REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 41450/2017

Not reportable

Of interest to other judges

Revised

19/9/2018

In the matter between:

M, G	First Applicant
M A	Second Applicant
K, N	Third Applicant
N, D	Fourth Applicant

and

WIM KRYNAUW INCORPORATED	First Respondent
KRYNAUW, WILHELM JOHANNES	Second Respondent
COETZER, JOHANNES BERNARDUS VAN AARDT	Third Respondent
NORTJE, HEIN	Forth Respondent
BEKKER, HENDRIK JOHANNES STEPHANUS (NO)	Fifth Respondent
LAW SOCIETY OF THE NORTHERN PROVINCES	Sixth Respondent
MASTER OF THE HIGH COURT – PRETORA	Seventh Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE HEALTH AND SOCIAL DEVELOPMENT OF THE	

GAUTENG PROVINCIAL GOVERNMENT Eighth Respondent

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application to declare a contingency fee agreement invalid and ordering the first respondent to account for fees charged in respect of professional services rendered to the applicants, by serving and taxing an attorney and own client bill of cost.

[2] The applicants bring this application in their representative capacities as biological parents and legal guardians of their minor children. The minor children suffered profound brain injuries as a result of birth complications in consequence of which the applicants instructed the first respondent, Wim Krynauw Attorneys ("Krynauw Attorneys"), to institute actions for damages against the eighth respondent, the MEC of Health and Social Development of the Gauteng Provincial Department ("the MEC"). The actions against the MEC were finalised successfully.

[4] The second respondent is Wim Krynauw, an attorney practising as the sole director of Krynauw Attorneys at its Krugersdorp branch. The third and fourth respondents are attorneys employed at Krynauw Attorneys. The third respondent, Mr. Coetzer, mainly dealt with the case of K, the first and second applicant's minor child, and the fourth respondent, Mr. Nortje, mainly dealt with the case of Z ("Z"), the third applicant's minor child.

[5] The first to third respondents consented to the relief sought by the first and second applicants in relation to the minor child K, and the consent order was made an order of court. In terms of this order they consented to re-serve an attorney and client bill of costs on the attorney of record, which bill of costs is to be taxed, and to make payment of the difference, if any, between the taxed fees and disbursements and the actual fees and disbursements deducted by Krynauw Attorneys, into the KR Monnye Trust.

[6] The fifth respondent is Hendrik Johannes Stephanus Bekker NO ("Bekker"), the first appointed trustee of the Z K Trust ("the trust"), an *inter vivas* trust established in terms of orders of this court dated 22 October 2015 and 20 October 2016. The relief sought against Bekker is mainly directed towards the amendment of certain paragraphs in the Trust Deed. Bekker does not oppose the application and has filed a notice indicating his intention to abide by the decision of this court.

[7] The sixth respondent is the Law Society of the Northern Provinces ("the Law Society"). It is cited in these proceedings as the governing body responsible for the professional conduct of attorneys within the area of jurisdiction of this court. The seventh respondent is the Master of the High Court, Gauteng Division and is cited herein by virtue of its interest in respect of the trust. No relief is sought against the sixth to eighth respondents.

[8] The only remaining */is* in this matter is between Krynauw Attorneys and the third and fourth applicants. The third and fourth applicants will collectively be referred to as 'the applicants' and the first, second, third and fourth respondents will be referred to as the 'respondents'.

BACKGROUND FACTS

[9] During March 2012 the third applicant mandated Krynauw Attorneys to

institute action on behalf of Z against the MEC. A contingency fee agreement was entered into between the parties and signed on 29 March 2012. An action for damages was instituted against the MEC based on the negligence of the staff of the Chris Hani Baragwanath Hospital during Z's birth, resulting in Z sustaining brain damage causing him to suffer from cerebral palsy.

[10] The action proceeded to trial on 25 April 2014 for a period of 12 days. Senior and junior counsel were appointed to conduct the trial. The issues of liability and quantum were separated. The trial concluded on 20 May 2014. On 6 February 2015 judgment was delivered in favour of the third applicant in her representative capacity, and the MEC was ordered to pay all of Z's agreed or proven damages.

