REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

DATE 29/4/14 SIGNATURE

CASE NUMBER 11069/13

In the matter between:

JUSTIN JOHN BITTER N.O (obo ANTHONY DE PONTES)	Applicant
and	
RONALD BOBROFF & PARTNERS INC	First Respondent
ROAD ACCIDENT FUND	Second Respondent

JUDGMENT

MAYAT J

The Parties

[1] The applicant is an advocate named Justin John Bitter, who instituted this application *nomine officio*, in his capacity as curator *ad litem* to a major male named Anthony De Pontes, born on the 8th of May 1987 ("Anthony"). Anthony was injured in a motor vehicle accident, which permanently rendered

him a quadriplegic. The first respondent is Ronald Bobroff & Partners Inc ("RBP"), Anthony's erstwhile attorneys, who rendered services to Anthony in relation to a claim for damages against the second respondent ("the RAF") in terms of the Road Accident Fund Act, 56 of 1996 ("the RAF Act").

The Relief Claimed

[2] The relief sought by the applicant against RBP in the present application is premised upon the findings of the same full bench of the North Gauteng Court in the cases of *De La Guerre* [1] (against RBP) and the *South African Association of South African Personal Injury Lawyers* ("*SAAPIL*") [2] on the 13th of February 2013. The full bench in both these cases held that so-called common law contingency agreements between legal practitioners and their clients were unlawful, invalid and unenforceable. The full bench also held in both these cases that the Contingency Fees Act, 66 of 1997("the Act") left no room for contingency fee agreements, which did not comply with the limitations of the Act. As such, the full bench found that contingency agreements of the kind concluded by RBP and other attorneys generally, as well as an agreement, which was the subject matter of the *Da La Guerre* case, were unlawful and invalid. Based on these judgments the primary relief, which the applicant initially sought in the present application, was an order to the effect that an agreement relating to contingency fees between RBP and Anthony (as well as his parents) be declared to be invalid and unenforceable.

[3] After the present application was instituted, applications for leave to appeal by RBP and *SAAPIL* in both the above full bench cases were refused by the full bench on the 12th of June 2013 and further applications for leave to appeal to the Constitutional Court were also subsequently dismissed by the Constitutional Court on the 20th of February 2014 [3]. In light of the Constitutional Court's decisions in this regard, RBP's counsel conceded at the hearing of the present application that a contingency fee agreement

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[1] *Juan Elize De La Guerre v Ronald Bobroff & Partners Inc* [2013] ZAGPPHC 33

[2] *South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development and the Road Accident Fund* ("*SAAPIL*") 2013 (2) SA 583 (GS])

[3] CCT 122/13 and CCT 123/13

concluded between RBP and Anthony (as well as his parents) was unlawful. In these circumstances, the declaratory relief, which the applicant initially sought in this respect in paragraph 1 of its notice of motion in the present application, is accordingly no longer in issue.

[4] The applicant also seeks the following related relief set out in paragraphs, 2,3 and 4 of its notice of motion:

i) An order that RBP delivers to the applicant within 30 days of an order by this court, a fully itemized and detailed accounting in the form of a "bill of costs", supported by the necessary vouchers, reflecting the reasonable fees and disbursements incurred by RBP in case number 09/3127 between Anthony and the RAF, on the basis that Anthony is entitled to demand taxation of such bill; and

ii) An order that RBP be ordered to pay the applicant's attorneys in trust the sum of R2 101 871.80, retained by RBP, as attorney and own client costs in relation to the said case between Anthony and the RAF as well as interest thereon.

[5] The applicant seeks no relief against the RAF, which is only cited as an interested party. The RAF emphasizes in its answering affidavit that the RAF is primarily concerned in these proceedings with "*the greatest possible protection .. to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle.*"[4] As stated by Kathree-Setiloane J in this regard in the *SAAPIL* case, the RAF obviously has a clear interest in ensuring that the victims of road accidents receive the payment of fair and reasonable compensation as contemplated in the RAF Act [5].

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[4] As stated in the case of *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 98 (CC) para 23, quoted in *South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development and the Road Accident Fund* ("*SAAPIL*") 2013 (2) SA 583 (GSJ) at para 5

[5] *supra* fn 1, para 5

[6] The relief sought by the applicant is opposed by RBP and supported by the RAF.

