LATEST DISCOVERY NEWS

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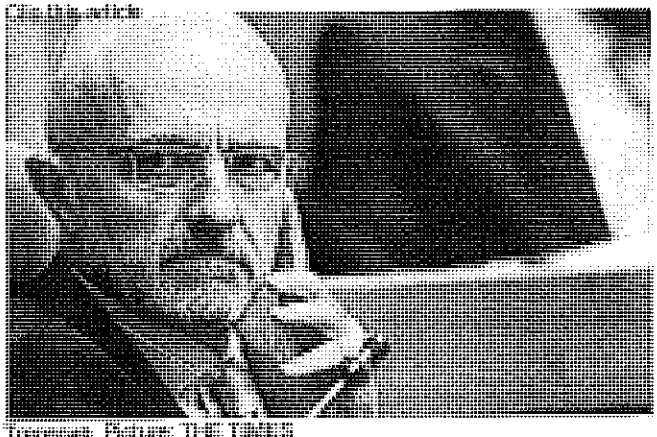
State management is a catastrophe

Peter Bruce: What was once one of the world's most financially muscular power generators has been run into the ground by the smug nonchalance of the ruling party

TORQUE: Accusations fly in medical aid case

by David Gleason, 28 January 2014, 05:33



Advocate Wim Trengove. Picture: THE TIMES

In this article

JSE-listed companies: Discovery

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A LEGAL struggle of titanic proportions was launched on Monday in the North Gauteng High Court. The action, which has so far gone largely unnoticed, involves leading senior counsel Wim Trengove, David Unterhalter and Mike Hellens, giants of the Bar, appearing against one another.

In this case, the argument is essentially between medical aid leviathan Discovery and the doyen of attorneys specialising in third party work, Ronald Bobroff. Discovery is standing behind members Jennifer and Matthew Graham, who take issue with Bobroff (and his son)

concerning services rendered in prosecuting a claim against the Road Accident Fund (RAF) after a serious accident in which Matthew Graham nearly lost his life.

The fund settled the claim for R1,979,953 and the Bobroffs handed the Grahams 60% of that amount, R1,187,972.

This alerted Discovery, which suspected that some of its members, the Grahams included, might have been "overreached" (in this case, meaning outwitted or cheated).

The Grahams' attorneys, Edward Nathan Sonnenbergs, laid a complaint on their behalf with the Law Society of the Northern Provinces (represented by Trengove).

The Grahams say the Law Society has not done its job and has failed to investigate the Bobroffs (represented by Hellens) as requested. Essentially, the Grahams (represented by Unterhalter) want the high court to take over the functions of the law society to investigate the Bobroffs and to institute appropriate action against them if warranted, or, failing that, to use its oversight powers to force the Bobroffs and the law society "to comply with their duties".

I have looked at some of the papers (but not all, probably in excess of 3,000 pages) and I am struck by the antagonism that reverberates through them.

The Grahams (read Discovery) want the Bobroffs struck off the roll or at the very least suspended.

The Bobroffs claim Discovery hoodwinks its members by failing to make it clear to them when they join that the medical care which it finances without conditions is actually limited to genuine illness.

The Medical Schemes Act (section 30(2)) requires that a detailed summary of the rules must be provided to members when they join.

I am involved personally in the sense that I've been a Discovery member since 1996, so, when I was told by an albatross that I was covered for medical care only for illnesses, my responses were incredulity and denial. But then I got hold of the Discovery Health Scheme's rules. Annexure C, dealing with exclusions and limitations, is especially significant.

Paragraph one lists matters that "will not be paid by the scheme".

This extends to: "All costs of whatsoever nature incurred for treatment of sickness, conditions or injuries sustained by a member or a dependant and for which any other party is liable."

Read as it's written, my interpretation is that Discovery could, if it wished, decline to meet my medical expenses were I involved in a road accident because I can access cover through the Road Accident Fund.

Then, rather confusingly, in paragraph 15.6.1 of the main body of rules, Discovery makes it plain that a member is "obliged to take all steps which are necessary to timeously submit to the Road Accident Fund ... a claim for compensation for the costs of any healthcare services performed", and in terms of 15.6.2 must tell Discovery it has done so.