[11] After the successful finalization of the liability-aspect, Krynauw Attorneys appointed twenty expert witnesses from various medical fields to provide it with medico-legal reports in order to quantify the minor child's claim for future medical and related expenses, loss of earnings and general damages. The quantum aspect of the claim was set down for trial on 12 October 2015, and ran for a period of 9 days. Senior counsel together with two junior counsel was instructed to act on behalf of the third applicant. On 22 October 2015 an order was granted in respect of Z's past and future hospital, medical and related expenses and, in addition thereto, an order for the payment of an amount of compensation for the administration of those funds by means of a trust. Judgment was reserved in respect of the issues of general damages and loss of earnings and the costs of the second junior counsel.

[12] On 15 January 2016 Krynauw Attorneys received payment in terms of the October 2015 order from the MEC in an amount of R 15 578 983-93. At that stage the registration of the trust was still pending and the capital amount, after fees and disbursements were deducted, was kept in a section 78 (2)(A)[1] account. On 14 July 2016 Krynauw Attorneys paid an amount of R 8 877 152.12 to the trust.

[1] Section 78{2)(A) of the Attorneys Act 53 of 1979

[13] On 20 October 2016 judgment was delivered in respect of the remaining issues, namely general damages and loss of earnings and an additional amount of R 1460409.67 was ordered to be paid by the MEC in respect of the two heads of damages. The judgment resulted in a total award of R 17 039 393-60. The costs of the second junior counsel were allowed in respect of the preparation of the schedule of future hospital, medical and related expenses.

[14] An application for leave to appeal was lodged on behalf of the third applicant only in respect of the award granted for general damages (R200 000) and the contingency deduction (35%). Leave to appeal to the Supreme Court of Appeal was granted on 13 February 2017 and the appeal was set down for hearing on 2 March 2018.

[15] A party-and-party bill of costs was drawn and served on the State Attorney on 20 April 2017. The State Attorney opposed the bill and it was set down for taxation on 21 August 2017. The party-and-party costs were taxed and the allocator therein in the amount of R 2 548 279-60 was paid to the trust on 26 October 2017.

[16] On 15 March 2018 the SCA upheld the appeal resulting in an additional award of damages in the amount of R 3 469 307.07 (over and above the amount of R 15 578 983.93 that had already been awarded) resulting in a total award of R 19 048 291.00. The MEC subsequently approached the Constitutional Court with an application for leave to appeal. During the hearing of this application I was informed that the Constitutional Court dismissed the application for leave to appeal.

THE APPLICATION

[17] It is important to briefly deal with some aspects of the applicants' founding affidavit, as well as averments made by the third applicant in two urgent applications

launched against Krynauw Attorneys in the Pretoria High Court, both of which have been struck from the roll with costs. At the same juncture I also deem it necessary to deal with the allegations raised by the respondents against the applicants in relation to Z. I will firstly deal with the applicants averments in the founding affidavits.

[18] In the current application the applicants' attorney, Mr. Norman Berger ("Berger") deposed of the founding affidavit on behalf of the applicants. In the founding affidavit it was averred that the applicants never received an attorney and client bill of costs from Krynauw Attorneys, notwithstanding that more than a year has passed since payment of the capital was made by the MEG. In their answering affidavit the respondents disputed this allegation and averred that two separate bills of costs were drawn up based on the fee agreement between the third applicant and Krynauw Attorneys. The first bill of costs was drawn in respect of the issue of liability and the second in respect of the issue of quantum. In the first urgent application instituted by the applicants on 6 July 2016, the third applicant confirmed that she had been handed two sets of bundles of accounts and/or invoices together with a distribution statement and that it was explained to her that they were bills of costs. She further stated that the one bundle was a "Bill of Costs in respect of merits and litigation" and that the other bundle was a "Bill of Costs in respect of quantum" and she attached both bundles to her founding affidavit. The allegation by the applicants that they never received any attorney and client bill of costs from the respondents is clearly false and is misleading. No explanation was provided by the applicants for the discrepancy.

[19] The applicants aver in their founding affidavit that no written fee agreement was entered into between the applicants and Krynauw Attorneys. The respondents disputed this allegation in their answering affidavit and alleged that the third applicant had signed a contingency fee agreement and that fees had been charged in accordance therewith. A copy of the contingency fee agreement was attached to the respondents answering affidavit. In a complete turnaround, the applicants admitted

in their replying affidavit that a contingency fee agreement had indeed been signed by the third applicant. Again no explanation had been furnished by the applicants for the false statement.