Aspects of related proceedings

[7] As a precursor to the present application, Anthony's mother, Alta De Pontes instituted an *ex parte* application on the 7th of March 2013 under case number 8344/13, inter alia with a view to appointing Mr Bitter as the *curator ad litem* to Anthony. He was subsequently appointed curator *ad litem* to Anthony by order of Wepener J on the 12th of March 2013. The order of Wepener J on that day was as follows:

> *"1. Advocate Justice Biitter, an advocate of the High Court, is appointed as curator ad litem to the patient for the purposes of investigating the question of whether the patient is capable of managing his own affairs and to report to the court on this question.*
>
> *2. The curator ad litem shall have the powers necessary of:-*
>
> *2.1 ratify and adopt whatever action has so far been taken in respect of the patient's claim for damages;*
>
> *2.2 make any demand against proposed Defendant/s or any other person or institution in respect of whom the patient has or may have a claim for damages arising out of the motor vehicle accident on the 2nd of September 2007 and any work done in consequence thereof;*
>
> *2.3 institute action against the proposed Defendant/s and to take all such steps as may be necessary for the due prosecution and finalization of the patient's action, including any appeal, if necessary;*
>
> *2.4 settle or compromise the claim at any stage (either before or after the action has been instituted) with the consent of a Judge of this Honourable Court in chambers or in open court.*
>
> *3. The curator ad litem is hereby granted leave to apply on the same papers, duly supplemented if necessary for an order appointing of a curator bonis and/or curator personam to the patient."*

[8] The application in the present matter was launched on the 23rd of March 2013 and the founding papers were served on RBP on the 2nd of April 2013. Notice of opposition, on behalf of RBP was filed on the 15th of April 2013. RBP's answering affidavit was then served on the applicant's attorneys on the 14th of May 2013 and the applicant's replying affidavit was subsequently served and filed on the 28th of May 2013. The application was initially set down for hearing on the 29th of July 2013, when the matter was postponed *sine die*.

[9] On the 29th of July 2013, after the full bench in the *De La Guerre* and *SAAPIL* cases had dismissed applications for leave to appeal, the present application as well as an application under case number 8344/13 were set down for hearing. In the latter application under case number 8344/13, RBP sought to rescind and set aside the appointment of Mr Bitter as curator in terms of the previous court order of Wepener J. The present application was also postponed *sine die* by Makhafola J, pending the determination of further applications for leave to appeal to the Constitutional Court in the *De La Guerre* and *SAAPIL* cases. In due course, the application under case number 8344/13 was eventually dismissed by Makhafola J on the 9th of September 2013, with punitive costs against RBP. As already stated, the Constitutional Court subsequently dismissed applications for leave to appeal by RBP and *SAAPIL* in the *De La Guerre* and *SAAPIL* cases in February 2014.

[10] RBP indicates in a further application instituted by RBP in terms of rule 30(1), which is referred to hereunder, that Makhafola J will be hearing an application for leave to appeal his decision under case number 8344/13 on the 25th of April 2014. RBP reflects the case heading to the application in terms of rule 30(1) to incorporate not only case number 8344/13, but also the present application.

Relevant factual background

[11] The relevant factual averments by the applicant in his founding affidavit in the present application in relation to Anthony (supported by confirmatory affidavits by Anthony's parents) are consistent with the factual averments in a previous affidavit by Mrs De Pontes in the context of her *ex parte* application for the appointment of Mr Bitter as curator *ad litem* under case number 8344/13. The affidavit by Mrs De Pontes in the latter application is annexed to RBP's answering affidavit in the present application.

[12] The factual averments relating to Anthony, as reflected in both the affidavits of the applicant in the present application and Mrs De Pontes in case number 8344/13, are for the most part not disputed on the papers. It is

accordingly not in dispute that Anthony was injured in a motor vehicle collision on the 2nd of September 2007. It is also not in dispute that Anthony suffered multiple injuries (including spinal injuries) as a result of the said collision, which rendered him a quadriplegic. He is permanently paralysed from the chest down and has no movement in his legs, apart from muscle spasms. He has no bladder function and has to activate his bowels periodically with medication. He has no movement in the fingers of his right hand and no wrist movement or sensation in his left arm. He can only feed himself with a spoon strapped to his right hand, but the food must be cut up by someone else. He needs assistance to drink liquids and he cannot dress himself or bathe himself. He cannot stand on his own. He can sit in a wheelchair, but can only move if pushed by someone else. He has absolutely no social life, except in relation to his family and some close friends who visit him, as he is permanently confined to his bed. Medical reports on record also indicate that he is prone to a number of related ailments including bedsores. For all these reasons, even though Anthony did not have any head injuries, it is not in dispute that he is completely and permanently dependent on his parents, who have assumed financial responsibility for his accommodation and maintenance.