Discovery is entitled to "recover payment of any benefit in respect of healthcare services for which the RAF has undertaken to make payment". This invokes the principle of subrogation — that an insurer that has paid out on a loss is entitled to the rights and remedies of the insured against a third party. Put another way, you can't be paid twice for the same injury or loss.

Does Discovery ever decline to cover the costs arising out of a motor accident? Never, say Jeff Katz, Discovery's in-house counsel, and Jonathan Bloomberg, Discovery Health's CEO.

But it certainly wants to recover money it has laid out to cover medical costs arising from a motor accident where the RAF has paid compensation. Katz and Bloomberg say recoveries amount to about R25m a year — other sources say this could run to as much as R100m annually.

Their action is significantly wrapped up in the charges levied by third party attorneys, sometimes disparagingly referred to as "ambulance chasers". In the case of the Grahams, the Bobroffs levied an all-in fee of 40%. But that's not permitted, say the Grahams. The maximum allowed by the Contingency Fees Act (66 of 1997) is 25%.

We've been here before.

In what became a famous case, De la Guerre v Ronald Bobroff & Partners & Others, a full bench of the high court in Pretoria ruled in December that the Contingency Fees Act was exhaustive, that reliance on common law was unlawful, and that a contingency fee that does not comply with the act is invalid. The South African Association of Personal Injury Lawyers challenged the constitutionality of the Contingency Fees Act, but it lost that argument and the law society was given a bollocking for failing to put in place rules to address the risks of overcharging by its members.

I understand the validity of the Contingency Fees Act will now go to the Constitutional Court.

If all this looks open and shut, it isn't. I am given authoritatively to understand that the exclusion of benefits for injury as opposed to illness is in contravention of the prescribed minimum benefit for emergency care and other injuries. This is obligatory under the Medical Schemes Act.

I am sure Discovery will be called on to explain its position.

I am also given to understand that Discovery requires an injured person, or members of his family if he or she is indisposed, to sign an undertaking that includes an instruction to attorneys to repay to Discovery Health any costs it has paid in respect to the injuries.

Failure to honour the obligations in the undertaking will result in Discovery requiring reimbursement by the member.

Discovery (per the Grahams) says Bobroff is a cheat. Bobroff says that's the pot calling the kettle black — Discovery and its brokers deliberately avoid telling prospective members about the exclusions.

More, much more, to follow.

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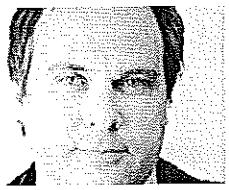

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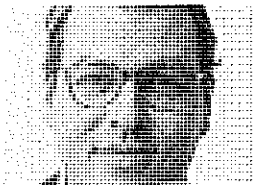

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UNDERTAKING TO DISCOVERY HEALTH
IN RESPECT OF PAST HOSPITAL & MEDICAL EXPENSES
(To be completed by Claimant)

I, the undersigned ..... Membership Number .....
do hereby state and agree as follows :

1. I am aware of Discovery Health's Rule 15 & Annexure "C" Exclusion 1.1 pertaining to payment of medical and hospital costs ("costs") arising from any incident giving rise to a claim for which any other party may be liable.

2. I confirm that I have appointed the firm of attorneys ..... to institute and finalize a claim on my behalf. Should any other firm of attorneys subsequently be instructed by me, I undertake to notify Discovery Health and / or their representatives within 14 days of having changed attorneys.

3. I hereby irrevocably instruct my attorneys (and agree to instruct any other attorneys that I may appoint in future), to repay to Discovery Health any costs that Discovery Health may have paid in regard to injuries sustained by myself / my dependant in an accident that occurred on ..... and which have been recovered, subject to any apportionment that may be applied in terms of the Apportionment of Damages Act.

4. I have been informed that should I not undertake to reimburse Discovery Health or if I fail to honour my obligations in terms of this Undertaking for past hospital and medical expenses paid on my behalf for injuries sustained by me in the incident, any payments made by Discovery Health will be reversed and will be for my account. Furthermore, Discovery Health will disavow liability for payment of any future costs relating to the incident.

5. I confirm that no legal fees or disbursements will be deducted from the amount in respect of the costs payable to Discovery Health.

6. I further confirm having instructed my attorneys to repay the amount due as set out above, immediately upon receipt thereof from the party liable, whether payment is made by way of interim, staggered or final payment

7. In the event that payment of the aforesaid amount is made directly to myself by the liable party, I hereby personally irrevocably undertake to repay Discovery Health immediately with the full amount received in terms of paragraph 3 above.

