THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 27428/10

AD **FIRST PLAINTIFF**

IB **SECOND PLAINTIFF**

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, WESTERN CAPE PROVINCIAL GOVERNMENT **DEFENDANT**

Coram: **ROGERS J**

Heard: **13 & 17 FEBRUARY 2017**

Delivered: **1 MARCH 2017**

SECOND SUPPLEMENTARY JUDGMENT

ROGERS J:

Introduction

[1] This supplementary judgment deals with costs. The parties have placed before me affidavits (including annexures) running to 299 pages and an agreed bundle of correspondence of 156 pages. The plaintiffs' heads of argument cover 53 pages and the defendant's 79 pages. I have also been given two lever arch files containing the authorities cited in the heads. I heard argument over two days.

[2] The defendant did not make a rule 34 offer. It is thus uncontentious that, with possible minor exceptions, the defendant should pay the plaintiffs' costs relating to the quantum trial, including (i) the costs associated with the defendant's conditional counterclaim; (ii) the costs attendant on the employment of two counsel; and (iii) the preparation and qualifying costs of the plaintiffs' experts. The defendant submits that these costs should be on the party/party scale.

[3] The plaintiffs seek certain special costs orders as follows:

- that the defendant should be liable for the fees not only of their principal attorney, Mr Joseph (who is based in Johannesburg), but also of a second attorney, Mr Ginsberg (who is based in Cape Town);

- that the fees of the said attorneys should be taxed on the attorney/client scale;

- as to the costs of the plaintiffs' main two advocates (Mr Irish SC and Ms Munro), that Ms Munro's fees be allowed at two-thirds of the fee allowed for Mr Irish rather than the one-half permitted by rule 69(2);

- that the defendant should be liable for the reasonable fees charged by three further advocates, Mr P de Waal SC (who was involved in drafting the trust deed) and Mr Marcus SC and Ms Pillay (who were engaged to argue the trust issues);

- that the costs recoverable in respect of expert witnesses based in Gauteng should include their reasonable costs of travel to Cape Town (economy class) and accommodation;

- that the costs recoverable in respect of Dr Strauss, who lives in California, should include his return flight (business class);

- that the costs recoverable in respect of Mr Joseph and Ms Munro should include their reasonable costs of travelling to Cape Town (economy class) and Ms Munro's reasonable accommodation costs in Cape Town;

- that the costs recoverable in respect of Mr Irish should include his costs of travelling to Johannesburg (business class) and accommodation costs in those instances where he consulted with Gauteng-based experts in Gauteng;

- that the defendant should be liable for the travelling costs of the plaintiffs and IDT (economy class) in those instances where they consulted with experts in Gauteng.

Admissibility of evidence on costs

[4] The plaintiffs filed two affidavits by Mr Joseph as being relevant to costs. The first affidavit (to which I shall refer as the founding affidavit) was made in support of an application for the court to receive into evidence (i) an attached affidavit by Mr Joseph providing an estimate of the plaintiffs' costs (to which I shall refer as the costs affidavit); (ii) a secret offer of settlement made by the plaintiffs on 31 October 2013. The defendant opposed the application but dealt at length with the costs affidavit and the secret offer in the event of the court finding them to be admissible.

[5] Legal costs are a very substantial feature of this case. Mr Joseph's cost estimates were germane to certain submissions which the plaintiffs' counsel wished to make. Although the defendant complained that the costs affidavit was an attempt to draw the court into matters of taxation, the plaintiffs made clear that this was not the intention. They wanted the court to have a sense of what the actual costs of

running the case were. Although the filing of such affidavits in the ordinary run of cases is not to be encouraged, I think it was legitimate in this matter for the plaintiffs to place this material before the court. I thus rule that the costs affidavit and the answering and replying material relating to the costs affidavit are admissible as evidence. (Both sides argued costs on this basis, in the defendant's case while advancing as her primary contention that the costs affidavit was inadmissible.)

[6] I shall deal later in this judgment with the admissibility of the secret offer.

The costs of two attorneys

[7] The costs of the second attorney, Mr Ginsberg, cover work as a second attorney and work as a Cape Town correspondent.

[8] In terms of rule 70(8) the taxing master may allow the costs of more than one attorney where he is of the opinion that more than one attorney was necessarily engaged in the performance of any of the services covered by the tariff. In the affidavits to which I have referred Mr Joseph sets out circumstances which in his view justified Mr Ginsberg's active involvement as an attorney and not merely as a correspondent. The defendant denies that the services of a second attorney were needed, claiming that at least some of the tasks mentioned by Mr Joseph could have been done by a secretary or candidate attorney.

[9] I am neither inclined nor able on the material before me to determine those attendances, if any, where a second attorney was necessarily engaged. I do not intend to make a special order usurping the taxing master's function (cf *Marshall v Minister of Police* 1970 (1) SA 251 (E) at 252A-C; *Aaron's Whale Rock Trust v Murray & Roberts Ltd & Another* 1992 (1) SA 652 (C) at 661C-H). The litigation was complex and onerous. The taxing master may well be persuaded that a second attorney was necessarily engaged on some aspects of the litigation but that will be a matter for his discretion. I do not feel better placed than he will be to decide the question.

[10] In regard to Mr Ginsberg's engagement as a correspondent, this was necessitated by the plaintiffs' decision to employ Joseph's Inc as their main attorney. The plaintiffs justify this on the basis that Mr Joseph is very experienced in medical cases and that his firm was willing to act on contingency and fund the cost of the litigation. Since counsel were not acting on contingency, the funding of the litigation was no small matter.

[11] The contingency fee agreement was concluded in April 2010 and summons issued in December 2010. The defendant conceded the merits on 31 July 2012. Because the defendant made no secret tender, the plaintiffs – who were always going to recover a substantial amount – were no longer at risk of not being able to pay an attorney's normal fees. However the position was anything but certain when the contingency agreement was concluded and summons issued. Joseph's Inc, having taken a substantial risk for more than two years, was entitled to the benefit of its contingency agreement even though the risk of defeat abated with the defendant's concession of the merits.

[12] The plaintiffs could not have afforded to run this litigation at their own expense. They could only have brought the case by reaching a special arrangement with their attorneys.

[13] The general rule is that a litigant who resides in a town distant from the seat of the court is entitled to engage an attorney in the place where he resides and that in such cases the cost of a second (correspondent) attorney at the seat of the court is justified (*Sonnenburg v Moima* 1987 (1) SA 571 (T)). The general rule would thus not, in the present case, permit the plaintiffs to recover additional costs occasioned by their choice of a Johannesburg attorney. I cannot find on the evidence before me that the plaintiffs could not have found a competent firm in Cape Town to act on a contingency basis. Put differently, I cannot on the material before me conclude that the plaintiffs could not have instituted action except by engaging Joseph's Inc or some other out-of-town firm willing to act on a similar basis. The plaintiffs may be able to persuade the taxing master that this was indeed the case in which event the taxing master in his discretion might properly allow the further costs occasioned by the engagement of a main attorney in Johannesburg.

Mr Joseph's travel costs

[14] In the light of what I have just said, the allowance of Mr Joseph's travel costs should be left to the taxing master pursuant to any decision he may make to allow the costs associated with the engagement of a Johannesburg attorney.

Ms Munro's travel and accommodation costs

[15] I do not know what the taxing master's attitude would be to the costs associated with engaging junior counsel from Johannesburg. Ms Munro is clearly an experienced counsel in medical matters. She is an advocate with whom Mr Joseph has previously worked in similar cases. However I think it would be going quite far to say that the plaintiffs could not have secured a competent and experienced junior in Cape Town to assist Mr Irish. I certainly do not feel comfortable in making a special order on that premise. This should be left to the taxing master.