[13] Anthony confirms in an affidavit dated the 28th of May 2013 (with his thumb print), which is annexed to the applicant's replying affidavit, that Mr Bitter was appointed as curator *ad litem* with his (Anthony's) full knowledge and consent. Anthony further states as follows:

> "*I have been kept appraised of all developments and everything that has been done on my instructions but because of my physical inability to do anything for myself, I would not without the appointment of Bitter have been able to institute the aforesaid application* [that is, the present application] *in the South Gauteng High Court or to have lodged a complaint with the Law Society of the Northern Provinces* [against RBP]."

Anthony also points out in this context that his parents, who are not legally trained, previously dealt with RBP on his behalf. He further states that he and his parents trusted RBP implicitly, given the devastating consequences of his injuries to him as well as his entire family. To the extent that it is relevant in

this context, Anthony also indicates that RBP did not address his complaint to the Law Society, apparently on the basis that RBP objected to his complaint not being incorporated in an affidavit signed before a Commissioner of Oaths. Anthony points out in this respect that RBP's employees are fully cognizant of the fact that he is physically unable to sign an affidavit.

[14] In these circumstances, even though Mrs De Pontes indicates in her affidavit under case number 8344/13 that Anthony is *compos mentis,* she also confirms that his severe injuries have resulted in permanent physical limitations. Therefore, as already pointed out, she states that Anthony is physically incapable of looking after himself and he is completely dependent on his family to assist him in his everyday life.

[15] As confirmed in the applicant's founding affidavit, Mrs De Pontes further states that after Anthony's accident, she and her husband gave a mandate to RBP to institute an action on behalf of Anthony against the RAF. She states in this context that at a consultation with an employee of RBP in September 2011, it was explained to her and her husband that RBP would charge 30% of the capital sum recovered from the RAF.

[16] It is also not in dispute on the basis of the papers that RBP instituted an action on behalf of Anthony against the RAF under case number 3127/09 and that on the 19th of November 2010, three days before the matter was set down for trial, RBP, on behalf of Anthony, accepted an offer from the RAF to settle Anthony's claim against the RAF in an amount of R6 145 824.05. In addition, the RAF also undertook at the time to pay RBP's party and party costs. Mrs De Pontes as well as Anthony state in this regard that they were given to understand at the time that the matter was settled on the day of the trial.

[17] It is further not in dispute on the papers that the RAF paid the settlement sum of R6 145 824.05 to RBP on the 10th of January 2011. From the said settlement sum, RBP retained a contingency fee in the cumulative amount of R2 101 871.80, which apparently comprised its fee in the amount

of R1 843 747.22, together with the applicable value-added tax in the sum of R248 124.61.

[18] It appears from correspondence on record that on the 30th of March 2011, Mrs De Pontes, addressed an email to an attorney employed by RBP named Philippa Farraj recording inter alia that Mrs De Pontes had unsuccessfully tried to speak to Ms Farraj on a number of occasions relating to RBP's fees mandate and "Settlement Discharge". By way of response, also on the 30th of March 2011, RBP addressed a letter to Mrs de Pontes advising her inter alia as follows:

- final payment to Anthony "... *is not due yet.*";

- "*...in light of your continuing pleas for the outstanding monies, we have agreed to assist you by paying you in advance the balance of the monies due, in an amount of R572 262.17 in full and final settlement of your claim.*"; and

- "*The amount of R572 262.17 is the residue available from capital amount of R6 145 824.05 after deducting our fee of R2 101 871.80 [R1 843 747.22 plus VAT of R248 124.61], the previous payments to you of R50 000.00 and R 2 450 000 00, and the amount due to the medical aid as per the settlement of R971 690.05*".