8. I further confirm having instructed my attorneys to submit all invoices to the liable party in respect of costs paid by Discovery Health and to report on the progress of my claim on a quarterly basis or in response to a query by Discovery Health or its duly authorised representative.

9. Should my claim for any reason not be successful, I confirm having instructed my attorneys to advise Discovery Health or its duly authorised representative immediately and to provide them with the full details for the rejection of the claim.

SIGNED at ..... on .....200..

MEMBER : .....

I, Mr / Mrs ..... of Attorneys ..... confirm that the above instructions have been conveyed to me and that, as long as my mandate is valid, I will act accordingly.

ATTORNEY : .....

tydelike maatreël. NADEL en ander engelssprekende raadslede het dit ondersteun.

Die Voorsitter het egter besluit dat vanweë die uiteenlopende standpunte wat gestel is, die instansies wat by die *LSSA* verteenwoordig is, dié saak weer onderling moet bespreek en dat die aangeleentheid moet oorstaan tot die volgende vergadering op 30 Julie 2002.

Intussen het die Raad van die Prokureursorde van die Noordelike Provinsies ook die aangeleentheid bespreek op 21 junie 2002. Aangesien die BLA gebonde is aan die standpunt van hulle nasionale verteenwoordigers, kon daar nie eenstemmigheid hieroor bereik word nie maar Raadslede het behoorlike geleentheid gekry om hulle standpunte te stel.

In hierdie tydperk waarin ons probeer om 'n *Wet op Regspraktyk* daar te stel wat eenheid in die professie en die belange van prokureurs sal bevorder, kan ons nie verdeeldheid oor taalkwessies bekostig nie.

JAN STEMMETT
PRESIDENT

WEER IETS OOR UITSLUITING VAN AANSPREEKLIKHEID EN *STARE DECISIS*

In die Junie 2002-uitgawe van ***Ordenuus*** op bladsy 8, bespreek ek die uitspraak van die Hof in die saak van ***STRYDOM V AFROX HEALTHCARE BEPERK [2001] ALL SA 618***. Ek gee dadelik toe in die artikel dat ek nie weet wat presies die grondslag is van die Regter se bevinding nie. Ek wys egter daarop dat hierdie 'n uitspraak van 'n enkel Regter is, maar dat dit 'n aanduiding is daarvan dat ons Howe nie wegskram daarvan om die bepalings van die Gemenereg te ontwikkel in die lig van die bepalings van die Grondwet nie.

Die uitspraak van die Hof *a quo* is nou tersyde gestel in die tot-op-hede ongerapporteerde uitspraak van die Hoëhof van Appél in die saak van ***AFROX HEALTHCARE BEPERK*** en ***C G STRYDOM, SAAK NR 172/2001 HHA***.

In die uitspraak (paragraaf 6) wys ***BRAND AR*** daarop dat die Verhoorregter sekere beginsels verwar het. In paragraaf 36 van die uitspraak word daarop gewys dat vrywaringsklousules soos wat in hierdie saak ter sprake is, hedendaags in standaard kontrakte eerder die reël as die uitsondering is en nie ontoelaatbaar is nie.

Wat egter van die uiterste belang is, is die bespreking deur die Hof van hoe die beginsels van *stare decisis* toepassing vind waar ***Artikel 39(2) van die Grondwet*** aangewend word om te bepaal of die Gemenereg verander, uitgebrei of ontwikkel moet word in die lig van die bepalings van die Grondwet. Ten opsigte van die *stare decisis* beginsel, wil dit vir my voorkom asof daar verskillende moontlikhede is en ten opsigte van een van die moontlikhede kan die bevinding van die Hoëhof van Appél saamgevat word in die volgende aanhaling wat verskyn in ***paragraaf 29 op bladsy 25*** van die uitspraak: ***"Die antwoord is dat die beginsels van stare decisis steeds geld en dat die Hooggeregshof nie deur Artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- of post-konstitusioneel af te wyk nie. Artikel 39(2) moet saamgelees word met Artikel 173 van die Grondwet."***

Dit is nou baie duideliker oor hoe 'n laerhof te werk moet gaan om die Gemenereg aan te pas, te verander of te ontwikkel aan die hand van die bepalings van die Grondwet waar uitsprake van die Hoëhof van Appél (voorheen die Appélhof) bestaan wat oënskynlik 'n aanpassing regverdig.