Ms Munro's fees

[16] The plaintiffs seek a direction that on taxation Ms Munro's fees be allowed at two-thirds of Mr Irish's fees rather than the one-half prescribed in rule 69(2).

[17] Ms Munro is very experienced in medical matters. She has been at the bar for more than ten years and was an attorney for some years before that. The present case was lengthy and complex. She played an active role, leading and cross-examining some of the witnesses and making closing submissions on parts of the case. If it were within my power to direct the taxing master to allow her fees at two-thirds of Mr Irish's fees, I would make such an order as I think it would be fair and just.

[18] However I do not think I have the power to give such a direction. Rule 69(1) empowers the court to authorise fees consequent upon the employment of more than one advocate. I will be granting this authorisation. Rule 69(2) states that where fees in respect of more than one advocate are allowed in a party and party bill, the fees permitted in respect of the additional advocate shall not exceed one half of

those allowed in respect of the first advocate. This rule is cast in peremptory terms. Rule 69(5) provides that the taxation of advocates' fees as between party and party shall be affected by the taxing master in accordance with rule 69 and, where applicable, the tariff. Again, the language is peremptory. Unlike rules 69(1) and 69(3), there is no provision for the court to authorise a departure.

[19] The rules, which are made by the Rules Board in accordance with Act 107 of 1985, are a species of subordinate legislation (*Computer Brilliance CC v Swanepoel* 2005 (4) SA 433 (T) para 36). The court has no power to override them except in accordance with authority granted by the rules themselves. In terms of rule 27 the court has wide powers to condone non-compliance and to extend or abridge time limits but this does not empower the court to order a departure from rule 69(2). The court's inherent jurisdiction caters for matters on which the rules are silent and thus cannot justify overriding something the rules expressly address.

[20] Rules 69(2) and (5) refer to bills and taxations as between 'party and party'. I would be inclined to accept that, if an opposing party is ordered to pay the successful litigant's costs on an attorney and client scale (or on an attorney and own client scale, if such an order is permissible), the taxing master may depart from rule 69(2) even though in a sense the taxation is still one as between party and party (see *Cambridge Plan AG v Cambridge Diet (Pty) Ltd & Others* 1990 (2) SA 574 (T) at 587I-588D, 598F and 618D-F)). Perhaps in seeking a departure from rule 69(2) the plaintiffs were by necessary implication seeking an order that Ms Munro's fees be taxed on the attorney/client scale. If so, the request for a punitive scale must fail for the same reasons dealt with more fully below in relation to attorneys' fees. I should add that an order for costs on an attorney/client scale is not an appropriate response to perceived inadequacies in the rules (*Bowman NO v Avraamides & Another* 1991 (1) SA 92 (W) at 95B-E)).

[21] In my respectful view rule 69(2) should be reconsidered by the Rules Board. The restriction contained in the rule inhibits the recovery by the successful party of his reasonable expenditure. There is no logic in the correlation which the rule lays down. What is worse, the rule provides a perverse incentive for litigants to engage more expensive advocates as their lead counsel. In a case warranting the

engagement of two counsel, the attorney and client might consider that two experienced juniors, or a silk who charges modestly together with an experienced junior, would be the best combination. The attorney would be aware, however, that in such a case a substantial part of the second advocate's fees will be disallowed on taxation. The attorney might thus recommend the employment of a more expensive silk (whose fees would nevertheless be regarded by the taxing master as reasonable), since that would permit a higher recovery of the junior's fees. This is detrimental to litigants (both in regard to cost and choice of counsel) and to those advocates who charge modestly (who might be passed over in favour of more expensive seniors).

Additional advocates

[22] The work done by Mr de Waal, who is from the Pretoria bar, did not duplicate work done by other counsel. If he had not settled the trust deed or attended the one pre-trial conference which he did in Cape Town, another counsel would have had to do so. Even if in some respects he was assisted by one of the juniors (whether Ms Munro or Ms Pillay), his reasonable fees would be covered by the order allowing the costs of two counsel. (The order to that effect is not limited to the costs of two specific advocates but covers any service which one or two advocates – whoever they might be – were engaged to perform.)

[23] However for the avoidance of doubt I shall make clear in my order that Mr de Waal's reasonable fees shall be allowed for work on which he and not more than one other advocate were engaged.

[24] In regard to Mr de Waal's travel costs (he attended one pre-trial conference in Cape Town), I intend to leave this to the taxing master. At the time he attended the pre-trial conference in Cape Town he was the only counsel on brief for the plaintiffs. He had been on brief for the merits of the case and remained on brief for a short while after the merits were conceded. The taxing master will need to determine whether it was reasonably necessary for the plaintiffs to engage counsel from out-of-town.

[25] The same applies to any work done by Mr Marcus and Ms Pillay in relation to the constitutional dimensions of the trust issues. To the extent that they performed work which would otherwise have been done by Mr Irish (or Mr de Waal) and Ms Munro, their reasonable fees should be allowed.

[26] Mr Marcus was present on the first day of the trial but did not address the court. Ms Pillay was present for several further days during the evidence of Dr Strauss and the second plaintiff. The costs occasioned by their attendance would require me to make an order permitting the costs of three or four counsel on the days in question. I do not think such an order is justified. Anything of relevance to their areas of interest would have been apparent from the transcript and would not have required their attention on the opening days of the trial.

[27] Ms Pillay assisted with the heads and appeared with Mr Irish and Ms Munro on the last day of argument (which was set aside for the trust issues). Her input was confined to the trust issues. Although Mr Irish and Ms Munro no doubt also applied their minds to those matters (and Mr Irish eventually argued them), it would be just to allow the costs of a third advocate in relation to the trust issues, including the costs of Ms Pillay's attendance on 12 August 2016. (The defendant, I may note, employed Mr Budlender SC to argue the trust issues.)

Gauteng experts

[28] Most of the plaintiffs' expert witnesses are based in Gauteng. This meant that they had to travel to Cape Town to testify while the plaintiffs, IDT and Mr Irish had to travel to Gauteng to consult with them. The experts in question may well be persons with whom Mr Joseph has a good working relationship. However I did not gain the impression that any of them boasted unique expertise which could not have been sourced in the Cape Peninsula. I am thus not willing to make a special direction regarding these disbursements and travelling time. The plaintiffs may be able to persuade the taxing master that in some or all instances the use of Gauteng experts was justified but that will be a matter in his discretion.

Dr Strauss

[29] Dr Strauss' high standing appears from my main judgment. I substantially accepted his evidence. Life expectancy was an important issue which affected the computation of many of the claims. The defendant's expert on this topic, Prof Cooper, acknowledged that there were no experts in South Africa with specific expertise in the life expectancy of cerebral palsy sufferers. Particularly since the plaintiffs bore the onus, their engagement of Dr Strauss, despite the fact that he resided in California, was reasonable.

[30] Dr Strauss travelled only once to South Africa, this on the occasion when he testified. He flew business class. Given his seniority and eminence, and given the tiring nature of a transatlantic flight coupled with what was a short turnaround time, I am satisfied that the cost of a business class flight was reasonable. I very much doubt that the plaintiffs could have secured Dr Strauss' attendance in Cape Town on any other basis.

[31] Dr Strauss, apparently in accordance with the usual practice of American experts, billed for his entire time in South Africa and not merely for the time spent in consultation and in testifying. Since he was from a foreign country and could not reasonably have been expected to have other professional work here, I think this basis for charging is reasonable. It will be for the taxing master to determine whether his stay in South Africa was longer than reasonably necessary in all the circumstances, having regard inter alia to the need for preparatory consultation, the length of time which he was expected to spend in the witness box and the availability of suitable flights.