[20] The two above-mentioned extracts from the third applicant's affidavits are unfortunately not the only instances where the applicants statements are found wanting. It is averred in the founding affidavit that *"none of the applicants were consulted in regard to the contents of the Trust Deeds and were not informed* as *to who is going to be appointed as trustee"* and *"the appointment of the fifth respondent was never disclosed to the applicants and they were never given an opportunity to express an opinion* as *to who should be appointed".* In the founding affidavit attached to the first urgent application the third applicant however stated "/ *informed the first respondent that I do not agree to the formation of* a *trust under Veritas and that I prefer to be nominated the trustee and/or agent on behalf of my son, but albeit my dissatisfaction,* a *trust was created known* as *Z K Trust".* At par 64 of the founding affidavit it is averred that *"No legitimate form of accounting has ever·been furnished by the first respondent to the applicants".* In the founding affidavit attached to both urgent applications the third applicant however stated *"During 2016 the first respondent delivered to me two sets of bundles of accounts and/or invoices. He informed me that the bundles were* a *Bill of Cost. He realized that I was not totally convinced and never satisfied. He then gave me* a *printout statement of account labelled "Distributions Statement MEG 0003- Client copy reduced fee".*

[21] But, of even greater concern is the fact that the third applicant, in both urgent applications, sought payment of an amount of R 6 648 689-78, and prayed that such payment must be made, not into the trust account of the trust, but into her personal bank account. She also requested the court to order the Master of the High Court to remove Veritas as the trustees and to appoint her as the sole trustee of the trust with immediate effect. The respondents submit that one of the biggest gripes the third applicant had with Veritas was expressed in her founding affidavit in the first urgent

application and that was the fact that Veritas failed to buy a house for the benefit of her son and that they were given "a *slap in the face"* when they were given R 20 000.00 *"to buy furniture for a six room house. We had no option but to buy very cheap and/or below standard furniture".*

[22] This brings me to the second important issue, namely the serious allegations raised against the applicants in regards to Z. The respondents contend that the applicants are ma/a *fide* and have a hidden agenda in launching the proceedings. It is submitted that in order to view this application in its true and proper context, the court must have regard to the applicants' general sense of entitlement to Z's award of damages and their consequent failure to act in his best interest. It is submitted that this application is not brought in Z's best interests and has its origin in the applicants desire to gain access to and control of Z's trust funds and to achieve personal gain from the trust funds to which they are not entitled.

[23] The deponent to the respondents answering affidavit is the fourth respondent, Mr. Nortje. As previously mentioned he was the attorney that directly dealt with Z's matter. In paragraph 58 of his answering affidavit, Mr. Nortje refers to correspondence which he received by e-mail from Melinda Rautenbach from Veritas containing an e-mail from Kirsten du Toit, the case manager employed by Ophilayo Case Management. Mr. Nortje states that he was requested to deal with the information contained in the email on a confidential basis, as the case manager and school principal feared the applicants' reaction to the concerns raised in the correspondence, should the information be disclosed to them.

[24] In summary, the report deals with the school principal's perception of feeling threatened and concern about Z's health whilst at home; the school principal's apprehension that the applicants may not be equipped to care adequately for Z; as well as a scenario in which the school staff are threatened on a regular basis and, finally, a concern *"that the third and fourth applicants may remove Z from the school*

and place him at home with the aim of receiving the increased monthly payment".

[25] Z is a learner at Minnies Angels. Ms Thandi Mbuku ("Mbuku"), the school principal, compiled a report which was made available to the trustees and subsequently came into the possession of Mr. Nortje. The report contained the following statements:

> [25.1] *"The parents still continue to come late to fetch him on the last Friday of the month and the Nurse is forced to work overtime".*
>
> [25.2] *"Z* (Z) *was dropped off on the 8th January 2018 by his parents and he was completely ungroomed with long dirty nails and his hair was not cut".*
>
> [25.3] *"The parents never bothered to leave the diapers for* Z *and said the trust will take care of it. This despite the arrangement agreed upon that* she *will be responsible for buying the diapers".*
>
> [25.4] *"The parents did not return half of* Z's *clothes. He* has *no toothbrush or face cloth and toiletries".*
>
> [25.5] *"Z's parents are becoming impossible to deal with because on the day they dropped off* Z, *I was not around and they told my staff the following (and I think it* was *unnecessary):*
>
> > *[25.1.1] They want to take* Z *out of the school because him being at the school fulltime messes up their chance of getting the house they want from the trust.*
> >
> > *[25.1.2] That they want to take charge of* Z's *money and make sure the trust gives in to their demands and feel like the trust* is *spending* Z's

money recklessly.

