Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter [2021] JOL 50051 (GJ)

REPUBLIC OF SOUTH AFRICA

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

Case Number: 1677/2019

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

07/4/2021
DATE

SIGNATURE

In the matter between:

MPOLOKENG MARY KEDIBONE obo	First Plaintiff
MK	Second Plaintiff
MT	Third Plaintiff
and	
ROAD ACCIDENT FUND	Defendant
CENTRE FOR CHILD LAW	Amicus Curiae

Case Number: 1928/2019

In the matter between:

NYARADZA MUTUVI obo	First Plaintiff
CM	Second Plaintiff
LM	Third Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CENTRE FOR CHILD LAW Amicus Curiae

Summary:

In two actions brought on behalf of children against the RAF the court was asked to make the settlement agreements an order of court, where payment had already been made by the RAF to the claimants' attorney in terms of such settlement agreements which were concluded *inter partes* and were performed upon by the RAF in the absence of a court order:

***Held*: The provisions of the Contingency Fees Act (CFA) underpin and permeate the entire settlement process and regulate the contractual and other relationships which operate in an action for damages against the RAF.**

***Held:* By reason of the operation of s 4(3) of the CFA - which accords mandatory statutory jurisdiction to the court over every settlement of an action where a contingency fees agreement has been entered into - payment by the RAF in terms of a settlement agreement in the absence of a court order is unlawful and contrary to the functions and powers of the RAF.**

***Held:* In children's claims against the RAF, it is incumbent on the child's attorney to provide, at least, the following information to the court in settlement proceedings, which information should be supplied in the context of the attorney making the peremptory affidavit required in terms of s 4(1) of the CFA in that, without such information in cases involving children the requirements of s 4(1) (a) to (g) have no efficacy:**

- **The relationship between the plaintiff and the child. This would include the duration of the relationship.**
- **The circumstances that led to the plaintiff caring for the child.**
- **The interests of the plaintiff.**
- **The financial circumstances of the plaintiff and his or her ability to safeguard and administer the money.**
- **The personal and financial circumstances of the child including his or her home circumstances and maintenance needs.**
- **A justification for the vehicle agreed to administer the funds and why such a vehicle is preferable to the other possibilities.**
- **The views and wishes of the child concerned, where appropriate.**

Held: **The determination of who is the best person to deal with a RAF claim on behalf of the child as parent and/or guardian and/or caregiver is a matter of inquiry and not assumption and courts, attorneys, and the RAF should not be tempted to ignore the realities of the child's situation in favour of an adoption of stereotypical family values and norms or resort to biology.**

Held: **A court in settlement proceedings where children are claimants must, before it makes an order, inquire into the necessity for the protection of the funds and the most appropriate means of achieving such protection.**

The Guardian's Fund offers a safe, reliable, accessible and free service and it should not be overlooked by a court as a possible vehicle for protecting children's monies, based only on apocryphal reports of inefficiency in the Master's Office.

Where an order for the approval of a settlement agreement is sought under circumstances where such settlement is invalid for want of compliance with s4 of the CFA, the court must deal with each matter in accordance with its own peculiar facts; provided that a court should, in all instances, satisfy itself that the rights of the children are properly taken account of by the order which is ultimately granted, which would of necessity involve a consideration of the issues set out in this judgment in relation to the contents of the s 4(1) affidavit.

Conduct of attorney and advocates referred to the LPC for investigation.

JUDGMENT

FISHER J:

Introduction

[1] These two cases came before me in the Settlement Court operating in terms of the Judge President's (JP's) Practice Directive 2.1 of 2019 which I deal with below. Both cases involve claims for loss of support brought against the RAF on behalf of children.

[2] It came to my attention, by chance that the amounts which I was being asked to order the RAF to pay, had already been paid by the RAF pursuant to an out of court

settlement concluded between the RAF and the plaintiff's attorney in both matters, Ms Sonya Meistre. My subsequent investigations revealed that Ms Meistre had received the monies into her trust account and had then immediately paid herself fees out of this amount received from the RAF. This occurred without a court order and without the fees charged being taxed by the Taxing Master. It furthermore occurred in circumstances where I was deliberately being led by both the legal representatives of the plaintiffs and by the RAF to the impression that the settlement agreement in each case was to occur pursuant to the orders sought.

[3] We are in an era in our High Courts where some plaintiff's attorneys who operate in the RAF environment seem to believe that they can engage with the courts in a game of cat-and-mouse aimed at avoiding court scrutiny of their settlements.

[4] There has been an appreciable resistance to court oversight in the RAF environment over the past years. It must be understood that RAF matters are, under the present RAF policy, settled rather than run.

[5] Since May 2020, RAF cases which are currently in their various stages of litigation before the courts, have been relieved of external legal representation. The new policy has been approved by both the Board of the RAF and the Minister of Transport (the Minister). This has been touted as a cost cutting and thus money saving measure. However, it has also left the RAF even more exposed and vulnerable to malfeasance and incompetence.

[6] Plaintiff's attorneys have sought to take the stance that, once the RAF and the plaintiff have settled the claim, the court has no jurisdiction to interfere in the settlement. This approach was referenced in the SCA in *P M obo T M v Road Accident Fund*[1] where Weiner AJA said the following:

> ' Judges in all divisions have expressed concern that in many RAF cases, there is an abuse of process. Settlements are concluded where, for example, the substantial

[1] (1175/2017) [2019] ZASCA 97; [2019] 3 All SA 409 (SCA); 2019 (5) SA 407 (SCA) (18 June 2019)

damages agreed to bear no relation to the injuries sustained. In this case the judge had a legitimate concern that the only reason for the settlement was the lack of preparation of the RAF's case and that there may, in truth, as appeared to be the case from the evidence she heard from a passenger in the vehicle, have been no negligence on the part of the insured driver and thus no liability on the part of the RAF.

Concern has been noted that to require a Judge to scrutinize every settlement in a RAF case would cause delays in the administration of justice. However, it is not every case that will require this form of judicial scrutiny. When a Judge expresses concern over the terms of a settlement, the court must ensure that those concerns are addressed by the parties to prevent an abuse of process and the unjustified disbursements of public funds.'[2] (footnotes omitted)

[7] On 05 July 2019, the JP of the Gauteng Division, Mlambo JP issued Practice Directive 2 of 2019 which was aimed at regulating trial actions for damages against the State, including the RAF (Practice Directive 2). A new daily Case Management Court was set up pursuant to this Directive, to provide for a process which required that judges manage cases more closely before certifying them trial ready. Practice Directive 2 was carefully crafted to allow for the Case Management Court to be alerted to any problems or inconsistencies in the case, including those between the expert forensic reports filed and the pleaded claim.

[8] On 02 October 2019, the JP followed this up with Practice Directive 2.1 which was directed specifically at settlement agreements. This area had been identified as one where practical oversight by the courts was direly needed in that vast amounts of public funds were at stake and no evidence was led. Paragraphs 2 and 3 of Practice Directive 2.1 read as follows:

'Every settlement/consent draft order presented [should] be interrogated by a Judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which order is premised are justified in relation to the law, the facts, and the expert reports upon which they are based.

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[2] Ibid at para 35 and 36.

Because no evidence is adduced under oath, as might have been presented on the trial, the Court may further require that the submissions relied upon should be confirmed by affidavit or oral evidence as more fully stipulated hereunder.'

[9] In their next move to subvert the process, some plaintiff's attorneys then attempted to oust the court's jurisdiction by claiming that they were entitled to enter into out of court settlements with the RAF and that the settlement court had no jurisdiction where neither the RAF nor the plaintiff sought that that the settlements be made an order of court.[3]

[10] As I deal with in detail in this judgment, such an approach would entail attorneys subverting the legislative scheme created by the Contingency Fee Act[4] (CFA) by seeking to suggest that the attorneys' contractual relationship with their clients is not a contingency fee agreement ('CF agreement') but an ordinary attorney /client relationship. This is a contrivance which would, to my mind, not withstand judicial scrutiny. Yet both the attorney in the matter and the RAF have engaged in this subterfuge. The RAF concedes that it routinely engages in concluding such settlement agreements and acting in compliance with them.

[11] On 21 February 2021 the JP issued a further Directive which provides as follows in relevant part:

'

1. Under no circumstances may a Taxing Master tax costs in matters wherein the claim was settled inter partes without a Court Order OR a valid Discharge Document or an equivalent document confirming settlement of the claim(s).
2. A settlement agreement between parties where the Defendant is the RAF, must be enrolled in the Settlements Court in order for the agreement to be made an Order of Court before the taxation may be enrolled.

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[3] This approach was taken in In the matters of Taylor v RAF (case 37986/2018); Mathonsi v RAF (case 13753/2019) GLD 16 November 2020.

[4] 66 of 1997.

3. This Notice applies ONLY to matters that were settled inter partes and does not affect the ability of practitioners to enroll bills of cost that are not related to a settled claim; including, but not limited to: bills of cost relating to abandoned or withdrawn litigation; bills to be taxed for the purpose of setting security for cost or settled bills of cost.
6. Attorney and own client bills where the attorney-client relationship had ceased may not be enrolled before a Taxing Master unless the bill of costs is the subject of litigation in the High Court.' (emphasis added).

[12] It is for this reason that attorneys such as Ms Meistre, who have entered into unlawful settlement agreements with the RAF, now have no option but to seek court orders *ex post facto* the performance of the unlawful settlement agreements, in order to tax their bills of costs. Regrettably, this has led to the subterfuge which is found in these two cases.