[32] I am thus satisfied that I should make a special direction permitting the recovery of Dr Strauss' travelling and accommodation costs, including a business class return flight, and the recovery of fees for the time reasonably taken up in travelling to and from Cape Town and in being in South Africa. While I have no reason to question the reasonableness of the hourly rate and time actually charged by Dr Strauss, the taxing master will have to determine these matters if there is an objection.

Dr Versfeld

[33] By the time Dr Versfeld came to Cape Town to testify, the only orthopaedic item which depended on his evidence was item 43 of "POC1" (the claims for treatment of scoliosis), quantified by the plaintiffs at R403 201. Items 38 - 41 were settled as part of the memorandum of agreement dated 29 February 2016 (treatment for minor and major fractures). It was never contentious, on my understanding, that IDT would require physiotherapy following surgery for fractures (items 42 and 43) but the extent and cost of the physiotherapy were in issue, something which turned on the evidence of the physiotherapists (Ms Jackson and Ms Scheffler). Items 42 and 43 were settled as part of an agreement dated 17 June 2016. Dr Versfeld did not give evidence on these items.

[34] In regard to item 43 the plaintiffs failed in toto. I preferred the evidence of Prof Dunn. The evidence of these two experts related exclusively to item 43. It seems to me, in the circumstances, that I would not be exercising my discretion judicially if I allowed the plaintiffs to recover the costs associated with Dr Versfeld's oral testimony (see *Estate Wege v Strauss* 1932 AD 76 at 86; *Penny v Walker* 1936 AD 241 at 260-261; *LAWSA* 2nd Ed Vol 3(2) para 295). However, because the plaintiffs recovered amounts which were not trivial in respect of items 38-43 and because it does not seem practicable to apportion Dr Versfeld's earlier attendances, the disallowance will affect only those attendances post-dating the settling of items 38-43.

[35] Dr Versfeld's testimony was completed in just under two days. Prof Dunn's evidence covered one full day and the first session of the following day (a shortened day because the defendant was not ready to proceed with her next witness). I think it follows from what I have said that I should disallow the costs of three trial days.

Dr Choonara

[36] The defendant submits that I should allow the costs associated with Dr Choonara's addendum report of 21 November 2014 on the basis that it was not served as an expert report and only came to light because Dr Choonara's secretary

sent it the defendant's urologist, Prof Lazarus. The plaintiffs' own counsel had not seen the addendum until the defendant made discovery thereof shortly before Dr Choonara was to testify. Upon such discovery, the plaintiffs said the document should not have been disclosed and was privileged.

[37] I do not intend to go into the heat which the production of this report generated. I think the defendant is correct, though, that the costs associated with the addendum report should be disallowed, not as a mark of disapproval but because the report was not served and relied upon by the plaintiffs as part of their case. There are no grounds for disallowing any other qualifying expenses relating to Dr Choonara.

Mr Freedman

[38] The plaintiffs do not seek qualifying or other witness expenses in respect of Mr Freedman. The defendant says that the costs associated with calling him should be disallowed because the purpose was to impugn Dr Bass' integrity. I am not persuaded to follow this course. His evidence was completed in a single session, the greater part of it under cross-examination. His testimony was not confined to the circumstances under which he was engaged by the defendant to do a joint assessment of IDT with Ms Scheffler.

Attorney/client costs in respect of attorneys' fees

[39] The plaintiffs do not seek attorney/client costs across the board but only in relation to the fees of Mr Joseph and Mr Ginsberg. Whether the fees of Mr Ginsberg will be allowed at all is something I am leaving to the taxing master. What I address under this heading is the question whether Mr Joseph's attendances and (if they are allowed at all) Mr Ginsberg's attendances should be assessed on an attorney/client rather than party/party basis.

[40] Central to the plaintiffs' argument in support of attorney/client costs is a secret offer of settlement which the plaintiffs made on 31 October 2013 in which they offered to settle the case on the basis that the defendant pay the plaintiffs R20

million plus interest from date of acceptance plus party/party costs plus the qualifying and preparation expenses of 25 listed experts. The plaintiffs contend that the defendant unreasonably rejected this offer and unreasonably failed to make their own globular counter-offer, thus requiring the plaintiffs to run a lengthy trial at enormous expense. The residual amount available for IDT would be significantly reduced if the plaintiffs were confined to party/party costs.

[41] The plaintiffs' secret offer was referred to in argument as a Calderbank offer, with reference to the judgment of the English Court of Appeal in *Calderbank v Calderbank* [1975] 3 All ER 333 (CA). In that case Cairns LJ said that he saw no reason in principle why, in cases not covered by the rules of court permitting secret offers, a litigant should not be permitted to make a settlement offer 'without prejudice save as to costs' and to rely on such offer, once judgment has been granted, in support of a particular costs order. This view was approved and acted upon in *Cutts v Head & Another* [1984] 1 All ER 597 (CA). The courts in Australia,[1] New Zealand[2] and Canada[3] have followed suit. In some jurisdictions the rules relating to secret offers have been amended to fill the gaps where Calderbank offers previously operated. In these jurisdictions it is accepted that a Calderbank offer by a plaintiff can, after judgment, be adduced in support of a request for what we would call attorney/client costs.

[42] There are two discrete questions on this part of the case, namely (i) whether a Calderbank letter is admissible at all in relation to costs; (ii) if so, what effect the letter has on the court's discretion as to costs.

[43] As I have said, in England and other Commonwealth jurisdictions it has been held that the privilege attaching to without prejudice communications does not bar the production of so-called Calderbank letters in relation to costs. In order to be

---

[1] See eg *Quirk v Bawden* [1992] 112 ACTR 1; *Pirrotta v Citibank Ltd & Others* [1998] SASC 6992; *Evans Shire Council v Richardson (No 2)* [2006] NSWCA 61; *Hulanicki v Walters* (No 2) [2015] ACTCA 45; *Meldov Pty Ltd v Bank Of Queensland (No 2)* [2015] NSWSC 740.
[2] See eg *Health Waikato Ltd v Van der Sluis* (1997) 10 PRNZ 514 (CA); *Aldrie Holdings Ltd v Clover Bank Ltd & Others* [2016] NZHC 1482.
[3] See eg *Cameron v Cameron & Others* 1978 CanLII 1509 (ONSC); *Hamilton v Canadian National Railway Co* 1991 CanLII 8348 (ONCA); *Vukelic v Canada* 1997 CanLII 12547 (BCCA); *Yellowbird v Chief and Council of the Samsa Cree Nation No 444 & Others* 2006 CanLII 913 (ABQB).

admissible for that purpose, the offer must explicitly state that it is made without prejudice ‘except in relation to costs’ (or words to similar effect). In *Cutts* the court drew a distinction between communications which are unqualifiedly without prejudice and those which are without prejudice ‘except in relation to costs’. The rule that without prejudice communications are inadmissible was said to be based partly on public policy and partly on the agreement or understanding conveyed by the use of the phrase ‘without prejudice’. The considerations of public policy largely fall away once the substantive issues between the parties have been determined. The inadmissibility of without prejudice communications thereafter rests mainly on the agreement or understanding conveyed by the words ‘without prejudice’. If these words are expressly qualified by the phrase ‘except in relation to costs’, there are no reasons of policy to treat the communication as inadmissible for purposes of determining a just and equitable costs order. On the contrary, the public policy of encouraging settlements would be better served if litigants appreciate the risk of adverse costs orders if they disregard reasonable offers of settlement.