DANIE OLIVIER
RAADSLID

CONTINGENCY FEE AGREEMENTS

It was, upon recommendation of the Court Practice Committee of the Law Society of the Northern Provinces, resolved by the Council on 23 February 2001 to support the principle of a percentage contingency fee.

After further careful consideration, which included taking opinion as to whether attorneys would be entitled to enter into valid contingency fee agreements in terms of the common law, notwithstanding the enactment of the Contingency Fees Act, 66 of 1997, it was resolved by the Council of the Law Society, on 21 June 2002, to accept:

1. Common law Contingency Fee Agreements may be validly entered into by Attorneys. That the Contingency Fees Act does not proscribe such agreements. It must however be accepted that such agreements will continue to be keenly scrutinised by the Courts. Such scrutiny by the Courts may even be raised *mero muto* by the Court.
2. A common law contingency fee agreement should meet the following criteria:
   2.1 It should relate to a genuine case of assisting an impecunious client to assert his rights. Impecunious does not mean totally indigent but in context it would refer to someone who, due to lack of means, is unable to assert his right to relief in the Courts; and
   2.2 The attorney's remuneration must be fair; and
   2.3 The agreement must not amount to gambling, speculation or trafficking in litigation.
3. The reasonableness of the percentage of the monetary proceeds retained as a success fee will be measured according to various criteria some of which are to be found in the opinion, but it seems more than likely that a Court will also have regard to the 25 % cap referred to in the Contingency Fees Act.
4. The restrictions to be found in the Contingency Fees Act will probably resonate in various guises in judicial scrutiny of a common law contingency fee agreement.

Colleagues may therefore henceforth enter into success / common law contingency / percentage contingency / contingency fee agreements in the knowledge of the acceptance by the Law Society of the Northern Provinces of such agreements. A step forward? For sure!

CP FOURIE
VICE PRESIDENT OF THE LAW SOCIETY OF THE NORTHERN PROVINCES
CHAIR PERSON OF THE COURT PRACTICE COMMITTEE

COMMON LAW CONTIGENCY FEE AGREEMENTS

It is now more than a year since the Law Society of the Northern Provinces gave the green light to its members to enter into common law contingency fee agreements with their clients. The feedback is that it was well received and that, by and large, it works well.

The other Provinces, however, have as yet not followed suit. During the Annual General Meeting of the Law Society of South Africa in March this year, an ad hoc committee was appointed to consider the matter and to make recommendations to the Law Society of South Africa. Two Councillors of the Law Society of the Northern Provinces serve on that ad hoc committee. We are awaiting the committee's recommendations, for consideration. Unless otherwise notified, members may continue to enter into common law contingency fee agreements with their clients.

However, kindly note the following:

1. A Common Law Contingency Fee agreement must be entered into. Such agreement will normally be entered into before commencement of the proceedings. If entered into thereafter, valid reason should exist. Common Law Contingency Fees cannot therefore be applied as a matter of course;

2. A Common Law Contingency Fee agreement should meet the following criteria:

* It should relate to a genuine case of assisting an impecunious client to assert his/her rights. This refers to someone who, due to lack of means, is unable to assert his/her rights to relief in the Courts; and
* The attorney's remuneration must be fair;
* The agreement must not amount to gambling, speculation or trafficking in litigation.

3. The question of whether a Common Law Contingency Fee agreement withstands judicial scrutiny will depend on the facts of every matter. It can be assumed that reasonableness will remain the touchstone in respect of the percentage of the agreed success fee. Because the Courts will probably refer to the 25 % cap on success fees in the ***Contingency Fees Act, Act 66 of 1997***, in determining the reasonableness, any agreed percentage in excess of that cap would be at risk. The percentage of the agreed success fee referred to is exclusive of actual disbursements of VAT.

Please note further that Council has considered the application of Common Law Contingency Fees to the value of an Undertaking, issued by the Road Accident Fund in terms of the relevant Act. Council's view is that Common Law Contingency Fees may not be applied against the value of an Undertaking. Members are therefore not allowed to apply the percentage of the agreed success fee to the value of such an Undertaking at all.