[13] It is indeed a sad time in our judicial history when attorneys engage in wholesale chicanery for the purpose of avoiding legislatively prescribed court oversight. That the RAF should acquiesce in such conduct is even more distressing.

Background

[14] When I expressed my concerns as to how these matters had been conducted and asked for submissions and explanations for such conduct, the RAF represented by Mr Puckrin SC, entered into the matter for the purposes, I was told, of assisting the Court in coming to a proper determination of the matters before me and giving a general sense of what is being done to overhaul the RAF system. The RAF had previously featured only on the basis that it concluded the out of court settlement with Ms Meistry and then approved the court order which was to be taken in each matter.

[15] Given that the rights of children are at the heart of these matters, the Centre for Child Law (CCL) participated as amicus curiae . I am exceedingly grateful for the very competent input of Ms Karabo Ozah, Director of the CLL who instructed Mr Courtenay also of the CCL who in turn filed helpful heads of argument and made submissions.

[16] Ms Meistre, it has emerged, trades in this way with the RAF as a matter of course and that she is not alone in this. As I have said, the RAF concedes that it routinely pays funds to attorneys without a court order. These cases show that it approved the form of the orders sought notwithstanding that it has known that it has already performed under an agreement concluded *inter partes* with the plaintiff's attorney. It concedes that this is not competent but gives no explanation for this misconduct. I have no doubt, that were it not for JP's Directive of 21 February 2021, these matters would not have come to the attention of this Court.

[17] In the one matter the monies (minus Ms Meistre's fees) have already been paid directly to the claimant, on the basis, I was told, of her being the child's biological mother and thus being 'as of right' according to Ms Meistre, entitled to such payment. There was no question of inquiry into the ability or otherwise of the children's mother to administer the funds. There was furthermore no distinction made between the children's separate claims in the settlement that was entered into by Ms Meistre and a globular sum has been paid by the RAF purportedly in respect of the claims of the children and their mother.

[18] In the other matter the monies (again minus the amount taken by Ms Meistre for her costs) remain in trust. I was told by Ms Meistre that this was because the person who made the claim was not a biological parent but the aunt of the children. The plan was for these monies to be released once the court order for payment had been granted by this Court.

[19] The RAF alleges that it is entitled to settle *inter partes* with attorneys. As I deal with in detail in this judgment it is wrong on this score. The RAF also alleges that it should be entitled to take comfort in the fact that it is paying into an attorney's trust account. As the facts of these cases show, this comfort is misplaced.

[20] A vital part of the function of the RAF is to pay out on claims made on behalf of children. The RAF submits that it fulfils such function by merely makes payment to an attorney. It argues that it has no duty to satisfy itself that the monies are properly spent or protected and that this is the job of the attorney.

[21] It appears however that the RAF stops short of entering into settlements and paying the monies where the claimant on behalf of the children is not a biological parent unless a curator *ad litem* has been appointed for the child. It is apparently for this reason that Mr Jonatan Bouwer was appointed. As I deal with below, the appointment of Mr Bouwer was expedient to the settlement transaction and had little, if anything, to do with protecting the children. In this case it was sought that the monies be paid into a trust to be established by Ms Meistre. As I have said, Ms Meistre had, by the date of this recommendation, already taken it upon herself to release some of these funds to herself and the children's aunt. Thus her dedication to the protection of the children's trust monies is questionable.

[22] The RAF concedes that the problems which emerge in these cases represent common failings across the board in relation to how children's claims are processed and administered generally.

[23] The Chief Executive Officer of the RAF, Mr Collins Phutane Letsoalo, (the CEO) filed an affidavit in which he set out changes that were being instituted in the system. The affidavit confirmed that part of the overhaul entailed wholesale a drive to settle all litigious matters with attorneys.

The issues

[24] This judgment considers in the context of these two cases and generally the obligations of the RAF and the attorneys and curators *ad litem* who act on behalf of children in RAF cases and more specifically the following issues:

- whether the RAF acts lawfully when it purports to contract with attorneys *inter partes* and performs under such settlements.
- The nature and extent of the obligations of attorneys and curators *ad litem* to their child clients and to the court.

- The courts function and duty in relation to the protection of court awarded funds to children.

[25] From 2017 to 2020 the RAF, on average, registered approximately 19 000 cases per year relating to children. These statistics represent widespread urgent need of the most fundamental kind for those who were supported by the deceased. They also raise questions as to how best to address this need in a manner that is feasible from an administrative and utilitarian perspective[5].

[26] It seems that Ms Meistre's firm specialises in loss of support cases. The fact that she is the attorney in both cases, whilst more than co-incidental because of the prevalence of the firm in this area of practice, does not detract from the fact that the problems are endemic to the field at large.

[27] To put the issues in context it is important to consider the facts of each case and the manner in which each was conducted by Ms Meistre and the RAF.

Mpolokeng, Mary Kedebone on her own behalf and obo minor children K and T Makhele

The claim

[28] Ms KM died as a result of a motor accident which occurred on 03 August 2018 on the Golden Highway, Gauteng. She was allegedly the mother of the minor children K - born on 25 June 2004 and then aged 14 (and now 16) and T born on August 2011 and then aged 7 (and now 9).

[29] The abridged birth certificate of K which is filed of record does not reveal who his mother is nor the identity of a father. It also neither bears the official stamp of the Department of Home Affairs, the signature of the Director of Home Affairs, nor its official crest. It is on the face of it an irregular document and does not constitute proof

[5] Statistics taken from the submissions under oath of the CEO.

that the deceased was the child's mother. The abridged birth certificate of T however seems regular on the face of it and does reflect that the deceased was the child's mother. It does not reflect the name of her father and the deceased is reflected as 'never married'. Despite the deficiencies in the evidence of maternity relating to K, I assume for the purposes of this judgment that both children are those of the deceased.

[30] Soon after the death, Ms Mpolokeng, who alleges she is the sister of the deceased and thus the maternal aunt of the children, approached the offices of Ms Meistre for the purposes of instituting a claim on behalf of the children and herself. There is no independent evidence that Ms Mpolokeng is the sister of the deceased, but again I will assume for the purposes of this judgment that she is the deceased's sister and thus the children's aunt. Ms Meistre who specialises in this work would surely have had questions as to how Ms Mpolokeng became the guardian or caregiver of the children. It has latterly come to light that Ms Mpolokeng is not, in fact, the caregiver of the children but that they reside in Soweto with their maternal grandmother.

[31] On 18 August 2018, Ms Meistre lodged a claim with the RAF on Ms Mpolokeng's instructions. She lodged a third party claim form (RAF1) as per the regulations and forms to the RAF Act[6] (as amended). In terms of the form Ms Meistre alleges that she is acting in a 'representative capacity' as 'attorney' of the claimant on the form, being Ms Mpolokeng.

[32] As part of the composite claim, Ms Meistre made a claim on behalf Ms Mpolokeng for funeral expenses in the amount of R 30 000. I will deal with this claim for funeral expenses later. What is of concern is that, although the children were mentioned as dependants in the claim, a separate claim is not defined on behalf of each of the children. Neither is Ms Mpolokeng's alleged claim separated as that of hers. As I have said this combining of claims is incompetent as it does not accord the children their separate rights.

[33] On 21 January 2019 Ms Mpolokeng, assisted by Ms Meistre, instituted action as first plaintiff for funeral expenses. It appears that these funeral expenses or at least

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[6] At 56 of 1996

most of them were not incurred by Ms Mpolokeng personally. She relies in her claim on documents which show expenditure by a third party. It is alleged that Ms Mpolokeng took cession of the claim from this third party. The children were second and third plaintiff's respectively for their loss of support.

[34] Why Ms Meistre did not, at that stage, apply for a curator *ad litem* for the children is inexplicable other than that it suggests that a curator was a matter of expediency as to a settlement of the matter.

[35] It was nine months later, on 28 November 2019 that a curator *ad litem* in the form of Mr Jonatan Bouwer was finally appointed. As is usual in these matters, his appointment was applied for *ex parte* and there was no basis on which it needed to be delayed – except the saving of fees which might otherwise flow to Mr Bouwer and not to Ms Meistre.

[36] A trial date was allocated to the matter for 03 November 2020. Ms Meistre prepared to take a judgment by default on this date due to the withdrawal of the RAF's attorney's in June 2020.

The application for judgment by default

[37] The default judgment application is instructive. It shows a profound lack of insight into the circumstances of the children and the duty owed to them and the Court.

[38] An affidavit, presumably drawn by Ms Meistre or someone at her firm, was signed by Ms Mpolokeng in support of the application for judgment. In it she says the following as to her part in the matter and as to the children's parentage and their care:

'21 I am the aunt of the minor children, K Makhele (ID *******) whose biological mother KM (ID***) (hereinafter referred to as the deceased) passed away from a motor vehicle accident on 3 August 2018

2.2 I am the elder sister of the deceased.

2.3 I confirm that the deceased was the breadwinner and sole provider for the children and they were resident with the deceased.

2.4 SGM (ID ***) [thus he would be aged 19 at the time] is the aunt (sic) of the deceased and he confirmed that the children are the biological children of the deceased.

2.5 PES (ID ***) is the sister of the deceased and he (sic) confirmed that the children are the biological children of the deceased

2.6 JMM (ID ***) is the uncle of the deceased and he confirmed that the children are the biological children of the deceased.

2.7 The minor children are currently residing with [no name given] *** and they are well taken care of.'

[39] This affidavit served also to verify the deceased's employment and Ms Mpolokeng's personal (ceded) claim for funeral expenses.