[25.1.3] That they want Z's *nurse to stay with him at home with them as it is the only way the trust can see* a *need for them to have a house of their own and not* a *rented house.*

[25.1.4] I feel like Z's *parents have no interest in what is best for Z because their main concern is what they want and what they think they should get from the trust. They cannot even take proper care of him for 2* days *in* a *month and now they want to keep him at home just* so *they can secure* a *house. Nonetheless, we are unable to continue being undermined and disrespected by these parents and if they want their child, they should follow proper channels of giving* us *2 month prior notice then we will release their child to whatever care they* see *fit (I strongly believe that shouldn't be the parents).*

[25.1.5] I have made contact with them and they confirmed that the best way for them to get a *house is if Z is with them fulltime but they denied that they said they are taking him out of our school".*

[26] Mbuku also requested that the information be kept confidential "as *I feel like Z's parents are dangerous human beings and will not hesitate to cause harm to anyone that stand in their way of accumulating* a *house they believe they deserve and that includes putting* Z's *life in danger".* Mbuku declined to depose to a confirmatory affidavit purportedly out of fear for the applicants.

[27] In the replying affidavit, deposed to by Berger, the parenting qualities of the applicants were canvassed and an attempt to rebut the averments made by Mr. Nortje was made in that such averments impugned the conduct of the third and fourth applicants in an inappropriate and distasteful manner.

[28] Mr. Nortje has suggested in his answering affidavit that the court should consider the appointment of a *Curator ad Litem* to assist Z in these proceedings and to report back to the court as to, *inter alia,* whether the applicants' own personal interests in the award of damages are impacting negatively on the ability of the trustees to act in Z's best interests.

[29] The allegations by Mr. Nortje are based on hearsay evidence. I am however of the view that it would be irresponsible of this court to ignore the serious allegations directed against the applicants in relation to Z. The matter is referred to the Regional Director of the Department of Social Development to conduct an enquiry into the allegations made by the case manager and school principal and to report back to this court within 60 days.

POINTS *IN LIMINE*

[30] The respondents raise two preliminary points. One: The application is premature as the main action between the applicants and the MEC has not yet been finalized. Two: The applicants approached the wrong forum.

Application was launched prematurely.

[31] The respondents' complaint is directed against Prayer 5 of the Notice of Motion in which the applicants seek the following relief against Krynauw Attorneys: *"Ordering the first respondent to serve an attorney and own client bill of cost, in respect of all work done in the case of Z, on the third and fourth applicants attorney of record within 21 days of date hereof which bill of cost is to be taxed".* The respondents submit that the application is premature because the principal action between the applicants and the MEC has not been finalized as the applicants successful appealed to the SCA and is now the subject of an appeal to the

Constitutional Court. The relief prayed for in Prayer 5 namely, accounting for *'all work done',* is therefore not possible until the matter has been completely finalized.

[32] In Prayer 1 in the Notice of Motion an order is sought declaring that there is no written, alternatively, valid agreement between the parties. Prayer 1 is not affected by the point *in limine* and on that basis alone the application was not launched prematurely.

[33] As far as the point *in limine* raised may affect the relief sought in Prayer 5, the following: The *Rules for the Attorneys' Profession* (annexed to the applicants' founding affidavit) states that the duty on an attorney to account to his / her client only arises within a reasonable time after the performance or earlier termination of any mandate. In my view this does not prevent a disgruntled client from requesting his attorney to furnish an attorney and own client bill of cost at any time before the performance is completed. A bill of cost would then be presented on all the work done **up to that stage of the proceedings** (my emphasis). As soon as Krynauw Attorneys debited fees and disbursements from the money received in terms of the court order, they have the obligation to account to the applicants if so requested. The respondents themselves recognized the necessity to account before the mandate has been completed, and did in fact account. It is in respect of that actual accounting that the present application has been brought. There is no merit in this point *in limine.* The application has not been brought prematurely.

Incorrect forum

[34] Two complete attorney and client bills (applicable to the work that had been finalized at that point in time) had been provided to the third applicant. The respondents allege that this court is the incorrect forum to assess the fees charged in the matter and that it should be referred to the Law Society for review. It is submitted that clause 10 in the contingency fee agreement provides for a referral to

the Law Society, as well as section 5 of the Contingencies Fees Act 66 of 1997 ("the Act").