[44] The plaintiffs submitted that there was a gap in our law because rule 34 contained no provision permitting a plaintiff to protect himself against the attorney/client component of his legal costs by making a settlement offer. They argued that I should reach the same conclusion as in the Commonwealth cases cited earlier, if necessary by developing the common law in terms of s 39 of the Constitution. They submitted that this development is required by the rights enshrined in ss 8, 9 and 34.

[45] The defendant reminded me of the approach laid down in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & Another* 2016 (1) SA 621 (CC) para 39 where a court is asked to develop the common law and of the need to exercise caution, bearing in mind that the ‘major engine for law reform should be the Legislature and not the Judiciary’ (para 40; and see also *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 57). The defendant submitted that the plaintiffs’ argument was in reality a constitutional challenge to rule 34 and that no such challenge had been pleaded and that interested parties, including the Minister of Justice, had not been joined.

[46] I do not agree that the plaintiffs are challenging the validity of rule 34. Rule 34 permits a defendant to make a secret tender. It does not provide, expressly or by necessary implication, that a secret tender made by the plaintiff, outside the rules, cannot be relied upon when it comes to costs. Furthermore I do not think that the answer to the admissibility question requires recourse to the Constitution save to the extent that the Constitution in the nature of things influences prevailing public policy.

[47] The question is whether our law in respect of without prejudice communications should permit the same exception that has been recognised in England and other Commonwealth jurisdictions. Our law of evidence regarding without prejudice privilege is the English law as at 31 May 1961 (see s 42 of the Civil Proceedings Evidence Act 25 of 1965; *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677F-H; *KLD Residential CC v Empire Earth Investments 17 Pty Ltd* 2016 (5) SA 485 (WCC) para 30). English law, and accordingly South African law, allows some exceptions to the privilege. The exceptions have developed with reference to the public policy underlying the without prejudice rule. Public policy is not immutable and the list of recognised exceptions is not closed (*KLD Residential* para 60).

[48] Although *Calderbank* and *Cutts* were decided in England after 1961, they do not represent a change in the law relating to without prejudice communications. The main case raised against the conclusion reached in *Cutts* was *Walker v Wilsher* (1889) 23 QBD 335 (CA). In *Cutts* the court did not overrule *Walker* but distinguished it on the basis that in *Walker* the without prejudice offer did not contain the qualification 'except in relation to costs'. Oliver LJ's analysis (which I have already attempted to summarise) begins thus (at 605d-e):

'Now, it is certainly the case, and the contrary is not argued, that the use of the words "without prejudice" as a cover for negotiations and with no reservation of the sort suggested in the *Calderbank* case has today the same consequences as it had in 1889 when *Walker v Wilsher* was decided. Thus, it cannot be contended that the meaning of the expression has changed. The answer to the question whether, accepting that meaning, it is yet open to a party taking advantage of the protection afforded by the use of the formula to qualify its operation must, I think, therefore be sought in an analysis of the underlying basis for the protection and the practice of the courts generally in relation to its application…'

[49] There is nothing in *Cutts* to suggest that the policy considerations which led to the court's conclusion were different in 1984 from what they were in 1961. The court was in essence declaring the state of the law, not changing it.

[50] In my view there is no reason why our law, based as it is on English law, should not recognise the same exception as has found favour in England and other Commonwealth jurisdictions. The considerations of public policy in favour of settlements and discouraging costly litigation are as compelling now as they ever were.

[51] The defendant relied on *Magxola v Skilingo* 1914 CPD, *Ovenstone Farmers v Villiersdorp* 1975 (2) SA 278 (C) and *Tshabalala v Presidents Versekeringsmaatskappy Bpk* 1987 (4) SA 72 (T) as authority for the proposition that without prejudice communications cannot be relied on in relation to costs. In *Magxola* the cases cited in argument were *Walker v Wilsher* and two Transvaal cases which followed *Walker v Wilsher*. *Ovenstone* in turn simply followed *Magxola*. The only case cited in *Tshabalala* was *Naidoo* which was not concerned with costs. In none of these cases, so it seems, were the without prejudice offers made subject to the qualification 'except in relation to costs'. I thus do not regard them as standing in the way of an acceptance in our law of the admissibility of Calderbank offers.

[52] There is a line of cases, not mentioned in argument, stating that, in order to be effective protection against costs, a tender must be pleaded and must remain open until the end of the case (see eg *Naudé v Kennedy* 1908 TS 799 at 807-810; *Foord v Lake & Others NNO* 1968 (4) SA 395 (W) at 398H-400A; *De Beer v Rondalia Versekeringskorporasie van SA Bpk* 1971 (3) SA 614 (O) at 616C; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) at 802H-J). In *Naudé* and *Unit Inspection* the offers appear to have been unconditional open offers, and in *Unit Inspection* the offer was in fact pleaded. In *Unit Inspection* Grosskopf JA observed that it has been held that if a defendant wishes to avail himself of a tender in order to disavow liability for costs the tender should be pleaded, adding, 'This was of course done in the present case'. I do not regard this as a definitive statement of the circumstances in which a tender must be pleaded.

[53] In *De Beer* it appears that the offer was made in the course of settlement negotiations but the defendant in fact pleaded the tender though not its precise content. Hofmeyr J held that the plaintiff was entitled to a copy of the offer by way of a request for further particulars to the plea. He did not go into the question whether it would be proper for the trial court to see the offer before giving judgment though presumably if the offer formed part of the further particulars it would be part of the court file.

[54] In *Foord* the offer was not expressly stated to be without prejudice but it was tendered without admission of liability and in settlement of the plaintiff's claim so in substance it was probably without prejudice. The defendants were unable to use the machinery of rule 34 because they were the liquidators of an insolvent company. They said that if their offer was accepted they would accept proof of the plaintiff's claim in the amount of the tender. The offer letter recorded that if the plaintiff did not accept the tender and the matter went to trial the letter would 'at the appropriate time' be brought to the notice of the judge who would be asked to disallow the plaintiff's costs from the date of receipt of the letter. The letter was thus in essence a Calderbank offer, save that it did not specify a time for acceptance. The merits were subsequently conceded and the trial ran on quantum. Upon conclusion of evidence and argument the defendants withdrew their offer by way of a further letter. The court awarded damages of R4998,98 while the withdrawn offer was in the amount of R5448,88. After delivery of judgment the defendants' counsel sought to hand in the letter as being relevant to costs.

[55] Trollip J relied on *Naudé* in finding that the offer should have been pleaded (at 399A-B). The defendants' counsel, who did not appear at the trial, submitted that it must have been understood between counsel that the offer of compromise would be withheld from the court and only produced after judgment was handed down. Since neither of the advocates in the costs argument had appeared at the trial, they could not inform the judge of the exact detail of counsel's agreement. Trollip J said that in the absence of such information he hesitated to rule that the offer of compromise should be excluded from consideration. He was thus willing to assume in the defendants' favour that the offer and its withdrawal were properly before the court (at 399C-E). He nevertheless said that the defendants must be regarded as

having been responsible for non-disclosure of the offer. If the defendant had pleaded or proved the offer during the trial, the court would have awarded the plaintiff the amount tendered if that was more than the amount proved, since to be effective the tender must be kept open until judgment. This accords with earlier authorities including *Greer v McHarry* 1938 WLD 182, which Trollip J cited and which contains a review of the provincial decisions.