[40] These garbled and incomplete statements are supported only by rudimentary manuscript affidavits claiming to be of the persons purportedly referred to therein. There is no indication that any further investigations were conducted by either the RAF or Mr Bouwer as at this date.

[41] The suit of affidavits filed in support of the proposed default order included that of Mr Bouwer, which was filed in order to give his curator's report to the court.

[42] Mr Bouwer's affidavit contained just two sentences of hearsay information which he said was obtained from Ms Mpolokeng relating to the children's personal circumstances. It read as follows on this matter:

'3.1 I consulted with the first plaintiff who is the aunt of the minors.

3.2. She informed me that the children are staying with her mother (their grandmother).

3.3. She informed me that the father is not taking care of the children and was not living with the children and the deceased at the time of the accident.'

[43] Mr Bouwer at this stage had had no contact with the children even though one of them was sixteen years old. No particulars are provided as to the grandmother who is the primary caregiver of the children, and neither was she interviewed at this stage. No details of how the children have been surviving since the death of their mother were provided.

[44] The apparent lack of investigation and care in reporting to this Court as to the needs and circumstances of vulnerable children by an officer of this Court who purports to act as a curator *ad litem* is, to my mind, worthy of further investigation by the Legal Practice Council (LPC).

[45] One of the duties of Mr Bouwer as set out in the order which appointed him to his position as curator *ad litem* was personally to negotiate a settlement on behalf of the children. It was specifically provided in the order that in the context of his negotiations, he was to obtain the approval of a judge in chambers before accepting any offer. This is in keeping with the practice in this Division. The aim of this judicial oversight is obvious – it protects the children and the public purse. But Mr Bouwer never negotiated the settlement. It appears that it was never, in truth, anticipated that he would do anything more than lend the appearance of approval to a settlement which was actually negotiated and entered into by Ms Meistre.

[46] Had Mr Bouwer properly carried out his responsibility as to the settlement, he would immediately have been aware of the fact that the settlement amount reached was a sum of the claims - i.e. there was no separation of the claims of each child or that of their aunt. The duty of Mr Bouwer was to represent the interests of each of the children independently. Ms Meistre also paid no heed to her separate obligations as attorney to each of the children.

[47] Ms Meistre's accepted of the offer and on her direction the money was received into her trust account. This took place on 18 December 2020, whereupon she immediately transferred 25% of the amount from trust into her own account as her costs.

[48] Ms Meistre's receipt of the money into trust and her dealings therewith shows that she completely ignored the fact that it was Mr Bouwer who, in term of an order of this Court, had the authority to negotiate and conclude the settlement and not her. Furthermore she ignored the fact that Mr Bouwer had not sought the consent of a judge before he approved the settlement.

Settlement Court Hearings

[49] On 20 January 2020, which was some weeks after the payment had been received by Ms Meistre, the matter came before me in the Settlement Court. I was asked to give an order in terms of a detailed a draft order which had apparently been drawn by Ms Meistre and/ or Ms Leizle Swart an advocate instructed by Ms Meistre.

[50] The proposed order was in accordance with the out of court settlement purportedly entered into between the RAF and Ms Meistre on the instructions of Ms Mpolokeng but it dealt also with added issues such as costs. It had the following features:

- It sought payment to each plaintiff of a specific amount.
- It sought to hide that payment had already been received by Ms Meistre and indeed that she had already taken her own fees from such payment.
- It sought costs including those of the curator ad litem (Mr Bouwer), senior junior counsel (Ms Swart), and the actuary who had attended to the quantification of the claim on Ms Meistre's instructions.
- It sought that this Court declare the contingency fee agreement between Ms Mpolokeng and the RAF to be invalid.

[51] At the hearing I raised that I had, in reading the documents, been led to believe that payment had already been made. This I had, per chance, noted from a confirmation document which was filed of record and which emanated from the RAF. I sought an answer as to why an order for payment would be asked for when payment had already been made.

[52] I asked also that Mr Bouwer explain why and indeed how settlement had been reached and payment received without judicial approval as required by the Court order in terms of which he was appointed. Mr Louw who was then moving the matter before me deferred to the knowledge of the matter by Ms Meistre and Ms Swart. He asked that the matter be postponed to 03 February 2021 so that the issues raised by me could be dealt with. Mr Bouwer then also undertook to make further clarifications at the postponed hearing before me as part of his role as curator *ad litem.*

[53] There were irregularities of a similar kind in the Mutuvi matter which also led to that matter being postponed to the same date. I deal later with the irregularities in the Mutuvi matter.

[54] Ms Meistre and Mr Bouwer in anticipation of the postponed hearing, filed affidavits in which they sought to deflect any blame from themselves as to the irregular conduct of the matters.

[55] To this end Ms Meistre, on 02 February 2021, filed a new draft order in terms of which it was no longer sought that the CF agreement be declared invalid. She now sought to rely on the CF agreement. This change in direction was latterly explained by Ms Swart on the basis that the order initially sought in Settlement Court on 20 January 2020 was sought 'in error'. Ms Swart's name appears at the bottom of the draft as the author thereof. How the alleged error came about was not explained by Ms Swart and she had every opportunity to do so. It was clear to me that she was integrally involved in the obtaining of the orders notwithstanding that she was well aware that they did not reflect the facts.

[56] Mr Bouwer, also on 02 February 2020, filed a second affidavit in which he said the following:

- He believed that the offer was in the interests of the children.
- He believed that Ms Meistre had acted in the best interests of the children.
- He had now chosen to 'ratify' all the decisions of Ms Meistre in relation to the settlement and the payments received.
- He conceded that he had not obtained the required judicial consent for the settlement agreement.

[57] But this was too little too late. By this stage, the CCL had been admitted as amicus and the RAF had, sensibly decided that it should no longer opt out of the proceedings and that it was best that it made submissions. I thus granted a further postponement so that the RAF could make further submissions on this matter and Mutuvi. I ruled also that, Ms Meistre, Mr Bouwer and Ms Swart could also produce further submissions in relation to the matters should they see fit to do so. The date for hearing was set at 12 February 2021.

[58] Mr Bouwer at this stage filed a third affidavit purportedly as *curator ad litem*. It reads as follows in material part:

'I wish to amplify and add to my previous report as the amicus curiae raised certain points:

1. GRANDMOTHER:

1.1. I consulted with the grandmother through a translator.
1.2. She claims to only have finished school to standard 6.
1.3. She believes the money should be paid out to her to manage on behalf of the children.

2. THE CHILDREN:

2.1 I consulted with the children.
2.2 On asking what their opinion was on where the money should go they claimed not to have given the matter thought and could not react thereto.
2.3 Later in the presence of their grandmother they telephonically claimed that it would not bother them if she managed the money.'

[59] Mr Bouwer then went on in this, his third affidavit, to set out his view in relation to Ms Meistre's entitlement to take her fees out of the trust monies. Unfortunately, his opinions in this regard bear no scrutiny. In fact, the focal point of all of Mr Bouwer's affidavits have been to attempt to accommodate and vindicate the position of Ms Meistre rather than to protect the rights of the children.

[60] The third affidavit of Mr Bouwer represents the first attempt at interviewing the children and their grandmother. Such interviews came about only because of the Court's intervention. The affidavit suggests a terse exchange with the grandmother and the children. It appears that this was telephonic. It is important that it shows that a dispute exists between the grandmother (who is never even given the courtesy of being named by Mr Bouwer or Ms Meistre) and Ms Mpolokeng as to who should administer the substantial amount of more than R1.3 million which has been paid in respect of the joint maintenance of the children. As I have said, the settlement reached did not distinguish between the children as to the amounts owing to each of them. This was notwithstanding that the amount due to the older child would, on the actuarial

calculation relied on by Ms Meistre to settle the matter, be less than half of that due to the younger child.

[61] Ms Meistre concedes that, in addition to R15 000 which she says is owed to Ms Mpolokeng personally as per her ceded claim, she has paid Ms Mpolokeng an amount of R 10 000 – which she says she was told by Ms Mpolokeng was for the children. Ms Mpolokeng could not however, on being asked, provide any proof of expenditure on the children.

[62] In heads of argument filed by Ms Swart together with an affidavit filed by Ms Meistre it is contended that the court's duty of oversight 'should not be over emphasised and overshadow' the duty of courts to act in the interest of minor children. The suggestion appears to be that the courts should allow for substance over form and should turn a blind eye to irregularities in the conduct of these matters if it shown that the attorney has the children's interests at heart. Ms Swart, wisely, did not persist with this argument at the hearing.

[63] Ms Meistre's affidavit seeks to exonerate herself for her failings to properly represent the children by suggesting that the children needed the money and she only acted out of concern for their well-being. Unfortunately for Ms Meistre, the facts of the matter, including her hasty and unseemly misappropriation of a large part of the children's capital for herself, tell a different tale.

[64] When her conduct was placed under scrutiny, Ms Meistre hastened, for the first time, to obtain photographs of the children's living conditions which suggest that the children live in poverty but that their grandmother is doing all she can to care for them. These photographs were used by Ms Meistre in an unseemly bid to bolster her argument that she had made payments out of the children's trust funds because of her 'concern for the children'. The irony of the fact that it was only for her own purposes and in defence of her failings that the living conditions of the children were placed before a court at all seems to have escaped Ms Meistre. In fact, in all affidvits filed by Ms Mpolokeng, the most that was offered was that the children 'are properly taken care of.'