Please ensure adherence.

CP FOURIE
VICE-PRESIDENT
LAW SOCIETY OF THE NORTHERN PROVINCES

DRINGENDE HOFBEVELE GERIG AAN DIE GESINSADVOKAAT

Die kantoor van die Gesinsadvokaat doen hiermee 'n dringende beroep op prokureurs om Hofbevele met kort keerdatums te vermy aangesien die Gesinsadvokaat vind dat:

1. Dit soms ongewens is, indien nie onmoontlik nie, om 'n vaste standpunt in 'n komplekse aangeleentheid in te neem waar meer oorweging en navrae eenvoudig 'n beter resultaat sou opgelewer het;

2. Die dringende Hofbevele vereis uit die aard van die saak spesiale reëlings wat dikwels beteken dat afsprake wat reeds geskeduleer is gekanselleer of verskuif moet word. Dringende sake is nie noodwendig altyd meer belangrik as ander sake nie en dit is onbillik om voorkeurbehandeling af te dwing onder dekmantel van 'n Bevel;

3. Baie van die dringende sake het 'n geskiedenis met duidelike gevaartekens lank voor die tyd wat daarop dui dat aandag daaraan gegee moet word. Deur die sake betyds na die Gesinsadvokaat te verwys kan baie van die krisisse afgeweer word;

4. Die dringende Bevele bevat dikwels instruksies dat sielkundige evaluasies gedoen moet word. Die Gesinsadvokaat beskik nie oor sielkundiges in-huis nie en maak dan van buite deskundiges gebruik, oor wie hulle werklik geen beheer het, sovêr dit betref wanneer die partye gesien word of hoe gou 'n verslag beskikbaar gemaak word nie;

5. Sommige keerdatums is eenvoudig onrealisties kort in omstandighede waar daar geen vooraf konsultasie met die Gesinsadvokaat se kantoor plaasvind nie;

6. Heelwat dringende bevele kom nie dadelik onder hul aandag nie. Dit is onwys om sondermeer te aanvaar dat die Griffier altyd sal toesien dat die Gesinsadvokaat die Bevel ontvang en dit is in praktyk veel beter indien die prokureur self daarna omsien; en

THE LAW SOCIETY
OF THE
NORTHERN PROVINCES

DIE PROKUREURSORDE
VAN DIE
NOORDELIKE PROVINSIES

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Your ref/U verw: Mr Grobler / djp / 05/10/2011

Our ref/Ons verw: MJSG / sl / 109/10

12 October 2011

His Honourable Judge W J van der Merwe
Deputy Judge President
North Gauteng High Court
PRETORIA

Fax: 086 640 1361

Dear Mr Justice Van der Merwe,

PRACTICE DIRECTIVE: PARAGRAPH 6.16 – SETTLEMENT AGREEMENTS AND DRAFT ORDER

A separate letter was addressed to you on 1 September 2011 confirming the willingness of the Law Society to participate in the stated case to determine the validity of common law contingency fee agreements, which included a proposed model common law agreement on which you still have to comment.

A further memorandum will be furnished to you shortly on the proposed stated case to convey the suggestions of the Law Society in this regard.

With reference to your letter dated 5 October 2011, the Law Society believes it is important to deal separately with agreements purporting to be in terms of the Contingency Fees Act, 1997, but which, in the view of the Court, do not comply with the Act.

Given the peremptory agreement which is required to be used in terms of the Act as proclaimed in 1999, there is limited scope for variation and/or amendment to such agreement. To the extent that the Courts encounter amendments or variations not provided for under this Act, the Law Society is obliged in terms of the Act and its statutory duty to consider complaints in this regard. It will most definitely do so, which can however only realistically be done when a complaint is received in terms of our disciplinary procedures.

<u>Common Law Contingency Agreements</u>

The Council has been of the view since 2002 and remains of the view that it will not be unprofessional conduct for attorneys to make use of common law contingency fee agreements outside the Act. Whilst the Council published suggested guidelines for such common law agreements, the guidelines were simply just that i.e. guidelines, and did not seek to prescribe what a common law agreement could or could not include.