[35] Clause 10 of the contingency fee agreement states that *"... the agreement or the fees may be referred for review to the Law Society..."* The clause does not mandate the applicants to approach the Law Society to review the fees charged. It clearly states that the agreement "may" be referred. Section 5 of the Act provides for similar terms:

> *"5(1)A client of* a *legal practitioner who has entered into* a *contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body.....*
>
> *(2) Such professional body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision of fees are unreasonable or unjust"*

[36] Although the Act provides for a procedure that may be followed by an aggrieved client, it does not prohibit such a client from approaching the court directly. The applicants could have approached the Law Society first before launching the proceedings, but in light of the relief sought in Prayer 1 of the Notice of Motion, namely declaring the contingency fee agreement invalid, the applicants cannot be faulted for approaching the court instead of the Law Society. The point *in limine* is dismissed.

VALIDITY OF THE CONTINGENCY FEE AGREEMENT AND APPLICATION TO STRIKEOUT

[37] Paragraph 5 of the contingency fee agreement provides for the levying of VAT in addition to the success fee instead of including it in the success fee. It is trite that a contingency fee agreement which provides for the levying of VAT in addition to the

success fee is invalid. It is obligatory that a contingency fee agreement must include VAT (if applicable) in the success fee. It is well established through case law that failure to comply with the provisions of the Act renders any purported agreement in terms thereof invalid and unenforceable[2] I am satisfied that the contingency fee agreement is invalid for non- compliance with the Act.

[38] The respondents applied in terms of Rule 6(15) of the Uniform Rules of Court that certain paragraphs in the applicant's replying affidavit must be struck out. The nub of the respondents' argument in the striking out application is that the applicants made out one cause of action in the founding affidavit namely that there was no written fee agreement, but relies on a totally new cause of action in the replying affidavit alleging that the contingency fee agreement is invalid and unenforceable. It is submitted that the cause of action should be made out in the founding affidavit and the applicants should not be allowed to change the cause of action in the replying affidavit. It is argued that the respondents have not been given a fair and reasonable opportunity to deal with the new case made out in the replying affidavits which has caused them severe and irreparable prejudice as they have been deprived of presenting certain evidence on which it would premise a legal argument for the validity and enforceability of the contingency fee agreement.

[39] The respondents set out in their supplementary heads of argument what 'evidence' they would have presented if given the opportunity to do so. The argument is as follows: The respondents concede that the contingency fee agreement does not comply with the Act in that the words "and VAT" was included in addition to the success fee. If the invalidity of the contingency fee agreement had been raised in the founding affidavit, the respondents would have raised a defence of severability and

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[2] Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA) AT [41], De La Guerre v Ronald Bobroff & Partners Inc and Others (22645/2011) [2013] ZAGPPHC 33 (13 February 2013), Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund [2012] ZAGPJHC 150 (Mofokeng) para [38] and [41], and Tjatji v Road Accident Fund and Two Similar Cases 2013 (2) SA 632 (GSJ).

would have pleaded for the phrase "and VAT" to be severed from the rest of the agreement. It is submitted that the respondents would in all likelihood presented evidence that the applicants would have accepted the terms of the agreement without the phrase "and VAT". As the invalidity of the contingency fee agreement was only raised in reply, the respondents were denied the opportunity to raise the severability point.

[40] In the notice of motion the applicants seek an order declaring that there was no written, alternatively valid fee agreement. The starting point is the contingency fee agreement. A court, when faced with a written fee agreement, may *mero moto* raise the validity of such an agreement. The fact that the validity issue was not pertinently raised by the applicants in the founding affidavit will not deter this court from investigating the issue.

[41] The contingency fee agreement signed by the third applicant on 29 March 2012 is identical to the contingency fee agreement signed by the first applicant on 28 March 2012. On 31 October 2016 Moshidi J declared the contingency fee agreement between the first applicant and Krynauw Attorneys invalid and ordered Krynauw Attorneys to serve an attorney and own client bill of costs in respect of all work done in respect of K and to make payment of the difference, if any, between the taxed fees and disbursements and the actual fees and disbursements deducted by Krynauw Attorneys in respect of work done in the case of K into the KR Monnye Trust.