[65] One must question what Ms Meistre did for the fee of 25% of the total payout (i.e. R 336 313 that she took from the trust monies of the children. She completed and signed the prescribed Third Party Claim form (RAF 1). This was done clumsily and with no regard to the separate claims of the children. It appears that her office, through Ms Mpolokeng, attended to the putting together of a rudimentary and for the most part, unconvincing file of documents which sought to prove that the children were dependants of the deceased. The obtaining of these documents requires no special skill and is easily done by non-professional staff. She then attended to the issuing of a summons.

[66] At this point it is apposite to explain that a dependant's action is generally relatively simple. Once the deceased's duty of support can be shown together with the deceased's employment and income, the matter is worked out by means of actuarial calculation and on the premise that certain percentages of such income are payable to dependant's. The claims are thus fairly rote and formulaic and, as I have said, are almost exclusively settled.

[67] The RAF alleges that, when Ms Meistre accepted the offer and signed the settlement agreement, it believed that she was acting lawfully. It says that it was not informed by Ms Meistre that Mr Bouwer did not have the permission of the Court to accept the settlement offer. The CEO stated on affidavit as follows in this regard:

'Having now had an opportunity to go through the document, I noted that the "Memorandum of Agreement[dated 12 January 2021]" (which was drafted and presented to the Defendant by the Plaintiff's attorney) does not mention that:

21.1 The Plaintiff's attorney had already received payment from the Defendant;

21.2 The curator ad litem still required the Honourable Court's permission to accept the offer; and

21.3 The Plaintiff's attorney did not inform the Defendant that the curator ad litem still required the Court's permission.'

[68] As I have said, the RAF, furthermore, concedes that it should not have acquiesced in an order which sought payment when it knew that payment had already been made. However it gives no explanation as to why it did so.

[69] As is set out above, it was a full nine months after summons and more than a year after a claim was made against the RAF that Mr Bouwer was appointed. The protection of the children's funds and the urgency in relation to their need seems to have escaped the practitioners involved as well as those officials acting in the course of their employment by the RAF. This has resulted in a flawed process which has deprived the children of their maintenance and their grandmother of assistance in maintaining them for a period of in excess of two years. This is unconscionable.

[70] I cannot but conclude that a person who had, as a priority, the children's best interests rather than the earning of fees would have done significantly better in obtaining direly needed redress for the children and their anonymous grandmother.

Matuvi on her own behalf and obo C and L Makheto v RAF

The claim

[71] On 20 August 2018, Ms Meistre lodged the RAF 1 claim form for loss of support of Ms Mutuvi and her two minor children, C born on 25 July 2004 and L born on 15 January 2007. This meant that at the time the claim was lodged the children were fifteen and eleven respectively. C is now an adult. The claim arose as a result of the death of the children's father and life partner of Ms Mutuvi.

[72] There was a problem which was immediately apparent from the documents on record. The deceased was known as Ephraim Maketo in terms of a South African identity document which was relied on for the claim. But it appears that this document was fraudulently obtained. This, at least, is according to Ms Mutuvi who made a rudimentary affidavit to the following effect on 03 November 2018:

' My husband was a Zimbabwean and he was using a South African I.D. South African ID is 730414 5819 081. Zimbabwe ID Maketo Joseph 83066955-S-83.'

[73] This discrepancy did not lead Ms Meistre to the conclusion that this identity problem needed explanation or attention in the pleadings or otherwise. The matter

was made more confusing still by the fact that the South African death certificate relied on for the claim recorded the cause of death as 'natural causes.' Which would exclude a motor vehicle accident.

[74] On 29 January 2019, Ms Meistre instituted action on behalf of the three plaintiffs for separate amounts for each of their claims. The actuary employed by the plaintiff calculated the total loss of support for the first plaintiff and the minor children as follows: Ms Matuvi: R174 141; C : R110 144; and L: R154 220-00.

[75] However, when the inevitable settlement negotiations ensued there was, as in Mplokeng, no attempt by Ms Meistre to delineate the claims and a combined amount was agreed to.

The settlement court proceedings

[76] As I have said, in this matter, there was no curator *ad litem* appointed to the children as they were represented by their mother. Ms Meistre thus made the assumption that the fact that the claim was made by a biological parent, meant that no investigation as to the children's needs and their representation in the claims made on their behalf was necessary. It seems that this is Ms Meistre's approach regardless of the facts.

[77] When an attempt was made to have the settlement made an order before me, the discrepancy as to the two identity documents of the deceased was not brought to my attention and had to be raised by me.

[78] Eventually, and at my insistence, Ms Mutuvi was called to give evidence. I was thus able to ascertain through my own questioning that the probabilities favoured a finding that the deceased was the common law husband of Ms Mutuvi and the father of the children and that he had been using false documents in South Africa. It furthermore emerged from the evidence of Ms Mutuvi that the children lived in Zimbabwe and not in South Africa.

[79] Also, at my instance, evidence was led of a police officer who attended the accident scene in a bid to fathom the discrepancy on the documents as to cause of

death. I was ultimately satisfied that the person who died in the accident in question was the same person who was using the South African identity document and the same person who's true identity was that of Joseph Mutuvi, a Zimbabwean citizen. The death certificate reflecting the death as natural causes thus is rejected. It appears in any event, on the face, of it also to be a fraudulent document.

[80] The failure to plead and deal with the problem of the two identities and the difficulty as to the cause of death recorded on the purported death certificate and generally suggests both incompetence on the part of the legal representatives and a cavalier view of the obligations owed to this Court as to disclosure.

[81] The settlement agreement that followed suffered from similar deficiencies as those which afflicted the Mpolokeng settlement. Most importantly the separate claims of the children were not delineated and a combined amount for all three claims was made. Again, the payment was made to Ms Meistre's trust account as directed by her. Yet again, there was an immediate deduction by Ms Meistre of part of the capital amount as costs allegedly owing to Ms Meistre.

[82] The draft order was, again, framed so as to suggest that payment would be made pursuant to such order when it had already been paid to Ms Meistre. As in Mpolokeng, the RAF approved the terms of order and indicated that it would not oppose the order being made. That payment had already been made and that thus the order sought was redundant as to the payment of capital was, as in Mpolokeng, not brought to my attention. Again it was sought that the contingency agreement be declared invalid. An accounting which was given on my direction shows that an amount of R 428 503 was paid to Ms Meistre's trust account and that she took R 66 625.75 'for costs' leaving a balance of R361 877. 25. This amount has been paid to Ms Mutuvi. There has been no taxation of any bill of costs.

[83] I am told by way of her affidavit filed as at the date of the final hearing, that Ms Mutuvi has done and will continue to do all things necessary to preserve the funds of the children. She has taken it upon herself to invest the monies obtained in investment accounts and I was furnished with documentary proof of this investment.

[84] Whilst it is not suggested that it has been shown that either Ms Mutuvi or Ms Mpolokeng have anything but the best interests of the children of the deceased at heart, the potential for prejudice and conflict of interest which arises out of the conduct in each of the case.

[85] I now move to deal with the question of the lawfulness of the RAF's payment to Ms Meistre without a court order.

Does RAF act lawfully when it pays out amounts to attorney's trust accounts pursuant to settlements?

[86] The entire RAF system is underpinned by the legislative scheme in the CFA. The purpose of CF agreements is to enable litigants to obtain legal representation to prosecute their claims where such litigant is otherwise unable to do so by reason of the prohibitive cost of litigation. CF agreements thus provide the entire substructure for the many thousands of actions instituted against the RAF in our courts annually. Indeed these matters comprise approximately 90% of all legal process in this and many other Divisions of the High Court and thus the contingency fee process is foundational to our system of justice. Its importance cannot be overemphasized.

[87] CF agreements are strictly controlled in terms of the CFA. Prior to the CFA coming into force, contingency fee agreements were prohibited for being contra bonos mores. The intention of the CFA is thus to encourage speculative litigation in order to allow for access to legal representation. However, due to the high risk of abuse and corruption attendant on contingency fee agreements, the Legislature has placed tight strictures and requirements on such agreements[7]. Thus a CF agreement that is not covered by the CFA, or which does not comply with its requirements, is invalid.[8]

[88] The object of the RAF is the payment of compensation in accordance with the RAF Act for loss wrongfully caused by the driving of motor vehicles. The powers and

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[7] *De La Guerre v Ronald Bobroff & Partners Inc and Others* (22645/2011) [2013] ZA GPPHC 33 (13 February 2013) and Masongo v RAF 2016 (6) SA.

[8] *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC); *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA); *Mostert and Others v Nash and Another* 2018 (5) SA 409 (SCA). *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd (448/2003) [2004] ZASCA 64; [2004] 3 All SA 20 (SCA) (1 June 2004)*

functions of the RAF include that it stipulate the terms and conditions upon which claims for the compensation are administered. A further function is 'the investigation' subject to the RAF Act of claims and 'the settlement' of such claims. It is enjoined to utilise the money of the Fund only 'for purposes connected with or resulting from the exercise of its powers or the performance of its duties'[9].

[89] The RAF, as part of its administrative function, has a duty to see to it that the provisions of the CFA are strictly adhered to when it comes to settling claims. As I deal with more fully later, a CF agreement does not merely control the relationship between the plaintiff and his or her attorney. It's validity or otherwise is integral to the RAF's ability lawfully to enter into a settlement agreement. The provisions of the CFA permeate the entire settlement process for litigious claims in the RAF environment and the contractual and other relationships which operate in the field of the RAF claim can only be understood with reference to CFA.