[56] In my respectful view, those cases in which *Naudé* was applied to without prejudice offers failed to appreciate the need to distinguish between open tenders and without prejudice offers. It is inherent in a without prejudice offer that it will not be made known to the court, at least not until judgment has been delivered. It is self-defeating to say that if a defendant wishes to rely on a without prejudice offer as protection against costs he must plead it. As *Magxola* and the other cases mentioned in para 51 above make clear, a without prejudice offer containing no reservation as to costs is inadmissible for all purposes, even in relation to costs. A defendant cannot permissibly plead and prove the making of the without prejudice offer, at least not without the consent of the plaintiff. The defendant could, of course, make the same tender in his plea, ie as an open tender, but his protection would then operate only from the date of the plea. He could not allege that the tender in his plea was a repetition of a without prejudice offer made at an earlier stage.

[57] If it is permissible to make an offer which is without prejudice 'save in relation to costs', the same rule would preclude the pleading and proving of the offer for any purpose other than costs. The recipient of the offer could not disclose it during the trial and seek to take advantage of it.

[58] It thus seems to me that if our law inflexibly lays down that a tender (outside of rule 34) is ineffective as a protection against costs unless pleaded and proved, a without prejudice offer can never be relied upon as a protection against costs because it is not permissible to plead and prove a fact of which evidence is by its nature inadmissible.

[59] There is no discussion in *Foord* of the without prejudice privilege and its policy-based exceptions. It would in my opinion be contrary to public policy to adopt

a rule that a litigant can only rely on an offer as protection against costs if it is an open offer which must remain open for acceptance until judgment and which will represent the amount awarded if it is higher than what the plaintiff proves. Relatively few litigants would find it attractive to attempt settlement on that basis. The plaintiff is put under scant pressure to assess his own case realistically. He can at any stage accept the offer if his case goes awry. And if he proves less at trial, he has the comfort of receiving the higher amount offered by the defendant, even if there be some penalty as to costs.

[60] I have thus come to the conclusion that in principle Calderbank offers are admissible in relation to costs and can be disclosed to the court for that purpose after judgment has been given.

[61] As to the effect of a Calderbank offer on costs, the Commonwealth cases emphasise that a plaintiff who has made such an offer is not entitled to attorney/client costs merely because he made a secret offer which was less than what the court awarded. The court must consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer. Factors mentioned in the Commonwealth cases are whether the defendant has engaged reasonably in attempting to settle, whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome, whether the plaintiff allowed the defendant a reasonable time to consider the offer, the extent of the difference between the amount of the offer and the amount of the award and the nature of the proceedings and resources of the litigants.

[62] Turning to the facts of the present case, the plaintiffs' secret tender of 31 October 2013 complies with the principles laid down in the Commonwealth cases for Calderbank offers. I thus find it to be admissible.

[63] I have nevertheless come to the conclusion that the existence of this offer and the other relevant circumstances of the case do not warrant a punitive scale of costs against the defendant.

[64] The settlement offered by the plaintiffs was R20 million. Leaving aside the time-value of money, how does this compare with the award determined in accordance with my main judgment and first supplementary judgment? The only amount currently undetermined is the lump sum to be awarded in respect of the trustee's remuneration (it is common cause that if the secret offer is admissible, the value of the trustee's remuneration must be included in determining the total value of the award). The amounts already determined total R18 146 167. The plaintiffs say that the trustee's remuneration is likely to be more than R3 million. This is supported by Mr Whittaker's illustrative calculations in his report of 2 May 2016.[4] The plaintiffs draw attention to the fact that in argument the defendant offered to pay a provisional sum of R2 million for trustee's remuneration. So a plausible range for the total value of the award is R20,1 million to R21,2 million. The offer was thus modestly below the total value of the award

[65] This simple comparison leaves out of account, however, that the offer was made on 31 October 2013 whereas my award was only finalised (save in respect of the trustee's remuneration) on 1 December 2016 (the date of my first supplementary judgment). The award probably carries no right to interest before that date since it was based on updated costs and rates (cf para 653 of my main judgment). The defendant's actuary, Mr Lowther, has furnished calculations showing what R20 million as at 6 November 2013 would be worth today, assuming interest rates ranging from 4% to 10% compound. The range is from R22,555 million to R26,787 million. In real terms, therefore, the secret offer was almost certainly more valuable than the amount eventually awarded.

[66] I need not decide whether, in matters covered by rule 34, the trial judge may properly take into account the time-value of money in determining whether to award costs in favour of a defendant whose offer in nominal terms, though not in real terms, was less than the amount subsequently awarded (cf *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) on the different question of currency fluctuation). I simply observe that in *Naylor & Another v Jansen* 2007 (1) SA 16 (SCA) the court said that rule 34 does not dictate any particular outcome. The

[4] 6/944-945. On Mr Whittaker's assumptions, the trustee's remuneration is likely to be 17% to 17,6% of the total award (apart from trustee's remuneration). 17% of R18 146 167 is R3 084 848.

court retains an unfettered discretion, provided the discretion is properly exercised. It does not seem unjustifiable to take into account the time-value of money, particularly where in quantifying a plaintiff's damages the court has used costs and rates prevailing at the time of the trial rather than when the delict occurred or summons was issued. Be that as it may, I see no reason why, in relation to Calderbank offers, the court may not take into account the time-value of money as one consideration in assessing whether the defendant acted unreasonably in refusing to accept an offer.

[67] The next relevant consideration is how the offer of R20 million compares to the plaintiffs' claims as formulated at the time the offer was made. As at October 2013 the plaintiffs claimed R1 116 416 for themselves and R19 735 100 for IDT, thus R20 851 516 in total. Their settlement offer was 96% of the amounts claimed. The plaintiffs were thus not offering a significant discount. The defendant was effectively being asked to pay their claims in full plus all their costs.

[68] The plaintiffs' claims underwent considerable change after October 2013. By the time the trial started in February 2016 the plaintiffs on the pleadings were claiming R2 010 354 for themselves and R36 225 363 for IDT. If the full value of my award, including the trustees' remuneration, were eventually to be determined at (say) R21 million, my award would be about 55% of their claims as finally formulated. Although the full value of my award may turn out to be very close to the secret offer of R20 million, the correspondence is purely coincidental, given the very substantial differences between the claims as formulated in October 2013 and the claims as finally formulated.

[69] I must take into account, next, the extent to which the defendant was able, as at October 2013, to form its own reasonably accurate view of the damages suffered by the plaintiffs and IDT. The particulars of claim as at October 2013 were in the same form as when summons was issued in December 2010. There were no detailed appendices furnishing a full breakdown of the claims. Certain claims were described as estimated globular amounts, including IDT's loss of earnings in the amount of R2,04 million. As at October 2013 the plaintiffs had not served any expert reports on quantum (though the offer required the defendant to accept liability for the

costs of 25 experts). The only expert for the defendant who had assessed IDT was Dr Springer, a developmental paediatrician at Tygerberg Hospital.

[70] There was a case management meeting on 6 May 2013 which provided for expert reports to be filed in time for the matter to be certified trial-ready by 2 September 2013. The plaintiffs complained in August 2013 that the defendant had failed to arrange for IDT to be examined by their experts. Mr Gava for the State Attorney replied that the defendant was having difficulty in retaining appropriate experts and required access to the plaintiffs' expert reports. He said that if, for example, Dr Strauss' report were made available and was found to be balanced and reasonable, this might obviate the need for the defendant to obtain an expert in that field. The plaintiffs did not deliver their expert reports in response to this letter. Their position was that the parties were to exchange expert reports, not file them successively.