[19] In addition to above settlement sum, the RAF also subsequently paid RBP costs and disbursements relating to Anthony's case in the cumulative amount of R260 468.54. The said sum comprised an amount of R7877.43 in respect of RBP's correspondent attorneys fees in Pretoria, as well as an amount of R83 169.47 in respect of RBP's taxed party and party fees and the further sum of R169 421.64 in respect of disbursements for experts and counsel.

[20] In these circumstances, the applicant states in his founding affidavit that in contravention of the Act, fees in the sum of R2 101 871.80, which RBP

had charged, exceeded the limit prescribed in the Act as a percentage of the settlement recovered by Anthony from the RAF. The applicant also states that as RBP also received the further sum of R83 169.47 from the RAF in respect of party and party costs, the fees retained by RBP (in respect of attorney and own client's costs in the sum of R2 101 871.80) constituted twenty-five times the amount received for RBP's party and party costs. Be that as it may, it appears that RBP simply provided Anthony with a "final statement" in essence incorporating a reconciliation of the settlement sum received from the RAF and the allocation thereof by RBP. As such, RBP did not account to Anthony in respect of services actually rendered by RBP to Anthony.

[21] Against this background, Mrs De Pontes states in her affidavit, and the applicant reiterates in his affidavit that Mrs De Pontes subsequently became aware of the case by Mrs De La Guerre against RBP, which was widely covered in the media. The said case related to RBP overcharging road accident victims generally, and Mrs De La Guerre specifically, in terms of so-called "common law contingency agreements". Mrs De Pontes asserts that she had followed the case of Mrs De La Guerre with keen interest and eventually sought legal advice with respect to the fees charged by RBP in Anthony's case.

[22] Thereafter, it appears from the papers on record that RBP's mandate to act for Anthony was terminated during February 2013 and a partner at Norman Berger & Partners ("NBP") placed NBP on record as Anthony's new attorneys. In a letter from the said partner ("Millar") to RBP dated the 6th of February 2013, RBP was advised that Anthony's mandate to RBP was withdrawn and NBP was authorized to act for Anthony. Millar also recorded in his letter at the time that after Anthony's claim was settled by RBP on his behalf in the sum of R6 145 824.05 in November 2010, Anthony received a cheque from RBP in the sum R2 450 000.00 on the 4th of February 2011, which together with a "loan" of R50 000.00 made by RBP to Anthony in December 2010 and a subsequent payment in the sum of R572 262.17 on the 30th March 2011, constituted the total payment of R3 072 262.17.

[23] NBP also requested RBP on the 6th of February 2013 to furnish NBP inter alia with a copy of all fee mandates signed by Anthony; a copy of the "settlement discharge" relating to Anthony; a written explanation as to why Anthony had only received an interim payment from RBP on or about the 4th of February 2011, some 24 days after RBP had received full payment of a settlement from the RAF relating to Anthony; a written explanation as to why Anthony had only received a final payment from RBP on or about the 30th of March 2011, some 78 days after RBP had received full payment of a settlement from the RAF relating to Anthony; a written explanation as to why no accounting has ever been furnished to Anthony, despite RBP's legal obligation to do so; and a written explanation as to why party and party costs in the sum of R260 468.54 recovered by RBP from the RAF on the 19th of August 2011, has never formed part of any accounting to Anthony. Millar also advised RBP that NBP would make arrangements to collect Anthony's original file from RBP by the 8th of February 2013.

[24] It appears from correspondence on record that RBP did not furnish NBP with Anthony's file by the 8th of February 2013, as requested. Be that as it may, after Millar eventually obtained these files from RBP, the applicant states that he had the opportunity to consider the contents of Anthony's file.

[25] The applicant notes in the founding affidavit in relation to the attendances by RBP, inter alia that a pre-trial minute relating to a pre-trial conference apparently held on the 1st of October 2010, was not signed either by RBP or the RAF. In addition, he notes that even though Anthony resides in Johannesburg, and his accident occurred in Johannesburg, summons was issued from Pretoria and the trial was set down in Pretoria, at Anthony's cost. He further notes that there is no complete party and party bill of costs, as the last three pages of the said bill had apparently been removed. There is also no accounting to Anthony in the said file, as prescribed by the Rules of the Law Society of the Northern Province (of which Ronald Bobroff, the senior partner of RBP, is a past President).