[90] CFA requires that, when a matter has been before court, any offer of settlement made to any party who has entered into a CF agreement, may be accepted after the legal practitioner has filed an affidavit with the court ('the section 4(1) affidavit') setting out details of the proposed settlement with reference to the likely prospects of success at a trial, why the settlement is recommended, an outline of the fees to be charged with reference to the difference between fees charged on settlement as opposed to the fees charged if the matter were to go to trial, and details that provide satisfaction that the client fully understands his or her position as far as the proposed settlement is concerned.[10] The CFA requires further assurances directly

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[9] See sections 3 and 4 of the RAF Act.

[10] Section 4(1) of the CFA. The full text reads as follows:

Settlement

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

(a) the full terms of the settlement;

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

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

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

(e) the reasons why the settlement is recommended;

(f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and

from the client, by way of affidavit, as to the client's understanding of and attitude to the settlement.[11]

[91] The CFA goes on to require that, if there is a CF agreement, the settlement agreement must (shall) be made an order of court if the matter was before a court.[12] The reason for this is clear. The Legislature regards court oversight as essential in all settlements where an action has been brought against the RAF. In most, if not all instances, such a case would involve an attorney and where there is an attorney there should, as a matter of course, be a CF agreement.

[92] Thus, the argument which is often sought to be made in our courts to the effect that when a RAF matter that has been before court is settled, the court loses jurisdiction over the matter[13] falls down on this statutory basis alone. The Court has statutorily imposed jurisdiction in these cases.

[93] As I have said, some attorneys are so anxious to avoid court scrutiny that they go to the absurd lengths of seeking to suggest that their agreements with their clients in RAF matters are ordinary attorney/ client agreements and thus not regulated by the CFA.

[94] This contrived argument loses sight of the fact that, in all but very exceptional cases, the plaintiff in a RAF claim is not in a position to enter into a contractual relationship with an attorney but for the anticipated pay-out from the RAF. Thus, the suggestion that such an agreement is not, in reality, a CF agreement, would, I would think, be treated by a court with some scepticism. It seems to me that this attempted manipulation of the contingency fee system would not withstand legal scrutiny and that

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

[11] Section 4(2) reads as follows:

'The affdavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating—
(a) that he or she was notified in writing of the terms of the settlement;
(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and
(c) his or her attitude to the settlement.

[12] Section 4(3) of the CFA reads as follows:

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

[13] See for example *P M obo T M v Road Accident Fund* n 1 above

such agreements may be regarded as *in fraudem legis*. But this is not a matter which is now before me.

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

[96] The making of payment without a court order, is incompetent and contrary to the statutory scheme which binds the RA. Without a valid settlement it has no basis to pay out on the claim and such payment is technically made *ultra vires*. In the Constitution, the standard of the best interests of the child can operate as a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities such as the RAF are constitutionally bound to give consideration to the effect their decisions will have on children's lives.

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

[98] I must caution that this judgment deals with litigious matters. Claimants can however approach the RAF directly in making their claims. I have not been given statistics by the RAF as to how many of such claims are processed on average. I have also not been given information as to how these claims are processed within the RAF's systems. I am thus unable to comment on whether and how the children's rights are protected and fraud avoided in these claims. However, if the manner that litigious matters are dealt with is anything to go by, I shudder to think what goes on in the non-litigious environment.

[99] The RAF argued that it cannot afford to offer legal assistance or protection in the case of each matter and that, as it is, the amounts that it pays for plaintiff's legal fees is prohibitive.I was told in the affidavit of the CEO that the RAF is in the process of streamlining its debt book and recovering massive duplicate payments that were

made (under previous management) to inter alia, firms of attorneys due to the antiquated and dysfunctional systems and large scale corruption. An example of the scale of the fraud is that new management has recovered approximately R 600 million in duplicate payments and that this recovery is expected to increase.

[100] Whilst the fact that an overhaul of the systems is underway is encouraging, these two cases bring into sharp focus the immediate systemic failures within the RAF statutory scheme and present a stark picture of the realities of the effect of this disfunction on the most vulnerable of our society who rely on it for their support.

[101] To my mind it must be squarely and urgently faced by the RAF that its present system of settlement of children's claims does not cater to the protection of children as claimants and is unlawful.

[102] In sum, full compliance with the CFA is necessary for a CF agreement to have force and effect.It is thus important to examine what compliance with the CFA actually entails with reference to child claimants

What does compliance with the CFA entail in relation to children's claims?

[103] The CFA is carefully framed to avoid exploitation of the claimant. It imposes stringent formalities and provisions for the conclusion of the CF agreement and any settlement agreement. In both of these cases, evidence that these formalities have been complied with is absent from the record before me.

[104] Section 2 of the CFA provides that a legal practitioner may enter into a contingency fee agreement if, in his or her opinion, there are reasonable prospects that his or her client may be successful in the subject proceedings.[14]

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[14] Section 2 of the CFA reads as follows
'**Contingency fees agreements**:
2. (1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may. if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed—
(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

[105] For the practitioner to form such opinion where he or she is in a direct relationship with a client is relatively simple. The matter is more complex when the attorney is contracting with a person who acts in a representative position for someone who lacks capacity.

[106] Where children are involved, the duty of the attorney to do more than merely take the hearsay evidence of a person who claims to be representing the child is patent. One would expect that the children should be interviewed in an authentic way if they are old enough to convey relevant information and that meaningful inquiries should be made as to the living conditions and state of the care being given to the child in the context of forming a proper opinion. The child is, after all, the client that is being represented by the attorney and is the other party to the CF agreement notwithstanding being represented by a parent or guardian. The taking into account of the views and wishes of the child concerned is required by law.[15]

[107] In order to form the required opinion that the child will be successful in the claim it is obviously important properly to interrogate the relationship between the child and the deceased breadwinner to the best of the attorney's ability.

[108] It is incumbent on the attorney in each instance to provide at least the following information in the preremptory section 4(1) affidavit which must be filed with the court:

- The relationship between the plaintiff and the child. This would include the duration of the relationship.
- The circumstances that led to the plaintiff caring for the child.
- The interests of the plaintiff.
- The financial circumstances of the plaintiff and his or her ability to safeguard and administer the money.

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.
(2) Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

[15] Sec. 10 and 14 of the Children's Act 38 of 2005 ("Children's Act").

- The personal and financial circumstances of the child including his or her home circumstances and maintenance needs.
- A justification for the vehicle agreed to administer the funds and why such a vehicle is preferable to the other possibilities.
- The views and wishes of the child concerned, where appropriate.

[109] This so because, on a purposive interpretation of section 4(1), it is clear that, without such information in cases involving children, the requirements of s 4(1) (a) to (g) have little or no efficacy.

[110] No doubt, attorneys will bemoan the difficulties and effort attendant on the making such enquiries and investigations. It is true that this task is made more difficult if children live in remote places but in many of these instances the need of such children is even greater.

[111] The putting together of a proper case for the child is, after all, what the attorney is being paid his or her substantial fees for. Practice in this area is lucrative for attorneys. From 2017 to 2020 the RAF was called upon to pay approximately R 256 000 per claim for the legal costs of plaintiffs' attorneys and advocates. For the same period, approximately R 777 000 per claim was paid by the RAF in minor's claims.[16]

[112] At the heart of the attorney's function in these matters is to gather enough admissible and cogent evidence to build a compelling case for the child's claim. This cannot be done without an in depth investigation into the child's circumstances and family relationships.

[113] The evidence is available and must be sourced. Children live in communities where they attend schools, and are known by neighbours and family friends who can give independent accounts of the children their relationships and their daily lives. It is imperative that information be sought aimed at satisfying the attorney as to these details such as telephone numbers of the children or their school principals or teachers or siblings or grandmothers and family also of absent parents. Clinics who have treated the children or attended to recording their development can be contacted to

[16] from the affidavit filed by the CEO.

verify the children's existence and their health and whereabouts. Each case will require its own method of investigation but the obtaining of proper information in order to satisfy the requirements of the CFA is an imperative.

[114] A child is entitled to the dignity of not being merely a name on a piece of paper or the subject of a hearsay instruction.

[115] When the matter ultimately comes before a court there should be enough information placed before the court to satisfy it that the attorney had sufficient information before him or her to satisfy him or her that the person she was contracting with on behalf of the child had the necessary credentials and that the claimant (i.e. the child) has reasonable prospects of success. Integral to this enquiry is the question of whether the person who seeks to act on behalf of the child in conducting the proceedings is an appropriate person to do so.

[116] As I have said, in Mpolokeng the children were in the care of a person referred to only as 'the grandmother'. The grandmother was never named and nor were her needs in the context of the children's rights and requirements even addressed. Mr Bouwer's report states only that he was informed by Ms Mpolokeng that 'the father is not taking care of the children and was not living with the children and the deceased at the time of the accident.' No indication is given as to the father's circumstances and neither is he named. There was clearly no attempt to speak to him, even though his duty and ability to maintain the children is of relevance to the claim.

[117] In Mutuvi it was not initially disclosed to the court when the settlement was sought to be made an order of court that the children were no longer in the jurisdiction of the court but living in Zimbabwe. This information came to the court because of its own inquiries – which included insisting on hearing the evidence of Ms Mutuvi.

[118] In each instance there was no apparent investigation into whether Ms Mpolokeng or Ms Mutuvi had the proper credentials to represent the children. It appears that the rote approach taken by Ms Meistre in all instances is that, provided it can be shown that the person is the biological parent of the child, the person is allowed, without further investigation or inquiry to enter into the CF agreement with the attorney on behalf of the child. In such instances the money is paid to the parent by Ms Meistre

as a matter of course and without any inquiry as to whether this is in the child's best interests. In the case of Mplokeng it appears that there was no real inquiry as to who the true *de facto* guardian of the child was. It emerged later that Ms Mpolokeng was not in fact looking after the children and that the children's grandmother cared for them.