.../2

For example, although no minimum or maximum porcentage is prescribed and given that attorneys and their clients are free to negotiate a contract in the same way as any other contract between competent parties, we indicated to our members that should the 25 % cap referred to in the Act, be exceeded, it will have to be justified, having regard to the various aspects which will have to be considered. This will *inter alia* include the complexity of the matter, the overhead cost structure of the firm, the extent of the disbursements to be covered by the attorney, the anticipated period that the attorney would have to carry such disbursements and wait for payment of fees, as well as other criteria such as those referred to in Rule 80 of the Law Society's rules.

Following the judgment given in the matter of *PricewaterhouseCoopers Inc./ National Potato Co-operative Ltd.* by the Supreme Court of Appeal and the lack of certainty as to whether a Court would uphold common law contingency fee agreements as a result thereof, we have cautioned our members to provide for alternative fee agreements with clients in the event that the common law agreement was disputed or ruled invalid by a Court.

The Council understands that most attorneys utilising common law contingency agreements also contract in the alternative with clients on a straight rate per hour basis and/or in terms of the Contingency Fees Act, 1997.

For all the above reasons, the Council very much welcomed your kind undertaking to consider a proposed model common law agreement which the Council truly believes is fair and workable and which will obviate many of the criticisms you have raised in your letter under reply. We would very much welcome engaging with you on this agreement.

The Council will of course investigate and seriously consider any matter referred by any Court. We believe an approved model common law agreement may address many of the issues raised by you.

I shall communicate with you again with regard to this matter as soon as circumstances permit.

Regards,

M J S GROBLER
Director

ATTORNEY AND CLIENT FEE AGREEMENT

Entered into by and between:

_____

(hereinafter referred to as "the Attorney")

And

_____

(hereinafter referred to as "the Client)

1. The client has requested the Attorney to institute an action ("the claim") on behalf of the client with regard to (insert nature of relief sought) on the express condition that the Attorney agrees to accept such instructions on a no win – no fee basis and in return for a fee comprising a percentage plus VAT of the damages recovered on behalf of the client.

2. The Attorney has agreed to accept instructions from the client on the basis that the Attorney's fee will be X% plus VAT of the monetary result obtained and payable immediately out of any moneys recovered on behalf of the client from the Defendant.

3.

3.1 The client hereby instructs and authorises the Attorney to pay out of the damages and costs to be recovered in the claim, all the expenses incurred in the claim, including but not limited to Advocate's and Expert's fees and also all disbursements incurred/paid in the client's matter as charged to the Attorney by any persons who have rendered any service in respect of the client's claim out of the proceeds of the claim.

3.2 The expenses will also cover internal disbursements in the Attorney's office including but not limited to telefaxes, photocopying, telephone charges, e-mail, courier services, transport and travelling costs, photographs, banking charges and any other consumable or services reasonably required with respect to the prosecution of the client's claim.

4. As security for disbursements to be incurred or paid by the Attorney in the course of the claim and also in respect of the Attorney's fees, the client irrevocably agrees to the Attorney receiving into his/her trust account all monies recoverable in the claim, and to the Attorney transferring from the Trust Account, sufficient funds to pay the Attorney's fees and all disbursements incurred in the claim.

5. Where the Defendant is liable to pay the client's party and party costs, (those fees and disbursements as set out in the rules of the Court in which the action was instituted), the Attorney will instruct a Cost Consultant at the client's cost, to prepare and tax/settle such costs with the Defendant or the Defendant's Cost Consultant.

6. All costs recovered nett of the Cost Consultant's fee, together with such residue of the capital as might be available after payment of the Attorney's fees and all disbursements as referred to herein, will be payable to the client in full and final settlement.

7. The Attorney will after receipt of the monetary proceeds of the claim and such costs as are applicable, furnish the client with a statement of account reflecting:

7.1 The amount recovered in respect of damages etc;

7.2 The amount of costs recovered from the Defendant;

7.3 The Attorney's percentage fee and the VAT thereon;

7.4 Disbursements individually reflected in respect of all service providers and suppliers in the claim including Advocates and Experts and also a globular amount in respect of nominal sundry disbursements.

8. The client shall be entitled to cancel this agreement within seven (7) days of signing same but will be obliged in that event to pay the Attorney in respect of all work done during such seven (7) days at the rate of RX per hour plus VAT as also to pay all disbursements reasonably incurred by the Attorney.

