng Division, Johannesburg), within fifteen (15) days of this order.

[17] *Bliss Brands* fn 14 para 10.

3 Should the taxed fees be less than the amount debited as fees (25% of the capital amount) and already paid to Sonya Meistre Attorneys, the attorneys shall within seven (7) days of such taxation, pay the difference between the two amounts, into the Trust Account held on behalf of the first plaintiff.

4 The Registrar of this court is directed to:

(a) to contact the first plaintiff and to explain to her the import of the judgment and the rights that it accords her and the minor children; and

(b) to deliver a copy of this judgment to the Legal Practice Council;

5 The fees of the curator *ad litem* shall also be subjected to taxation by the Taxing Master before they are paid.

6 Sonya Meistre Attorneys are ordered to cause a Trust to be established within three months of this order in accordance with the provisions of the Trust Property Control Act 57 of 1998 in respect of the minor children;

7 The Trust referred to above must be established in accordance with clauses 5.1 – 5.13, and 6 – 9 of the Draft Consent Order dated 20 January 2021;

8 Once the Trust is established, Sonya Meistre Attorneys are ordered to pay to the Trust, all monies received from the defendant, the RAF, and held in trust on behalf of the minor children;

9 Sonya Meistre Attorneys are ordered to report to the Registrar of Judge Fisher within 3 months of this order regarding the establishment of the Trust and the payment of the monies under clause 8 above.

10 The Registrar of this court is requested to bring a copy of this judgment to the attention of the Legal Practice Council regarding the conduct of Attorney Sonya Meistre, Adv Jonatan Johanan Bouwer, and Adv Liezle Swart.'

3 Under case number **1928/2019**, the order of the high court is set aside and replaced with the following:

> '1 The contingency fees agreement entered into between Sonya Meistre Attorneys Incorporated (Sonya Meistre Attorneys), and the first plaintiff, is declared invalid;
>
> 2 Sonya Meistre Attorneys are directed to submit a bill of costs in respect of their attorney-and-client fees to the Taxing Master of this court (Gauteng Division, Johannesburg, within fifteen (15) days of this order.
>
> 3 Should the taxed fees be less than the amount of R66 625.75 debited as fees and already paid to Sonya Meistre Attorneys, the attorneys shall within seven (7) of such taxation, pay the difference between the two amounts, to the first plaintiff.
>
> 4 The Registrar of this court is requested to bring a copy of this judgment to the attention of the Legal Practice Council regarding the conduct of Attorney Sonya Meistre and Adv Liezle Swart.'

TATI MAKGOKA
JUDGE OF APPEAL

Appearances:

For appellant:	R Schoeman
	(Heads of Argument drafted by R Schoeman and L Mokgoroane)
Instructed by:	Malatji and Co., Johannesburg
	Honey Attorneys, Bloemfontein
For *amicus curiae*:	RM Courtenay
Instructed by:	Centre for Child Law, Faculty of Law, University of Pretoria
	Webbers Attorneys, Bloemfontein.