[119] This raises four questions:

- First, who can be considered a guardian of a child in the absence of parents or legally appointed guardian?

- Second, even if the child has a parent/ legally appointed guardian, does it suffice in the context of a dependant's claims that it is accepted, without more, that such guardian has the right to sue on behalf the children in his/her care?

- Third, when is it necessary to appoint a curator ad litem for the child?

- Fourth, how should funds awarded to the child pursuant to the litigation be treated by the court in making the settlement an order of court and more specifically, is it sufficient that the parent, guardian or caregiver be allowed to take unfettered control of the funds without consideration of the specific circumstances of the child; and should the approach differ depending on whether the guardian is a parent or not.

I move to deal with these question in turn.

Who is legally a guardian?

[120] Apartheid achieved complete geographical, spatial, and social segregation. For this the Apartheid regime relied on displacement policies and restrictions on land ownership and free movement.[17] This had and continues to have a devastating effect

[17] Main measures were the Group Areas Act (1950), the Pass Laws Act (1952) and the Population Registration Act (1950). These and other Apartheid laws and policies led to a systemised population development along urban lines in terms of population densities but not in terms of public service delivery or industrial development.

on our social fabric and the ability of some people to form and sustain the traditional nuclear family environment or, for that matter, any functional family environment that entails parents or responsible caregivers living in proximity to their children and thus being available to understand and meet their financial, emotional, spiritual, educational, physical and psychological needs.

[121] It is common for children in South Africa, especial those in underprivileged circumstances to be raised by extended family such as grandparents or older siblings. This enable's parents to be close to city centres so that they can make a living, often, in unskilled positions such as domestic workers, security guards or labourers. Some barely make a wage sufficient to accommodate themselves properly in these city environments and support themselves and their families. This often necessitates them having to live in informal circumstances away from their traditional family homes and away from their children.

[122] *In Du Toit and Another v Minister of Welfare and Population Development and Others*[18] the following was said by Skweyiya AJ[19]:

'Recognition of the fact that many children are not brought up by their biological parents is embodied in section 28(1)(b) of our Constitution which guarantees a child's right to "family or parental care". Family care includes care by the extended family of a child, which is an important feature of South African family life. It is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children.'[20]

[123] The death of a breadwinner inevitably creates a seismic shift in the financial affairs of most families. This is especially so when the dependants of the deceased are children. The financial considerations which arise are often fraught with complications. Questions of succession and progenitorship in the wake of a death can become divisive and controversial.

[124] The prospect of a significant claim against the RAF can be a motivating factor in relation to who is to care for the child. It may be seen as a way to improve the

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[18] (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006 ; 2003 (2) SA 198 (CC) (10 September 2002).

[20] Ibid para 18.

personal circumstances of the person who steps up to be named guardian or caregiver to the child. Often one parent (mostly men) will have had limited contact with his child only to be brought into the child's orbit by the necessity of making the claim. Such a person may lack appreciation for the needs of the child. A biological father of the child may, for instance, have acquired parental rights and obligations in terms of section 18 of the Children's Act.[21] This would allow for significant legal interference in the child's claim although he has not played any part in the child's life and has no insight into the child's needs or, worse still, is pursuing a financial agenda of his own.

[125] The question of who can legitimately be regarded as guardian must be viewed against the background of the South African condition. By far the majority of those who die on our roads are underprivileged people who are forced to rely on badly maintained roads and dangerous public transport or walk in poorly lit areas in the dark which puts them at risk as pedestrians. One should not be tempted to ignore the realities of the South African condition in favour of a lazy adoption of stereotypical family values or resort to biology.

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[21] 38 of 2005. Section 18 reads as follows:

'18.Parental responsibilities and rights

(1) A person may have either full or specific parental responsibilities and rights in respect of a child.
(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right—
(a) to care for the child;
(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child.
(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must—
(a) administer and safeguard the child's property and property interests;
(b) assist or represent the child in administrative, contractual and other legal matters; or
(c) give or refuse any consent required by law in respect of the child, including—
(i) consent to the child's marriage;
(ii) consent to the child's adoption;
(iii) consent to the child's departure or removal from the Republic;
(iv) consent to the child's application for a passport; and
(v) consent to the alienation or encumbrance of any immovable property of the child.
(4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.
(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).'

Does every parent/guardian have a right to sue on behalf of the children in their care?

[126] The complexity of this inquiry has recently been driven home in the case of *Constant Wilsnach N.O. v T M and others.*[22] In this case the biological father of a deceased child sought to share in the child's deceases estate which comprised a R 15 million payment from the MEC for Health arising from a claim made on behalf of the child for damages due to the negligence of clinicians at the child's birth which rendered him profoundly brain injured due to cerebral palsy. The child's father sought this inheritance purely on the basis that he was the biological 'parent' for the purposes of the Intestate Succession Act[23] (ISA) notwithstanding that he had abandoned the child shortly after his birth. In considering whether the father was a parent for the purpose of inheriting as contemplated in section 1(1)(d) of the ISA and in that context Kollapen J said the following[24]:

'And while biological parenthood may well be the starting point of parenthood in all instances, the role and place of a parent beyond birth becomes much more than simply a matter of biology. It often happens that the biological parent ceases to play any further role in the life of the child as would be in the case of adoption or a child born through an agreement of surrogacy or a child who was abandoned and deserted.

In these instances the parent/s who have the biological link with the child do not cease being biological parent/s but others may take over the role of being parents in situ and this may occur either on a de facto basis or as a result of a formal legal process generally resulting in an issue of an order by a Court. Simply put there are many paths to becoming a parent just as there are many forms of parenthood.' He went on to conclude[25]:' In all of this, the role and place of biology and blood is limited, the primary focus being the relationship that exists between the child and the parent (or the person who discharges that role).' (Footnote omitted).

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[22] Case number 22553/ 2019 Gauteng Division (16 November 2020).
[23] Act 81 of 1997
[24] Ibid at para 40 and 41.
[25] Ibid at para 42.

[127] Thus, the determination of who is the best person to deal with the claim for the maintenance of the child is, by its very nature, a matter of inquiry and not assumption.

[128] When an attorney is approached so that a claim can be made for loss of support on behalf of a child, it is incumbent upon him or her to determine how the rights of the child clients can best be represented. I would think that it would be prudent in most instances for a level of scrutiny to be brought to bear urgently as to how the children's needs and circumstances are being accommodated given the sudden loss of support. This would allow for applications to be made for interim relief pending the settlement or determination of the claim. There should also be proper scrutiny as to the motives and abilities of the person in relation to the claims of the children.

[129] This raises the question of when a curator *ad litem* should be appointed to the child.

When should a curator ad litem be appointed?

[130] The following was said *In Du Toit v Minister of Welfare and Population Development*[26]:

'In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of section 28(1)(h) of the Constitution which provides that:
"Every child has the right –

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

[131] In every case where the source of a child's support has been lost and another person has to step in to represent the child's most fundamental needs, the child would

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[26] n 18 above at para 3.

to my mind be subject to an injustice if he is not allowed a proper facility to express his/her own needs or have them expressed independently.[27] Section 10 of the Children's Act entitles every child to participate 'in an appropriate way' in any matter 'concerning the child'. It adds that the 'views expressed by the child must be given due consideration.'[28]

[132] Section 14 of the Children's Act recognises the right of every child to have access to court for the protection and enforcement of their rights. It further entitles every child 'to be assisted in bringing a matter to a court'[29]. Section 15 deals with the enforcement of fundamental rights and reinforces the broad standing provisions of s 38 of the Constitution specifically in relation to children.[30]

[133] Ponnan JA *Hoërskool Fochville*[31] said the following in relation to these sections of the Children's Act:

' It would thus seem that the legislature intended to create wide and generous mechanisms for the protection and enforcement of children's rights beyond that available to them at common law.'

[134] An orphaned child who has suffered a loss of support and who is obliged to rely on others for the institution of his claim is vulnerable no matter the circumstances. A failure of a State entity such as the RAF to cater to this vulnerability is to fall short of constitutional imperatives relating to the rights of children. Furthermore, if the child's

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[27] Sec. 10 and 14 of the Children's Act . See also *Centre for Child Law v The Governing Body of Hoerskoel* Fochville **[2015] ZASCA 155 (8 October 2015)**

[28] Section of the Children's Act 10 provides:
'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

[29] Section 14 provides:
'Every child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court.'

[30] Section 15 provides:
'(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.
(2) The persons who may approach a court, are:
(a) A child who is affected by or involved in the matter to be adjudicated;
(b) Anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;
(c) Anyone acting as a member of, or in the interest of, a group or class of persons; and
(d) Anyone acting in the public interest.'

[31] n 27 above at para 23.

legal representatives fail to inquire into the circumstances of the child, to determine how best to serve the interests of the child, and to place the fruits of such inquiry before the court they are derelict in their duty to both to their child client and the court.

[135] An attorney must be astute to the needs of the child and the RAF must keep attorneys to high standards as to the proper conduct of the matter. This can in apposite circumstances require the assistance of a curator *ad litem*, a social worker or a medical practitioner.