[71] The result, at least initially, was that expert reports were exchanged in fits and starts as the defendant procured her reports. The reports of the physiotherapists and paediatricians were exchanged on 4 February 2014. In terms of agreed case management directions of 6 February 2014 the parties were to exchange the reports of the occupational therapists and speech therapists during February and March 2014. The plaintiffs were to file all their remaining expert reports by 1 April 2014. By the time of the pre-trial conference held on 13 May 2014 the plaintiffs had served, electronically, the reports of 13 further experts. In that conference the plaintiffs indicated that they were intending to procure expert reports from Dr Campbell (rehabilitation expert), Dr Strauss, Mr Schüssler (economist) and Mr Whittaker (actuary) and that these would be furnished in the near future 'once all appropriate investigations have been completed to permit the finalisation of such reports'. On 30 May 2014 the plaintiffs' attorneys indicated that they also intended to call Prof LH Hofmeyr (otologist and neurotologist). Dr Strauss' first report is dated 16 July 2014 and Mr Whittaker's first report 9 July 2014.

[72] I do not intend to go into the criticisms which each side levelled at the other regarding the preparation and filing of expert reports. I do not feel in a position to apportion blame. The fact is that as at October 2013 and for many months thereafter

the defendant did not have all the plaintiffs' expert reports in support of the claims and did not have reports from her own experts. The defendant was thus not in a position to form a realistic view of claims' merits.

[73] The defendant's counsel pointed out in argument that Mr Joseph himself, in an affidavit of 18 June 2015 (in response to the defendant's application to amend her plea and introduce the conditional counterclaim), acknowledged the difficulty of forming an accurate view of the claims at the earlier stages of the litigation. He was responding to an allegation that the plaintiffs had substantially increased their claims in August 2014. He explained that when the claims were originally formulated it was impossible – in the absence of expert reports, a determination of IDT's life expectancy and an actuarial calculation – to be more precise than the estimates contained in the pleadings. He surmised that the reason the defendant had not offered to settle the case at the amount of R19 million originally claimed was that she knew the quantum needed to be explored 'with a degree of precision'.

[74] The State Attorney's response to the offer of 31 October 2013 was that the defendant was in the process of evaluating the offer but the legal team found it practically impossible to advise the client in the absence of the plaintiffs' medico-legal reports. In the circumstances I have summarised above, I cannot find this response to have been unreasonable.

[75] Another circumstance of relevance is that the plaintiffs' secret offer of 31 October 2013 only remained open for acceptance until 6 November 2013. Mr Irish said that a time-limit was included because this accorded with the English practice relating to Calderbank offers. Even so, a time-limit of one week in the circumstances which prevailed in October/November 2013 was not a reasonable period.

[76] The plaintiffs' argument is not merely that the defendant failed to accept a reasonable offer. They complain that the defendant at no stage made a globular counter-offer. That this is so is common cause. It is certainly surprising that the defendant did not take the precaution of protecting herself by making an offer. However I cannot find that the failure to make a globular counter-offer was unreasonable. The defendant's approach was apparently to engage in discussions

on individual line items of the claims. Both sides appeared in argument to acknowledge that details of those discussions are privileged. I am thus not in a position to comment on whether their respective approaches on individual line items were or were not unreasonable. What can be said is that by the time the trial started some of the line items had been resolved while others were settled during the course of the trial.

[77] If one is to penalise the defendant for failing to make a globular counter-offer, one needs to be able to determine more or less when the defendant could be said to have had enough information realistically to assess the claims as a whole. On 31 July 2014 the plaintiffs served an amendment notice increasing their claims to R33,747 million (this was shortly after they obtained reports from Dr Strauss and Mr Whittaker). It is not clear that prior to this date the defendant had enough information to evaluate realistically the claims as they were formulated prior to the amendment. Once the amendment was effected, the increased claims and the extensively revised particularity on which they were based had to be assessed. The plaintiffs do not say that after the amendment they would still have entertained a settlement in the region of R20 million.

[78] The plaintiffs argued that the defendant's failure to make a globular counter-offer is explicable only on the basis that the defendant was resolutely against settlement and wanted to run the case as a matter of principle. They submit that even if the defendant was bona fide in doing so, it is not fair for IDT to suffer the high cost associated with the defendant's choice. Mr Irish referred me to certain passages from Ms Bawa's opening remarks in support of this thesis. I do not think that I can find that the defendant had the attitude attributed to her. The determination of quantum was never going to be precedent-setting. The parties did in fact reach agreement on many items and I have no reason to think that the defendant was in principle resistant to resolving all of them. I am not privy to discussions which took place regarding the line items which remained unresolved nor have I endeavoured to compare the parties' respective measures of success on the unresolved items. The defendant may have been intent on litigating the trust issues as a matter of principle but this is something which would only have taken a few days if the parties had been able to resolve quantum.

[79] The plaintiffs submitted that in deciding whether to make a punitive costs order a court may take into account that without such an order the plaintiffs' success on the merits would be rendered nugatory. I was referred in that regard to *Savage and Lovemore Mining Pty Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) at 216-217. I do not think the case bears out the submission. Stegmann J said that the defendant had conducted the litigation 'in a tricky way', a way calculated to make the plaintiff's case 'extremely difficult to prove and uncertain in its outcome'. The judge thought that the 'low level of commercial morality' and lack of bona fides displayed by the defendant in its contractual dealings with the plaintiff deserved the court's condemnation. A plethora of unmeritorious defences were raised. It was in those circumstances that the judge concluded that it would not be just to leave the plaintiff with a heavy attorney/client liability. These types of criticisms cannot be levelled at the defendant in the present case.

[80] It is unfortunate that IDT's award may be substantially eroded by irrecoverable costs. It is doubtful, however, that withholding an attorney/client award in respect of attorneys' fees will play a significant role in this erosion. The main drivers of irrecoverable costs are likely to be contingency fees, interest on disbursements, junior counsel's fees and the cost associated with the use of Gauteng experts and a Gauteng attorney:

- As to contingency fees, the hourly rate permitted for an attorney in a party/party taxation is R1000. I understand that in an attorney/client taxation the taxing masters in this division might, for a senior attorney, allow up to R1300. In terms of the contingency fee agreement (April 2010) the plaintiffs agreed that Mr Joseph could charge double his usual fee of R2500 p/h, ie R5000 p/h, increasing at 10% p/a. This means that in the quantum phase of the case (2013-2016), Mr Joseph's fees ranged from R6500 p/h to R8000 p/h (assuming the 10% increase is simple not compound). On a party/party taxation, therefore, the irrecoverable portion of Mr Joseph's 2016 fees will be R7000 p/h of which only about R300 (4%) might be clawed back if attorney/client costs were granted. I appreciate that in an attorney/client bill the taxing master might allow attendances which he would disallow in a party/party

bill but it is difficult to know how extensive those are likely to be in the present case.

- As to interest on disbursements, the power of attorney forming part of the contingency fee agreement provides that, if the plaintiffs are unable to pay disbursements, amounts paid out on their behalf by Josephs Inc will bear interest at the maximum permissible rate. (I do not have information as to the rate of interest Joseph's Inc will in fact levy on his disbursements in respect of counsel and experts.)

- As to junior counsel's fees, I have explained why I cannot authorise a departure from the one-half allowance in rule 69(2). The effect, based on the plaintiffs' counsel's current fees in the case, is that R5000 p/d and R500 p/h of Ms Munro's fees will be disallowed (not, I must emphasise, because her fees are unreasonable but because of the rule). Based on information in Mr Joseph's affidavit, the disallowed fees could be of the order of R650 000.

- As to Gauteng-related costs, the taxing master may well disallow the travel and accommodation costs of the Gauteng experts and of the legal team. Based on the estimates contained in Mr Joseph's affidavit, the amounts in question exceed R620 000.

[81] As a makeweight point for attorney/client costs, the plaintiffs made certain criticisms of the way the defendant conducted the trial. The defendant warded off these criticisms and made some criticisms of the plaintiffs' conduct. I do not intend to discuss the details. I do not find the various criticisms compelling or discern any clear balance against one side or the other.