[42] I agree with counsel for the applicants that since the two fee agreements are identical, logic dictates that, if the one agreement is invalid, that the other agreement is also invalid. Once the first applicant's contingency fee agreement was declared invalid, the respondents should have realized that this would affect all other matters in which contingency fee agreements were concluded and that the same directive, to have their fees taxed, would apply to all those matters. The respondents must have been aware of the invalidity of their contingency fee agreement before the hearing of

the application and as they rely on this agreement as the basis upon which the applicants were billed, they could have raised the defence of severability in the answering affidavit.

[43] The respondents concede that the contingency fee agreement is not in compliance with the Act and is therefore invalid. This court has a duty under the Act to ensure that invalid contingency fee agreements are not enforced. To permit the application to strike out the replying affidavit, I would be failing in that duty. The application to strike out is refused.

THE TRUST

[44] In is common cause that a trust was established for *Iama* in terms of a court order. The Trust Deed was drafted and signed by Veritas Board of Executors with Barnie van Heerden from Veritas as the founder. The Trust Deed was accepted by the Master of the High Court and the Z K Trust was registered under registration number IT001373/2016 (T).

[45] Berger, the attorney acting on behalf of the applicants, submitted that Krynauw Attorneys failed to properly ensure that the establishment of the Trust Deeds complied with the provisions of the Trust Property Control Act 57 of 1988 and failed to ensure that the Trust Deed complied with the respective court orders. It is contended that the Trust Deed is deficient in the following material respects:

> [45.1] the provisions of paragraph 5.1 in terms whereof the trustees shall have the power to deal with the assets of the trust "as if they were the absolute beneficial owners" is in conflict with section 11(1)(a) - (d) of the Trust Property Control Act. The trustee is acting in a fiduciary capacity and can never be the beneficial owner of any of the assets of the Trust or deal with them as though he were.
>
> [45.2] the provisions of paragraph 9.1 create an unacceptable risk to both the

trust and the beneficiaries. It is wholly undesirable that any non-South African resident be appointed as a trustee of these particular trusts. They exist solely for the benefit Z and if the trustee is not easily accessible and available to the applicants, then the purpose for which the trusts have been established will not be achieved;

[45.3] the provisions of paragraph 9.2 are clearly unacceptable. The office of trustee is a fiduciary one and the trustee holds office, subject to compliance with the Trust Deed and at the pleasure of the Master of the High Court. The office of trustee is not hereditary and transmissible to the heirs of the trustee for the time being.

[45.4] the provisions of paragraph 9.3 are at odds with the provisions of section 6 and its sub-paragraphs of the Trust Property Control Act. It is only the Master of the High Court that has the power to appoint a trustee and subject to the conditions set out in that section.

[45.5] the provisions of paragraph 9.4 are directly in conflict with the provisions of section 6(2)(a) of the Trust Property Control Act and the provisions of paragraph 4.3 of the court order.

[45.6] the provisions of paragraph 15.1 to 15.3 are in conflict with section 9(2) of the Trust Property Control Act in that such provisions are as a matter of law void.

[45.7] the provisions of paragraph 19(1)(ii) and paragraph 20 are in conflict with paragraph 5.6 and 5.7 of the court order which specifically provides that any variation of the Trust Deed may only be effected with the leave of the Court and that the Trust will only terminate on the death of Z.

[46] The application for the amendment of the Trust Deed is not opposed and Bekker filed a notice to abide and abandoned any cost order to effect the amendments. The Trust Deed is therefore amended.

CONCLUSION

[47] The applicants submit that Krynauw Attorneys has failed to properly account to the applicants and has also failed to comply with the rules of the Law Society.[3] The complaint, in a nutshell, is that the fee charged by the first respondent inclusive of VAT, was R3 999 999.98. That is 25.67% of the capital and not 25%. The respondents dispute this and aver that Berger's calculation is based on the amount of R 15 578 983-93 that was awarded on 20 October 2015 and he had failed to take into account that the total award is the amount of R 17 039 393-60, which was awarded on the 20 October 2016. The respondents submit, that if correctly calculated, the total fee inclusive of VAT for work done up until 20 October 2016 was 23,47% of the total award.

[48] I agree with counsel for the applicants that it is unlikely that the respondents calculated its fee based on the amount of R 17 039 393.60 as Krynauw Attorneys rendered a distribution statement to the applicants on 8 June 2016 reflecting the fee of R3 999 999.98, which was four months prior to the judgment handed down on 20 October 2016. At that stage the respondents could not have known what the amount of the final award would have been.