9. The client shall be entitled at any time during or at the conclusion of the proceedings in question, to address any queries or complaints with respect to the Attorney to the Law Society of the Northern Provinces.

10.

10.1 In the event of the client terminating the Attorney's mandate at any time, or the Attorney withdrawing from the matter after written notice to the client as a consequence of the client rendering it impossible for the Attorney to carry out the mandate, the Attorney will be entitled to payment of fees calculated at the rate of RXX per hour plus VAT in respect of all time spent in the matter together with all disbursements incurred or paid in the conduct of the matter.

10.2 Should the client dispute the Attorney's fee as referred to in 10.1 above, the client shall be entitled on written notice to the Attorney to request that the Attorney draw and tax an attorney and client bill of costs, provided that the client undertakes in such written notice to bear the Cost Consultant's fee in respect of the drawing and taxation of such bill.

SIGNED AT ON THIS THE DAY OF

AS WITNESSES:

1. _____

2. _____ _____

THE ATTORNEY

SIGNED AT ON THIS THE DAY OF

AS WITNESSES:

1. _____

2. _____ _____

THE CLIENT

2.9 a member is entitled to inspect free of charge the scheme's rules at the scheme's registered office and to make extracts therefrom (Section 41(2));

2.10 Section 57(4) of the Act deals with the duties of the trustees of a scheme and includes that they are obliged to ensure that adequate and appropriate information is communicated to its members regarding their rights, benefits, contributions and duties in terms of the scheme's rules (sub-section (d)).

3. In the fastfax dated 1 February 2011 attorneys were cautioned against advising clients to agree to the furnishing of undertakings, or the attorney themselves signing such undertakings on behalf of their clients, in the absence of proof that there is a clear contractual obligation on the members in terms of a written contract of membership entered into at the time the member first joined the scheme that the member is so obliged. Attorneys who practise in this field of law are strongly encouraged to familiarize themselves wit the provisions of the Act, the regulations thereto and the relevant scheme's rules when advising their clients regarding the reimbursements of medical expense amounts recovered from the Road Accident Fund.

S A THOBANE
President

THE LAW SOCIETY
OF THE
NORTHERN PROVINCES

Proclorum Building
123 Paul Kruger Street, Pta, 0002
Docex 50
P.O.Box 1493, Pretoria, 0001
Tel: 012-338-6800
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E-mail: communication@lsnp.org.za

Incorporated as the Law Society of the Transvaal
Ingelyf as die Prokureursorde van Transvaal

Serving Gauteng, Mpumalanga, Limpopo & North West Provinces
Bedien Gauteng, Mpumalanga, Limpopo & Noordwes Provinsies

Proclorumgebou
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E-pos: communication@lsnp.org.za

FASTFAX
MATTERS BEFORE COUNCIL
1 FEBRUARY 2011

URGENT NOTICE TO MEMBERS:

MEDICAL AIDS / ROAD ACCIDENT FUND CLAIMS

1. The Council has become aware of pressure being applied on Claimant Attorneys by Medical Aids and/or Medical Aid Collection Attorneys, to furnish undertakings to the Medical Aids, to reimburse such Medical Aids out of the proceeds of Road Accident Fund claims and where the Medical Aid may have covered certain medical disbursements arising out of the accident.

2.

2.1 Similar or greater pressure is being brought to bear on the Medical Aid Members themselves by Medical Aids and/or their Collection Agents, with threats being made by the Medical Aid/Collection Agents to reverse medical cost disbursements already made on behalf of the member, or to decline further benefits, unless and until the member and the member's Attorney furnish an unqualified undertaking to reimburse the Medical Aid in full any relevant amounts recovered.

2.2 The Council is not aware that the Medical Aids in question tender to bear a pro rata portion of the costs and/or risks involved in the litigation by their members and where such litigation is intended to also benefit the Medical Aid.

3.

3.1 Members are cautioned against advising clients to agree to such undertakings or the Attorneys themselves signing such undertakings on behalf of their client, IN THE ABSENCE OF PROOF THAT THERE IS A CLEAR CONTRACTUAL OBLIGATION ON THE MEDICAL AID MEMBER IN TERMS OF A WRITTEN CONTRACT OF MEMBERSHIP ENTERED INTO AT THE TIME THE MEMBER FIRST JOINED THE MEDICAL AID THAT THE MEDICAL AID MEMBER BE SO OBLIGED.