[26] Ms Farraj does not dispute the amounts and figures set out in NBP's letter to RBP, but clarifies that Anthony was also advised in March 2011 that a further sum of R971 690.05 was allocated by RBP in respect of a disbursement to be made to his medical aid. Be that as it may, it appears that Anthony's medical aid was only paid by RBP in October 2011, some ten months after RBP had been paid by the RAF.

[27] Against this background, the applicant avers in his affidavit that the fee charged by RBP for the successful settlement of Anthony's claim was "shockingly excessive and amounts to gross overreaching". He also asserts that RBP's entitlement to a fair and reasonable fee due for work actually done can only be determined on the basis of an attorney and client bill drawn and taxed by the Taxing Master.

[28] Ms Farraj confirms that she attended to and finalized the action instituted by Anthony against the RAF. She also raises in her affidavit a point *in limine* relating to the *locus standi* of the applicant in relation to the present application, and she makes legal submissions in her answering affidavit premised upon the requirements of rule 57 of the Uniform Rules of Court. Ms Farraj accordingly avers that Mrs De Pontes did not comply with the requirements of rule 57 and did not make the necessary essential factual averments, which were necessary to obtain an order for the appointment of a curator *ad litem*. It is also contended that no information or evidence was furnished as to the basis on which it was alleged that Anthony was unable to manage his own affairs, nor was it alleged that Anthony was aware of the application to appoint a curator. Ms Farraj further emphasizes that even though Mrs De Pontes acknowledges in her *ex parte* application that Anthony is *compos mentis*, she contends, "without any facts or evidence whatsoever" that Anthony is unable to manage his affairs "merely due to the fact that he is a quadriplegic". Ms Farraj accordingly annexes medico-legal reports to her affidavit with a view to establishing that Anthony did not have a head injury. In these circumstances, Ms Farraj indicated at the time that an application would be made to set aside the order appointing Mr Bitter as a curator to Anthony.

[29] Ms Farraj also states in her answering affidavit that when preparing for Anthony's action against the RAF, she and her counsel had consulted with Anthony, who was fully alert and aware. Thus, she opines that Anthony is "undoubtedly able to manage his affairs albeit that he is physically incapacitated."

[30] As already stated, after the answering affidavit of Ms Farraj was filed, Anthony confirmed in an affidavit dated the 28th of May 2013 (with his thumb print), which is annexed to the applicant's replying affidavit, that Mr Bitter was appointed as curator *ad litem* with his (Anthony's) full knowledge and consent.

[31] On the 11th of March 2014, the applicant's attorneys served a notice of set down for the hearing of this application on the opposed motion roll during the week of the 22nd of April 2014. Thereafter, on or about the 28th of March 2014, the application in terms of rule 30(1), referred to above, was launched by RBP on the basis that setting down the present application for hearing was irregular, pending the determination of an application for leave to appeal before Makhafola J under case number 13/8344, apparently set down on the 25th of April 2014. As already stated, the case heading for the said application in terms of rule 30 (1) incorporated both the present case number as well as case number 13/8344 (with the applicant in the present case being cited as a respondent).

[32] The applicant filed an answering affidavit in the application in terms of rule 30(1) in which it is asserted inter alia that the only purpose of the said application was to delay the determination of the present application under case number 11069/13, in which RBP has no defence on the merits. It is also averred that RBP has no *locus standi* to challenge Mr Bitter's appointment as curator *ad litem* to Anthony, and that the only interest which RBP has in setting aside Mr Bitter's appointment as curator is to delay payment of RBP's debt to Anthony. As such, it is contended by the applicant that RBP is abusing this court's process, as a recalcitrant debtor, simply with a view to delaying the inevitable payment to Anthony.