[136] Ms Meistre relied heavily on the judgment of Tuchten J in *Ex Parte Molantoa obo TR and OM*)[32] to advance the proposition that the appointment of a curator *ad litem* was not encouraged by the court when a child was represented by a parent or adult caregiver and that unless the person was shown to be unfit there was no reason to appoint a curator *ad litem*. Tuchten J stated as follows:

'To sum up: a curator *ad litem* will be appointed to assist a child in an action against the Fund where the best interests of the child require that such an appointment should be made. Each case must be determined on its own facts. An adult care-giver who is a family member in relation to a child is competent to assist the child in its action against the Fund. Where a conflict of interest or other good ground is shown, such a curator will be appointed. Unless and until the reasonable (and not merely speculative) possibility of a conflict arises, no curator will generally be required. The *fact* that the child's' care-giver is a family member other than a biological parent is no ground on its own for the appointment of a curator. Nor is the fact that the care-giver is poor or ill-educated.

[137] Ms Meistre's submissions misunderstand the ratio of the case. This passage is not authority for the proposition that parent or caregiver has the right to represent the child unless he or she is shown to be unfit. What the learned Judge actually held was that a curator ad litem is not the panacea for all irregularities in the process.

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[32] (3198/18) [2018] ZAGPPHC 953 (26 September 2018).

[138] In *Ex Parte Oppel & Another*[33] the court cautioned that because of the nature of the inroads curatorship makes into the relationship between parent and child a court should be loath to grant an application for the appointment of a curator *bonis* to a minor's estate unless it was satisfied that a minor's parent was incapable to manage such an estate.

[139] But such an approach is not in accordance with constitutional prescripts. The protection of the child's rights are, to my mind, more important than any potential encroachment being made on parental authority.

[140] It is trite that in all matters concerning the child the child's best interest are paramount.[34] This imperative infuses our law.

[141] In *Molete v MEC for Health*[35] the court, similarly, held in respect of the appointment of either a curator *ad litem* or curator *bonis* as follows:

'The respondent has badly misconstrued not only the purpose but the applicable test. The test is not whether the parents are capable or not of managing the estate of the minor child. The test is whether the appointment or non-appointment of a curator will serve the best interests of the minor child regard being had to the peculiar circumstances of this matter.'[36]

[142] This would obviously include factors relating to the parent's ability to manage the minor child's estate.

[143] As one sees in Mpolokeng, Mr Bouwer's appointment did not serve any real purpose as far as the children's rights were concerned.

[144] It is, no doubt, correct that if the attorney, does his or her job properly and thus gathers all relevant information and evidence and is diligent about placing this evidence before a court, a curator *ad litem* would probably not be necessary. However there may be occasions where a proper consideration of the child's circumstances

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[33] 2002 (5) SA 125 (C) at 129G – H
[34] 28(2) of the Constitution reads:
"A child's best interests are of paramount importance in every matter concerning the child."
[35] 2012 JDR 1174 (FB) (unreported).
[36] Ibid at para 58.

would lead a prudent attorney to conclude that the children's interests will be served by the appointment of a curator *ad litem* or, as I have, said another professional who can testify to how the rights of the child are being accommodated and what should be done for the child.

[145] The position of a curator *ad litem* is a responsible one because the court depends on his or her report in order to put in place protections as to the rights of the child and see to it that public funds are being properly and efficiently used. The curator should be a legally trained professional with experience in practice and be in good standing with the Legal Practice Council (LPC) This aims to guarantee competence and accountability. Advocates and attorneys owe a fiduciary duty to the court.

[146] A curator *ad litem* should not, as was the case with Mr Bouwer be appointed for the purpose only of lending a veneer of legitimacy to the acceptance of the settlement agreement which has already been concluded by the attorney and in an illegitimate bid to 'ratify' a flawed process.

The courts' function and duty in relation to the protection of court awarded funds to children.

[147] The payment by the RAF is of a lump sum. There are various approaches which can be taken to the management of these funds. As I have said, the money is routinely paid into the claimant's attorney's trust account. The attorney will generally be mandated by the CF agreement to pay the money directly to the claimant. Should this happen as a matter of course or should there be protections put in place to protect the funds against mismanagement and/or fraud?

[148] What these two cases demonstrate with reference to the approach adopted by the RAF is that little heed is paid by the RAF to the protection of child claimants when attorneys are involved. I can as I have said make no comment on the position which it adopts when claims are made directly to it.

[149] The RAF, as an organ of state, is duty-bound to uphold and protect the Bill of Rights.[37]

[150] The ambit of these rights in relation to the child was aptly articulated by Sachs J in judgment of *S v M*[38] as follows:

'[T]his court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. Thus, in Fitzpatrick (supra) this court held that that the best interests principle has "never been given exhaustive content", but that "it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child". Furthermore "'(t)he list of factors competing for the core of best interests (of the child) is almost endless and will depend on each particular factual situation'".

Viewed in this light, indeterminacy of outcome is not a weakness. A truly principle led child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre- determined formula for the sake of certainty irrespective of the circumstances would in fact be contra to the best interests of the child concerned.'[39]

[151] What this means is that a court must, as a starting point in every application to have a settlement agreement made an order, be satisfied that the child's rights to the funds are to be protected. Thus a court must, before it makes an order, inquire into the necessity for the protection of the monies and the best means of such protection taking into account the costs of such protection and the needs of the child. For this the court will need the information which is required in terms of the section 4(1) affidavit as set out above, in order to provide an appropriate order in settlement court.

[152] It is in the interests of all parties that a proper case in this regard is made out as a court will be loath to grant an order for payment if it is not given sufficient information as will allow it properly to discharge its duties as upper guardian of the child.

[37] This is made plain by both sections 7(2) and 8(1) of the Constitution that explain, respectively: "7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. and 8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.
[38] *S v M* (Centre for Child Law Amicus Curiae) 2007 (12) BCLR 1312 (CC).
[39] Ibid para 24.

[153] This brings me to an examination of the various options open to parties and the court when it comes to determining the best method of protecting the child's funds.

The methods of protection available

[154] The options that present themselves are to direct that the monies be paid to the child's parent or guardian or to direct that a trust structure be created or a curator bonis appointed. And then there is the Guardian's Fund - which has been given something of a bad press by legal representatives in our courts but which, to my mind, should be revisited as an option. The court must — when alternative methods are suggested to administer the monies on behalf of the children be provided with sufficient evidence regarding the financial sustainability of the particular method in each case. Trusts and the appointment of a curator *bonis* come at a cost.

Payment directly to the parent/ guardian

[155] I have dealt above with the inquiry that needs to be undertaken in this regard. A court should always consider the rights and obligations of a parent or guardian in terms of the Children's Act, to administer and safeguard the child's property. But this cannot simply be the default position in the absence of information being given to the court.

Curator Bonis

[156] A court may appoint a curator *bonis* to administer the funds on behalf of the child. The monies will usually be invested in an interesting bearing account. The curator *bonis* will usually be empowered to make payments to the guardian/caregiver/third party to ensure that his or her needs are met on an ongoing

basis. A curator *bonis* may also be ordered to report to the court on the carrying out of his or her mandate. The court, in this manner, is able play a supervisory role. The downside is the cost. A curator *bonis* is usually a legal practitioner or other professional who, unless they agree to render the service pro bono, will charge a fee. This, especially over time, may deplete the capital.

Trust

[157] Whilst courts do derive some comfort from the fact that monies are placed in a trust to be administered by trustees, this approach needs to be examined with reference to the financial implications of such investment. One or more of the trustees will generally be professional or be attached to a bank or other financial entity and this obviously comes at a cost. The CCL argues that this is an expensive option. In this regard, there are establishment costs and fees payable to the general administration, the trust is also taxed at a flat rate of 40% on all income it receives. This will reduce the overall return on investment over time.

[158] The RAF agrees and argues that where amounts awarded are relatively small, trustees have no incentive to administer the funds as the trustee's fees are generally based on a percentage of capital invested.

[159] These drawbacks of the trust system are important considerations in determining an appropriate vehicle.

Guardian's Fund

[160] The Guardian's Fund does not only administer inheritances due to minors it is, in addition, competent to receive monies paid by the RAF. An opportunity for regulated synergy between State entities exists in this relationship.

[161] Once payment has been made into the Guardian's Fund, an account is opened in the name of the child who then becomes a beneficiary of the Guardian Fund.

Thereafter, the child will have access to the money owed to him or her in the form of maintenance or allowance through a parent, guardian or caretaker.[40] In this way the parent or guardian is allowed to be integrally involved in the process in order to carry out his or her duties and be accorded his or her rights.

[162] Accessing the funds entails a process in terms of which the parent, guardian or caregiver of a child can claim maintenance from the Guardian's Fund by lodging certain documentation with the office of the Master of the High Court.

[163] The Master is entitled to administer payments for the maintenance of the child, which can include school fees, medical feeds, boarding and lodging and any other needs that the child may have. The services rendered by the Fund do not carry any administrative fees or charges in respect of the payment of maintenance or allowances.

[164] The manner in which the Guardian Fund operates is accessible to the lay person. The Department of Justice, together with the Master's Office, provides all the information one requires to access the Fund. A beneficiary or guardian thereof does not require an attorney or any form of specialised assistance in order to have access to it and the process in which the Funds can be accessed is standardised for simplicity.

[165] The Guardian Fund is accessible to people from all socio-economic groups. It is a safe vehicle in which a beneficiary's money can be invested. The Guardian's Fund employs safeguards to ensure that the child's money is not squandered, for example, a guardian or caregiver is required to provide a full motivation when applying for funds on behalf of the child. Further, the payments can be made from the Guardian's Fund directly to service providers such as schools or a hospitals, school uniform providers, book stores, and the like. These safeguards serve to ensure that the money reaches the intended payee thus providing protection against misappropriation or maladministration of the funds.