[82] For all these reasons I have concluded that I should not make a punitive order in respect of attorneys' fees.

The counterclaim

[83] The defendant submits that the plaintiffs should not be allowed the costs of Mr Joseph's answering affidavit of 18 June 2015 since the plaintiffs were not in fact opposing the amendment of the plea and the introduction of the counterclaim. Mr

Irish told me that Mr Joseph filed the affidavit on his advice to deal with allegations which a professional person could not be expected to leave unanswered. I agree. In supporting the establishment of a trust, the defendant, through Dr Bass, explicitly expressed concern that the defendant's attorneys were not acting in IDT's best interests. In order to deny these allegations Mr Joseph had to deal with the material in the founding affidavit which was said to justify the concern. I shall thus allow the costs of the answering affidavit.

Trustee's remuneration and the 25% cap

[84] In terms of s 2(2) of the Contingency Fee Act Mr Joseph's fees may not exceed the lesser of double his usual fees or 25% of the total amount awarded. The total amount awarded for this purpose excludes 'any costs'. The plaintiffs argue that the trustee's remuneration forms part of the total amount awarded. The defendant argues the contrary.

[85] If the trustee's remuneration were excluded from the total amount awarded, the cap would be R4 536 542 (25% of R18 146 167). If the trustee's remuneration were to come to (say) R3 million and were included in the cap, the cap would increase to R5 286 542, a difference of R750 000. According to Mr Joseph, there is a distinct likelihood that an amount calculated as double his usual fees will exceed the cap, however calculated. If so, it is necessary to know what the cap is in order to determine his maximum entitlement to fees.

[86] The second attorney, Mr Ginsberg, does not have a contingency fee agreement. His firm was engaged by Joseph's Inc in accordance with a power of attorney granted by the plaintiffs. The plaintiffs might strictly speaking be liable for Joseph's Inc's full fees (up to the amount of the cap) and Mr Ginsberg's fees. However Mr Joseph has offered an undertaking that his fees and those of Mr Ginsberg will not in total exceed the amount of the cap.

[87] The defendant does not argue that the trustee's remuneration constitutes 'costs' for purposes of s 2(2). The defendant also appears to accept that in the ordinary course the amount awarded by the court in respect of the trustee's

remuneration would, like the costs of protecting an award through the appointment of a curator bonis, be part of the total amount awarded for purposes of s 2(2). I think that view is correct. The lump sum awarded to cover the costs of the remuneration of a trustee or curator bonis is simply part of the damages awarded by the court.

[88] The defendant's argument that the trustee's remuneration should be excluded when calculating the cap is based on the wording of clause 3 of the contingency fee agreement. That clause provides that Joseph's Inc's fees will not exceed 25% of the 'capital award'. The clause goes on to say that the capital award, 'without limiting the generality of the foregoing', includes 'all amounts awarded in respect of general damages and special damages and loss of earnings and future loss of earnings and medical and related expenses and future medical and related expenses'. The defendant submits that because the trustee's remuneration is not mentioned in clause 3 the parties must have intended it to have been excluded in computing the cap.

[89] The contingency fee agreement has no bearing on the taxation of the plaintiffs' costs, and thus on the costs for which the defendant will be liable, except in the unlikely event that the attorneys' taxed costs were to exceed the 25% cap (in which event there would have to be a deduction from the taxed fees to bring them within the cap). The defendant nevertheless has an indirect interest in the cap by virtue of the following. If the cap were R4 536 542 rather than (say) R5 286 542, the deduction which Joseph's Inc would be entitled to make from the award before paying it over to the trust would be less and the amount received by the trust (including the amount credited to the medical fund) would be more. The higher the net amount paid to the trust, therefore, the longer it might take for the defendant's top-up obligation to be triggered. On the other hand, I should note, the higher the net amount paid to the trust, the higher the amount the defendant has to pay in respect of the trustee's remuneration.

[90] My prima facie view is that clause 3 of the contingency fee agreement does not have the effect for which the defendant contends and that the trustee's remuneration must be included in calculating the cap. If the question arose only between the plaintiffs and the defendant, that would be my conclusion. The difficulty

I feel in reaching a final decision is that the determination of the cap is perhaps of greater importance as between the plaintiffs and their attorneys than it is between the plaintiffs and the defendant. If there were a plausible argument to be made that the trustee's remuneration is to be excluded in calculating the cap, it would be to the advantage of the plaintiffs and IDT that this argument be made. In a sense, therefore, the submission which the plaintiffs' counsel advanced against the defendant's argument were to the advantage of Joseph's Inc but to the disadvantage of the plaintiffs and IDT. I do not know whether the plaintiffs have considered the matter and have been able to reach an independent view. I think it fair to say that this difficulty had not occurred to the plaintiffs' counsel until I raised it during argument.

[91] There is another matter I raised with counsel, namely whether the agreed manner for calculating the trustee's remuneration does not give rise to an intractable circularity in calculating the trustee's remuneration and the cap. The parties are in agreement that the trustee's remuneration must be calculated on the net amount received by the trust (the trust deed so provides). The net amount received by the trust will be the total amount awarded in respect of IDT after subtracting all disbursements and attorneys' fees less the legal costs recovered from the defendant. Accordingly, in order to calculate the trustee's remuneration, one needs to know what the net amount is. In order to calculate the net amount one will probably need to know the cap. But if the trustee's remuneration is to be included in calculating the cap, one needs to know the amount of the trustee's remuneration in order to calculate the cap. So the calculation of the trustee's remuneration depends on the cap being known; and the calculation of the cap depends on the trustee's remuneration being known. On the second day of argument Mr Irish told me that he had discussed this apparent circularity with Mr Whittaker who said there was an algebraic solution. Mr Irish handed up a sheet of Mr Whittaker's formulas. I have not been able to follow the algebra and am not convinced of the solution.

[92] What one can say for certain is that the cap will be not less than R4 536 542. It may be that, once the attorneys' fees are accurately calculated, they turn out to be less than R4 536 542. In that event it will be irrelevant whether or not the trustee's remuneration would theoretically have been included in the cap. In my view,

therefore, it would be preferable to leave open the question whether the trustee's remuneration is to be included in the cap and, if so, whether the problem of circularity can be resolved. If the attorneys' fees exceed R4 536 542, the court will have to be approached to solve the problem. The parties can then consider whether the plaintiffs need independent advice and whether evidence needs to be placed before me on the issue of circularity.

[93] A related matter is whether – assuming the trustee's remuneration must be included in calculating the cap – a pro rata portion of irrecoverable fees and disbursements must be deducted from the capitalised amount so that the opening credit in the separate account established for the trustee's remuneration (clause 10.3 of the trust deed) will be the capitalised amount less such pro rata portion. If not, the irrecoverable fees and disbursements would have to be deducted pro rata from the other heads of damages, thus inter alia reducing the opening credit in the medical fund.

[94] In the light of clause 10.4 of the trust deed, it may not matter very much whether or not a deduction is made upfront against the capitalised amount awarded for the trustee's remuneration. Clause 10.4 provides that if the funds in the separate account for trustee's remuneration are exhausted, the trustee may employ other assets under administration for paying the remuneration, such payments to be proportionately allocated to and subtracted from the medical fund and the residual fund (unless the trustee in its discretion is able to justify an allocation entirely to the medical fund or to the residual fund as the case might be). So sooner or later the medical fund and the residual fund will have to bear any shortfall in meeting the trustee's remuneration. Clause 10.3 is probably more consistent with a conclusion that the amount to be credited to the trustee's remuneration account should be the full capitalised amount, with the irrecoverable disbursements and fees being deducted pro rata from the medical fund and residual fund. However this can stand over for final determination if it should be in dispute.