[33] At the commencement of the hearing of this matter on the 23rd of April 2014, counsel for RBP subsequently placed on record that a "with prejudice" settlement offer in terms of rule 34(1), (2) and (5) had been made to Anthony primarily relating to the relief set out in paragraph 2 of the applicant's notice of motion. It was recorded in the notice of offer of settlement in this respect, which was handed up to the court, that without in any way recognizing the *locus standi* of the applicant, an offer had been submitted in full and final settlement to the applicant on the basis that an itemized "statement of account in the form of a Bill of costs" in respect of professional services rendered by RBP for and behalf of Anthony for compensation for personal injuries sustained by him in a collision would be submitted within 30 days from the date of acceptance of RBP's settlement offer. The notice incorporating the settlement offer also made provision for taxation of such statement of account so submitted, if the applicant's attorneys rejected the said statement within 30 days. It was further provided in the said notice that RBP would pay the applicant's attorneys the difference between the fees already charged by RBP to Anthony and an amount equivalent to the taxed or agreed bill of costs for its services rendered as provided in the said notice.

[34] As already stated, the said notice of offer of settlement was specifically made on the basis that RBP did not admit the *locus standi* of the applicant in these proceedings. Furthermore, the said offer varied from the relief sought by the applicant to the extent that no offer was made by RBP to pay NBP (the applicant's attorneys of record) in trust the sum of R2 101 871.80, pending the payment of taxed or agreed costs. Be that as it may, the applicant did not accept the said offer.

[35] It may also be mentioned by way of background that even though NBP is the attorney of record of the applicant, it appeared that there was an attempt to serve the said settlement offer on Anthony personally, and that Anthony did not accept service of the said notice.

Preliminary issues

[36] Pursuant to the concession by RBP relating to the unlawfulness of the contingency fee agreement, the following interlinked preliminary aspects still remained in issue at the hearing of this matter:

i) The relief requested by RBP in the application in terms of rule 30 (1) based upon the application for leave to appeal the order of Makhafola J by RBP; and

ii) The *locus standi* of Bitter as a point *in limine* in the present application on the basis of the averments in Ms Farraj's answering affidavit in the present application.

[37] At the outset in relation to the application in terms of rule 30(1), I wish to state that this court cannot, of course, pronounce on the merits of the application for leave to appeal before Makhafola J. As such, submissions by counsel for the applicant pertaining to the appealability of the order of Makhafola J on the basis of the provisions of section 20 of the Supreme Court Act, 59 of 1959 are misdirected. I do, however, agree with counsel for the applicant that the application for leave to appeal the judgment of Makhafola J has no bearing on the present application, simply by virtue of the fact that the previous order of Wepener J relating to the appointment of Mr Bitter as curator to Anthony still remains in force. This is particularly so as the papers suggest no prejudice whatsoever to RBP if the order of Wepener J remains in force. Furthermore, even if Makhafola J grants the application for leave to appeal at the instance of RBP, on the 25th of April 2014, the previous order of Wepener J still stands and the papers suggest no prejudice to RBP if the said order remains in force. In any event, contrary to the averments by RBP's counsel in the context of the present application, it is also my view that RBP had no direct and substantial interest in the order made by Wepener J, nor was Mrs de Pontes obliged to give RBP notice of such application. This is particularly so as rule 57(2) specifically envisages an *ex parte* application for the appointment of a curator.

[38] In these circumstances, I agree with counsel for the applicant that the application in terms of rule 30(1) is obviously motivated by the ulterior purpose of not paying a debt to Anthony, which has been outstanding for more than three years. As such, the said application constitutes an abuse of the court process, and falls to be dismissed.

[39] As regards the point *in limine* relating to the *locus standi* of the applicant, it is significant that Anthony as well as his parents categorically state that the appointment of Mr Bitter, an advocate, as curator was sought with the consent and knowledge of Anthony, given Anthony's physical limitations. As Anthony and his parents do not challenge such appointment, submissions by RBP's counsel pertaining to the averred violation of Anthony's constitutional right to dignity appear to be a transparent attempt simply to retain Anthony's money under the guise of protecting his averred right not to have a curator, if he is mentally sound. Significantly, Anthony's mandate to RBP had been withdrawn prior to the institution of the present proceedings. Be that as it may, given Anthony's tragic and permanent physical limitations, which are undisputed, and his complete dependence on his parents, the assertion by Ms Farraj in her affidavit that Anthony is "undoubtedly able to manage his own affairs" was not only untenable, but also somewhat insensitive. Similarly, the assertion by RBP's counsel at the hearing of this matter to the effect that RBP was better placed than Mrs De Pontes with respect to assessing Anthony's best interests, simply cannot be sustained.

[40] Therefore, the point *in limine* relating to the *locus standi* of the applicant also cannot be upheld.