[49] I find it unnecessary to determine this issue, given that the contingency fee agreement has been declared invalid and the respondents will have to present a new attorney and own client bill of costs which must be taxed. The respondents have tendered that the attorney-and-own client account in respect of all work done to date hereof be referred to the Law Society for an assessment of their files and fees as set out in their bills of cost. I intend to keep them to that tender.

COSTS

[50] Counsel for the applicants contends that the conduct of the first respondent

[3] Rule 68.7 and 68.7.1 to 68.7.4 which applied until 29 February 2016 when they were replaced by

has fallen short of the standard expected of senior and expert attorneys in representing their client's interests. It is submitted that the first respondent should be ordered to pay the costs of this application on the scale as between attorney and own client.

[51] The respondents submit that they were never given an opportunity of explaining the applicants' perceived misgivings prior to the application being launched. It is submitted that had Berger approached Krynauw Attorneys with a simple request for whatever explanations were required, Krynauw Attorneys would not only have been in a position to provide same, but would have done so without delay. It is submitted that the failure by Berger to have followed this course of action was unreasonable and irresponsible.

[52] It is further submitted that the applicants have brought this application relying on a litany of untruths in the founding affidavit for which they have not given any explanation and is not even addressed in the heads of argument. In the circumstances it is submitted that this matter warrants a punitive cost order and an order including that the costs be paid by the attorney of record *de bonis propriis* jointly and severally with the applicants.

[53] The general rule is that the costs follow the event. A court may deviate from the general rule and deprive a successful party of his costs if it is found for instance that the successful party gave false evidence or attempted to mislead the court. The conduct of the applicants is unacceptable and improper. They gave false evidence and mislead the court and when confronted, they did not bother to give any explanation for it. I agree with counsel for the respondents that Berger, at the very least, should have enquired from the applicants why these untruths are contained in the founding affidavit and, as an officer of the court, explain this. In the circumstances, and as a mark of my disapproval, I am of the considerate view that

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rules 35.11 and 35.11.1 to 35.11.4.

the applicants should be deprived of their costs.

[54] In the result the following order is made:

[54.1] The contingency fee agreement entered into between the third applicant and the first respondent is declared invalid.

[54.2] The first respondent is ordered to serve an attorney and own client Bill of Costs in respect of all work done in respect of Z and to make payment of the difference, if any, between the taxed fees and disbursements and the actual fees and disbursements deducted by Krynauw Attorneys in respect of work done in the case of Z into the Z K Trust.

[54.3] The first respondent is ordered to make payment of interest at the rate of 10.25% per annum on any amount found to be payable in terms of paragraph 50.2 above from 29 January 2016 to date of payment, both days inclusive.

[54.4] The first respondent's attorney-and-own client accounts in respect of work done up to October 2016 is referred to the Law Society for an assessment of the first respondent's files and fees as set out in their Bills of Cost.

[54.5] A copy of the judgment, with specific reference to paragraphs 17-29 is referred to the Department of Social Development and the Department is ordered to investigate the allegations contained therein and to report back to this court in writing within 6_0 days.

[54.6] That the Trust Deeds of the Z K Trust be amended in the following respects and directing the fifth respondent to take such steps forthwith as may be necessary to procure the amendments and registration thereof in the offices of the seventh respondent in accordance with the provisions of section 4(2) read together with section 13 of the Trust Property Control Act 57 of 1988 as follow:-

[54.6.1] By deleting paragraph 5.1 inclusive of the Trust Deed. [54.6.2] By deleting paragraphs 9.1 to 9.4 inclusive of the Trust Deed.

[54.6.3] By deleting paragraph 15.1 to 15.3 inclusive of the Trust Deed.

[54.6.4] By deleting paragraph 19.1(ii) of the Trust Deed.

[54.6.5] By deleting paragraph 20 of the Trust Deed.

[54.7] No order as to costs.

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L WINDELL

JUDGE OF THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

Attorney for applicant:	**Norman Berger and Partners Inc**
Counsel for applicant:	**Advocate D.J. Erasmus**
Attorney for respondent:	**Wim Krynauw Incorporated**
Counsel for respondent:	**Advocate N. van der Walt SC**
	Advocate M. Coetzer
Date matter heard:	**14 June 2018**
Judgment date:	**19 September 2018**