[95] I do not think that all of this need hold up the taxation of the plaintiffs' bill of costs. The cap will only be relevant if the total amount allowed for attorneys' fees in the party/party taxation exceeds R4 536 542, something I understand to be at best a

remote possibility. The defendant's counsel said that on their understanding the taxing master will only tax a bill up to the amount of the cap, ie he will not tax items appearing after the item which brought the attorney's fees up to the level of the cap. I do not know whether that is the practice of the taxing master. If so, it seems to me to be a wrong, or at least inconvenient, way of proceeding, given that the decisions of the taxing master on earlier items in the bill might be revised following a review. Unless the taxing master taxes the entire bill, there would potentially be a succession of taxations and reviews. I think the bill should be taxed in its entirety. If the fees so taxed exceed the cap, there should be a final item in the bill reducing the allowed fees to the level of the cap.

[96] In the present case I will direct the taxing master to proceed with taxation despite the uncertainty as to the cap. If the attorneys' fees as taxed do not exceed R4 536 542, he should finalise the taxation by allowing the attorneys' fees as taxed. If the taxed fees exceed R4 536 542, he should suspend the finalisation of the taxation pending the court's determination of the cap.

The costs of the costs argument

[97] The plaintiffs have succeeded in their application to have admitted as evidence the secret offer and Mr Joseph's costs affidavit. In the event the admission of that material has not yielded the results which the plaintiffs wanted. The plaintiffs have had only limited success in persuading me to make special costs orders. However the defendant did not make a tender on costs. I do not think a court should lightly deprive a successful plaintiff of a portion of costs just because some time was taken up in urging the court to make special costs orders. I thus consider that the defendant should pay the plaintiffs' costs of the application dated 7 December 2016 and of the hearing of the costs argument (including the preparation of heads of argument).

Conclusion and order

[98] I make the following orders relating to costs:

(1) The plaintiffs' application dated 7 December 2016 for orders directing that the secret offer of 31 October 2013 and the costs affidavit of Mr Joseph dated 6 December 2016 be admissible as evidence is granted with costs, including those attendant on the employment of two counsel.

(2) The defendant shall pay the plaintiffs' costs in respect of the defendant's application for the introduction of the conditional counterclaim, including the costs of Mr Joseph's answering affidavit dated 18 June 2015 and the costs attendant on the employment of two counsel.

(3) The defendant shall pay the plaintiffs' costs in respect of the claims in convention and reconvention, including, subject to (4) below, the costs of two counsel, and including the costs relating to argument on costs, but excluding the costs of three trial days (being the days taken up with the evidence of Dr Versfeld and Prof Dunn).

(4) The costs allowed in respect of counsel shall include the reasonable costs of preparing heads of argument on the claims in convention and reconvention and heads of argument on costs.

(5) The plaintiffs shall be entitled to the costs of three counsel for the preparation of that part of the heads of argument in (4) above dealing with the trust and shall be entitled to the costs of the appearance of a third counsel on the last day of argument (12 August 2016).

(6) Although Mr Irish SC and Ms Munro were the plaintiffs' main counsel, the order allowing the costs of two counsel may include fees for work performed by other counsel (and more particularly Mr P de Waal SC, Mr Marcus SC and/or Ms Pillay) provided that, save as set out in (5) above, fees of only two advocates shall be allowed in respect of any particular item of work.

(7) Where the fees of one or more attorneys and/or one or more counsel were charged for work done jointly in respect of the present case and the case in respect of Chelsey Fransman, the fees must, to the extent otherwise allowed by the taxing master, be fairly apportioned between the two cases and on a 50/50 basis if there is no preferable method of apportionment.

(8) The costs awarded to the plaintiffs include the reasonable fees charged by the following experts for the preparation of medico-legal reports and for all reasonable

related attendances, including where applicable consultations, meetings with opposing experts and the preparation of joint minutes and attendance at court:

- Dr G Marus (neurosurgeon);
- Dr MM Lippert (paediatric neurologist);
- Dr L Grinker (psychiatrist);
- Dr S Choonara (urologist) but excluding the costs and attendances associated with the preparation of his addendum report dated 21 November 2014;
- Dr G Versfeld (orthopaedic surgeon) and the related costs of the radiology report of Dr Pencharz, but excluding the costs and attendances of Dr Versfeld subsequent to 29 February 2016;
- Ms P Jackson (physiotherapist);
- Dr R Campbell (rehabilitation specialist);
- Dr P Lofstedt (dentist);
- Dr Maron (ENT surgeon);
- Ms IM Hattingh and Ms E van der Merwe (speech and language therapists, audiologists and AAC specialists);
- Ms Crosbie (occupational therapist);
- Mr Hakopian (orthotist);
- Mr Rademeyer (mobility expert);
- Mr Eybers (architect);
- Messrs Hope and Warren (quantity surveyors);
- Ms Bubb (educational and counselling psychologist);
- Ms Donaldson (industrial psychologist);
- Mr Schussler (economist);
- Dr Strauss (statistician and life expectancy expert);
- Mr G Whittaker (actuary).

- Prof Hofmeyr (ENT surgeon);
- Ms Swart (audiologist).

(9) The costs allowed in respect of Dr Strauss shall include his travel costs from California to Cape Town (business class), his reasonable accommodation expenses in South Africa, and his reasonable fees for time reasonably spent in travelling to and from South Africa and in being in South Africa to testify.

(10) Save as aforesaid, it shall be for the taxing master to decide the extent, if any, of recoverable travel and accommodation costs for the plaintiffs' experts.

(11) The following witnesses are declared necessary witnesses and their witness fees and travel costs (if any) shall be recoverable in accordance with the relevant tariff:

- the second plaintiff;
- Jessica Lundy;
- Samantha de Freitas;
- Sonja Higham;
- Elsabet Bester.

(12) The taxing master is authorised and directed to tax the entire bill of costs presented by the plaintiffs in respect of the costs awarded to them as set out above. If the amount allowed on taxation for all attorneys' fees (including any fees allowed in respect of a correspondent attorney and/or additional attorney) is equal to or less than R4 536 542, the taxing master shall allow all the attorneys' fees so taxed and shall finalise the taxation. If the amount allowed on taxation for all attorneys' fees is more than R4 536 542, the taxing master shall suspend the finalisation of the taxation pending this court's determination as to whether the plaintiffs' attorneys are, in terms of the contingency fee agreement, entitled to fees exceeding R4 536 542.

(13) The issue as to whether the capitalised amount awarded in respect of the trustee's remuneration is to be included in the award for purposes of calculating the

25% cap contemplated in s 2(2) of the Contingency Fee Act ('the cap') stands over for later determination if necessary.

(14) The issue as to whether, and if so how, the cap and the trustee's remuneration are to be calculated in light of the fact that the calculation of each is dependent on the calculation of the other stands over for later determination if necessary.

(15) If, pursuant to 13 and 14 above, it is determined that the capitalised amount of the trustee's remuneration is to be included in calculating the cap, the issue as to whether a pro rata share of irrecoverable legal costs and fees should be deducted from the said capitalised amount in arriving at the opening credit to the separate account to be maintained for the trustee's remuneration in terms of clause 10.3 of the trust deed, stands over for later determination if necessary.

ROGERS J

APPEARANCES

For Plaintiffs	Mr D Irish SC & Ms W Munro Instructed by Joseph's Incorporated Unit 1, Bompas Square 9 Bompas Road Dunkeld
For Defendant	Ms N Bawa SC & Ms M O'Sullivan Instructed by

The State Attorney

4th Floor, 22 Long Street

Cape Town