Submissions pertaining to the repayment of monies

[41] After taking into account the settlement offer made by RBP, the only real issue between the parties in relation to the relief sought by the applicant in the present proceedings, relates to whether the monies retained by RBP (in terms of an unlawful agreement) should be paid in trust to the applicant's attorneys, pending agreement or taxation of RBP's attorney and client costs relating to Anthony. Conversely, the issue to be determined is whether RBP is

entitled to retain the sum of R2 101 871.80 as security for its attorney and client costs, when its taxed party and party costs, which it has already received, constitutes an amount of R83 169.47. As pointed out by the applicant in this respect, the amount of R2 101 871.80 retained by RBP in respect of its fees (in terms of an unlawful agreement) constituted more than twenty-five times the taxed party and party costs in the sum of R83 169.47. It is accepted in this respect that in the absence of a lawful agreement relating to contingency fees within the parameters of the Act, RBP is only lawfully entitled to fair and reasonable costs for work actually done. Furthermore, in the absence of a lawful agreement, RBP's entitlement to a fair and reasonable fee for services actually rendered can only be determined on the basis of an attorney and client bill taxed by the Taxing Master.

[42] There is accordingly no legal basis whatsoever for RBP to retain the sum of R2 101 871.80, particularly so as attorney and own client costs in this matter will in all likelihood constitute a small fraction of the total settlement sum of R2 101 871.80. More importantly, there is no prejudice to RBP (which has had the benefit of Anthony's money for more than three years) if such money is paid to the applicant's attorneys' trust account, pending agreement or taxation of the bill of costs to be submitted. To the contrary, Anthony has been prejudiced already on the basis of an illegal contract. Not surprisingly, there is no suggestion on the papers that RBP's attorney and client costs will be anywhere close to the amount already received by RBP on the basis of an unlawful contract.

[43] It does not avail RBP to aver that it considered so-called common law contingency agreements to be lawful and only received the definitive pronouncement of the Constitutional Court in this regard on the 20th of February 2014. As Kathree-Setiloane J correctly pointed out in the *SAAPIL* case in this respect, our courts have consistently recognized that the contingency fee agreements between litigants and their attorneys outside the ambit of the Act are contrary to public policy, unenforceable and unlawful [6].

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[6] at para 7

Thus, the full bench in both the *De La Guerre* and *SAAPIL* cases referred to the dicta of the Supreme Court of Appeal ("the SCA") in the case of *Price Waterhouse* where Cameron JA (as he then was) stated ten years ago that the Act was "*enacted to legitimize contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law*".[7] Furthermore, as Fabricius J noted, both RBP as well as the Law Society of the Northern Provinces (the second respondent in the *De La Guerre* case) knew as far back as 1992, when former Chief Justice Corbett wrote a letter to the Natal Law Society that the learned Judge was *prima facie* of the view that contingency fee agreements between an attorney and his client would be unlawful in terms of the common law. [8] More recent judgments in the South Gauteng Court, referred to with approval by the full bench also effectively take the same view[9].

[44] It may also be mentioned that RBP's counsel made much of the fact that the applicant in the *De La Guerre* case merely sought an order that RBP pays to the applicant in that case the difference between the sum unlawfully retained by RBP and the total of the taxed bill of costs within 7 days of such taxation. As such, RBP's counsel emphasized that in the *De La Guerre* case no order was sought by the applicant in that case for RBP to repay the entire amount retained by RBP (on the basis of an unlawful contract) before taxation of a bill of costs by RBP. That may well be, but the relief sought in each case will depend on the facts and circumstances of that case.

[45] Finally in this context, it may be mentioned that counsel for the RBP made reference to the notional "floodgates" opening against RBP if monies

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[7] *supra* fn 4 at para 41

[8] quoted by Fabricius J in paragraph 3 of his judgment

[9] See for example, the case of *Tjali and Others v Road Accident Fund* [2012] ZAGP JHC (19th October 2012) in which Borochowitz J concluded that section 2(1) of the Contingency Act as well as the long title of that Act make it plain that the Contingency Act was intended to be exhaustive of the rights of legal practitioners to conclude contingency fee agreements with their clients and there was no room whatsoever for legal practitioners to enter into contingency fee agreements outside the paramaters of the Act or the common law. The learned Judge accordingly emphasized that the primary object of the Contingency Act was to legitimize contingency agreements prohibited by the common law. See further the judgment of Mojapelo DJP in the case of *NK Bridget v Road Accident* (Case no :2010/24932 of 22 August 2012) at para 32, also quoted with approval by Fabricius J in para 13 of the *De La Guerre* case.