[166] It is important that that once a child reaches the age of majority he or she is able to claim the invested money from the Guardian's Fund. Further, where a court has ordered that the child's money be paid into the Guardian's Fund on an interest

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[40] https://www.justice.gov.za/master/guardian.html.

bearing basis, upon attaining majority, the child is able to claim the invested money as well as the interest accrued thereon.

[167] Mr Courtenay for the CCL submits that the Guardian's Fund offers a safe, reliable, accessible, and free service and that it should not be overlooked in favour of alternative trusts or replaced with a curator *bonis* where there is no specific need or special circumstance that exists.

[168] I am inclined to agree with Mr Courtenay on this point. In my experience, legal representatives attempt to steer courts away from the Guardian's Fund on the basis that they ask the court to make the assumption that the Master's Offices will, as a matter of course, always be inefficient in the administration of the monies and thus that the Guardian's Fund should be avoided. The CCL argues that the anecdotal submissions regarding the inefficiencies of the Guardian Fund are not supported by any objective and verifiable facts. The RAF makes the same submission. And to the extent that the Master is not properly administering the fund the child or guardian has redress through the courts.

[169] A cynical view as to the reason for legal representatives seeking to avoid resort to a process which curtails release of large sums of monies paid by the RAF to claimant, is that this does not allow for easy access to funds for the purposes of payment of fees and that the adult claimant sees more success in the award of a lumpsum. There can however be no doubt that this unchecked flow of funds creates an incentive for fraud, corruption, and maladministration.

[170] From a general perspective, seems to me that the obligation to pay significant lump sums is not only financially devastating to the RAF in its current state of commercial and actual insolvency but also fails to appreciate that the purpose of damages being to put the claimant, as far as possible, in the position he or she would have occupied had the delict not occurred.

[171] Mr Puckrin on behalf of the RAF correctly submits that but for the death of the breadwinner, support to the child would, at best, have been provided to a claimant over his or her life and would not have been by way of lump sum. The lump sum

payment requirement which follows common law principles as to the award of damages has its limitations in the RAF environment. There can be no doubt that a process which allows for large sums of ready cash to be paid out in lumpsum amounts creates an incentive for corruption. But this discussion goes beyond the scope of this judgment and involves an inquiry as to the meaning and perhaps the constitutionality of section17 (4)(b) of the RAF Act.

Conclusion

[172] In conclusion the RAF is acting contrary to its functions and powers when it pays amounts to attorneys without a court order and such payment is unlawful.

[173] The settlement agreements concluded by Ms Meistre and the RAF in both cases are invalid for want of compliance with the CFA and in the case of Mpolokeng for want also of compliance with the order of court appointing Mr Bouwer as curator *ad litem.*

[174] I will postpone the matters to allow for the parties to comply with the provisions of the CFA.

[175] The position in Mutuvi is complicated by the fact that Ms Matuvi has already been paid most of the monies under the invalid agreement. I am satisfied, having heard Ms Matuvi and having been given further information on affidavit as to the investment of the monies, that Ms Mutuvi is currently acting in the best interests of the children. It is, however, important that the children's separate rights be protected, and I intend to circumscribe such rights by way of the order I make in this case.

[176] In Mpolokeng, I deem it prudent to appoint another curator *ad litem* to the children. She will have the power to conclude a settlement agreement with the RAF in relation to the children's independent claims. She will thus file an affidavit dealing with the section 4(1) requirements referred to above.

[177] In both matters, the settlement agreements ultimately concluded will be put before this court for its approval, as is the statutory imperative of section 4(3).

[178] Nothing in this Court's order should be taken to suggest that an attorney may be relieved of his or her duties under the CFA. It must, however, be recognised that, to the extent that attorney's such as Ms Meistre have purported to conclude out of

court settlements with the RAF, there are inchoate legal positions as to these settlement negotiations which currently maintain and the Taxing Master will not tax the bill of costs without a court order..

[179] It seems to me that, in each instance, where an order is sought under these circumstances, the judge called upon to approve the settlement must deal with each matter in accordance with its own peculiar facts. In all instances, a court should satisfy itself that the rights of the dependants are properly taken account by the order which is granted ultimately granted. This would, to my mind, involve a consideration of the issues set out in this judgment in relation to the contents of the section 4(1) affidavit and thus it would be prudent in each case to insist on the filing of such an affidavit.

[180] It must be realised that, when courts are dealing with unopposed matters, which are legion in this court, they do not have the resources to undertake intensive investigations into the minutia of every matter. As they are entitled to do, judges take comfort in counsel's submissions as to whether a particular matter is in order. They rely also on attorneys' affidavits and on the reports of curators *ad litem*. If counsel and attorneys cannot, in fact, be relied on in their service to the court and their clients, this inevitably leads to orders being granted when they should not be granted. Unscrupulous legal representatives sometimes seek to take advantage of the trust placed in them by the courts and the workload of judges in unopposed court by asking for orders to which they are not entitled. This approach is prevalent in the RAF arena.

[181] This drives home the necessity of the RAF insisting on court orders before it pays out pursuant to any settlement in litigious matter where there is a contingency agreement and/or where minor children are involved.

[182] To my mind, prima facie the record and the affidavits and heads of arguments filed, the conduct of Ms Meistre, Mr Bouwer, and Ms Swart seems to fall below the standards demanded of them as practitioners in this Court.

Orders

[183] I thus make the following orders:

In **MPOLOKENG M KEDIBONE obo K M and TM v RAF (case number 1677/2019)**

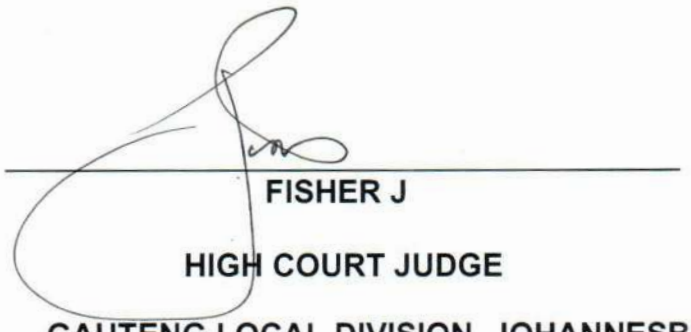
1. The application is postponed *sine die.*
2. The settlement agreement is declared to be invalid.
3. Adv Nomvula C Nhlapho is appointed as curator *ad litem* for the purposes of investigating the circumstances of the minor children and providing a report which deals with the section 4(1) provisions of the CFA as set out in this judgment.
4. Adv Nhlapho shall have the power to:
    a. Conclude a settlement agreement with the RAF on behalf of the children;
    b. Place such settlement agreement before this court for approval;
    c. Seek the court's directive in relation to what is to happen to the funds currently held in trust by Ms Meistre;
    d. Approach this court for interim relief as far as the needs and requirements of the children are concerned, should she see fit to do so.
5. The RAF shall pay the fees of Adv Nhlapho directly to her within 30 days of receipt of an invoice from her.
6. Mr Bouwer's curatorship is suspended pending the final determination of this matter and/or this Court's further directives.
7. Until such further directives of this Court in relation to Mr Bouwer's curatorship, he is not entitled to charge or collect any fees for his services in this matter.
8. The monies paid to Ms Meistre by the RAF pursuant to the putative settlement concluded between Ms Meistre and the RAF are to remain in trust with Ms Meistre pending this Court's further direction.
9. Ms Meistre is to produce to this Court a draft bill of costs as to her fees in this matter within 15 days of this order.

10. A copy of this judgement is to be placed before the LPC and the conduct of Ms Meistre, Adv Bouwer and Adv Swart is referred to the LPC for investigation.
11. The costs of the matter are reserved before me.

In **NYARADZA MUTUVI obo C M and LM v RAF (Case Number: 1928/2019)**

1. The matter is postponed *sine die.*
2. It is directed that the amount of R 428 503 paid by the RAF under the putative settlement agreement in this matter is allocated as follow as follows:
    a. R 164 141 is the amount due to Ms Mutuvi (first plaintiff) personally.
    b. R 110 142 is the amount due to C (second plaintiff)
    c. R 154 220 is the amount due to L (third plaintiff)
3. Ms Maistry is to produce to this court a draft bill of costs as to her fees in this matter within 15 days of this order.
4. The conduct of Ms Meistre and Adv Swart is referred to the LPC for investigation.
5. The costs of the matter are reserved before me.

A copy of this judgment in relation to both cases is to be delivered by the Registrar to the NDPP and the Minister of Transport.



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 12 March 2021.

Judgment Delivered Electronically on : 07 April 2021.

APPEARANCES:

In ***Mpolokeng***

For the plaintiffs : Adv L Swart.

Instructed by : Sonya Meistre Attorneys.

For Defendant : Adv C Puckrin SC, with him Adv R Schoeman & Adv N Makopo.

Instructed by : Malatji JI & CO Attorneys.

Amicus Curiae : Adv R M Courtenay.

Instructed : Centre For Child Law.

In ***Mutuvi***

For the plaintiffs : Adv L Swart.

Instructed by : Sonya Meistre Attorneys.

For the Defendant : Adv C Puckrin SC, with him Adv R Schoeman & Adv N Makopo.

Amicus Curiae : Adv R M Courtenay.

Instructed : Centre For Child Law.