are paid out in trust, as requested by the applicant. The obvious response to this averment is that to the extent that the applicant has established a case for the payment of Anthony's money into the applicant's attorneys' trust account, the effect of an order in this regard on other parties is not a relevant consideration from the perspective of Anthony. Be that as it may, every case will depend on its own facts and circumstances, as well as the number of attendances by RBP in that particular case. For different reasons, attorney and client costs could hypothetically be higher in certain cases than others.

[46] In these circumstances, the applicant's attorneys are entitled to receive payment of Anthony's money in trust, pending agreement or taxation of RBP's attorney and own client bill of costs relating to Anthony. As regards interest, it is my view that as the contingency agreement relating to Anthony was always unlawful, interest should run from the time money was retained on the basis of such unlawful agreement in January 2011. However, as RBP conveyed to Anthony that the money was taken as fees by RBP in March 2011, I am of the view that it is fair and reasonable that interest should run on the said monies (less the attorney and client costs due to RBP) from the 1st of April 2011.

Conclusion

[47] For all the reasons given, the applicant has *locus standi,* to institute the present application, and the applicant is entitled to the relief sought.

Costs

[48] As regards costs, the applicant seeks attorney and own client costs, including costs occasioned by the utilization of two counsel. I agree with Fabricius J in this context that the senior partner of RBP, as an experienced practitioner, must have been aware that the overwhelming view of distinguished authorities, including the SCA, was to the effect that any agreement for fees which did not comply with the Act was invalid, and could in the proper context, also amount to unprofessional conduct [10]. In the present case, RBP's unexplained delay in paying Anthony a portion of the capital sum

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[10] at para 16

of his claim is also exacerbated by RBP's opposition of this application primarily on technical grounds. Furthermore, it was completely irregular to attempt to serve a settlement offer on Anthony personally, even though the applicant had an attorney of record. In my view, all of these factors only serve to aggravate the unfortunate circumstances relating to Anthony. There is accordingly no reason for Anthony's estate to bear the costs of these proceedings. I am therefore of the view that a punitive costs award against RBP is warranted, not only for the reasons given, but also to convey this court's strong disapproval of the conduct of RBP in relation to Anthony.

Order

[49] Based on the aforegoing, the following order is made:

(i) The first respondent is directed to deliver to the applicant within thirty (30) days of this order, a fully itemized and detailed accounting in the form of a "Bill of Costs", supported where necessary by vouchers, reflecting the reasonable attorney and client fees and of the first respondent as well as disbursements incurred by the first respondent in case number 09/3127 in the North Gauteng High Court between Anthony De Pontes and the second respondent, and the first respondent shall tax such Bill of Costs, if the applicant so demands;

(ii) The first respondent is directed to pay into the applicant's attorneys trust account immediately the sum R2 101 871.80, which sum shall be retained in trust on behalf of the applicant, pending agreement on or settlement of the first respondent's Bill of Costs in terms of paragraph (i) above;

(iii) The first respondent is further directed to pay interest at the rate of 15.5% per annum from 1 April 2011 to date of payment, both days inclusive, on the difference between the amount reflected in paragraph (ii) above and the fair and reasonable attorney and client fees due to the first respondent, as agreed or taxed;

(iv) The first respondent is directed to pay the applicant's costs on an attorney and own client scale, which costs are to include the costs consequent upon the employment of two counsel.

DATED AT JOHANNESBURG THIS THE 25th DAY OF APRIL 2014.

MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Applicant's Counsel	:	B Ancer SC A Berkowitz
Applicant's Attorneys	:	Norman Berger & Partners Inc
First Respondent's Counsel	:	IJ Zidel SC J Erasmus
First Respondent's Attorneys	:	Bove Attorneys
Second Respondent's Counsel	:	J Khan
Second Respondent's Attorneys	:	Routledge-Modise
Date of Hearing	:	23rd April 2014
Date of Judgment	:	25th April 2014