3.2 Where the Medical Aid alleges that there was a variation to the initial written contract of Medical Aid Insurance, Attorneys should insist on a copy of such variation signed by the member PRIOR to the incident giving rise to a current claim, being provided to the Attorney and verified with the client.

4. An Attorney who advises their client to sign an undertaking in favour of the Medical Aid, or where the Attorney does so on behalf of the client in the absence of clear written proof of the client's obligation to do so, as referred to above, may well find himself/herself being liable to the client for a refund of all amounts paid to the Medical Aid and flowing from the Attorney's negligence in failing to properly protect the client's interests.

5. Members are encouraged to refer details of matters to the Council, where Attorneys acting on behalf of Medical Aids persist in pressurizing Attorneys and/or their clients in seeking to force the client and/or the Attorney to sign undertakings as referred to above, and where such Attorneys have failed and/or refused to provide adequate documentary evidence that the Attorney's client is in fact obliged to sign the undertaking in favour of the Medical Aid in question.

Mr S A Thobane
President

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FASTFAX
MATTERS BEFORE COUNCIL
15 APRIL 2011

MEDICAL AID SCHEMES / ROAD ACCIDENT FUND CLAIMS

1. Attorneys are referred to the fastfax dated 1 February 2011 dealing with medical aid schemes and Road Accident Fund (RAF) claims.

2. The nature of the relationship between a medical aid scheme (a / the scheme) and its members is of importance and the following should also be noted:

   2.1 the relationship between a scheme and its members is not purely contractual in nature, but includes statutory, regulatory and contractual elements with its contractual terms set out in the scheme's rules as amended, approved and registered by the Registrar of Medical Schemes from time to time;

   2.2 the rules of some schemes oblige members, who undergo hospitalization and/or treatment in relation to injuries sustained in motor vehicle accidents and who claim and receive scheme benefits in respect of their medical expense, to claim compensation from the RAF and, if successful, to reimburse the scheme what it is paid to or on behalf of such members. Where the RAF rejects the claim the members bears no obligation to reimburse the scheme;

   2.3 withholding an amount due to a scheme by virtue of its rules may amount to a failure to repay a debt within the meaning of Section 29(2)(b) of the Medical Schemes Act, no, 131 of 1998 (the Act) and may entitle a scheme to reclaim what it has paid to or on behalf of such members and/or to terminate membership;

   2.4 the rules of a scheme must provide for advance written notice to members of any change in contributions, benefits etc, or any other condition affecting their membership (Section 20(1)(i) of the Act).

   2.5 Section 30(2) of the Act provides that a scheme is obliged to provide free of charge to every member, on admission, a detailed summary of the rules;

   2.6 a scheme may amend or rescind its rules or make additional rules and no such amendment, rescission or addition is valid unless it has been approved by the Registrar of Medical Schemes;

   2.7 the rules of a scheme are binding on the scheme, its members, its officers and any person who claims benefits under the rules or whose claim is derived from a person so claiming (Section 32 of the Act);

   2.8 a scheme is in terms of the provisions of Section 41(1) of the Act obliged to deliver to a member on demand and on payment to the scheme of the fee prescribed by the rules, its rules;

.../2

Discovery Health

25.2 Which members of the Society were involved in any way in the meeting(s) / deliberation(s) referred to in paragraph 25.1 above? And which members were involved in formulating and/or settling the LSSA rejection?

26 Should you remain of the view that Discovery is entitled to none of the information called for above, kindly provide us with your considered basis for this view so that we may address it in the PAIA notice / application which will follow.

27 Meanwhile we advise that Discovery is suffering ongoing, mounting harm as a result of the Society's failure to date either to withdraw or to correct the LSSA notice circulated at the start of the month. We confirm that, since the LSSA notice Discovery has recovered less than 25% of its usual recoveries of past medical expenses for a corresponding time period. Discovery knows of no other factor of significance that may account for this drop-off in recoveries and concludes that it is attributable to the LSSA notice. Indeed many firms of attorneys – including Ronald Bobroff & Partners – have in recent weeks relied on the LSSA notice as the basis on which they or their clients are withholding amounts due to the scheme. (In this regard we annex RBP's telefax dated 23 February 2011 addressed to clients who are members of Discovery.) Discovery's rights in regard to losses caused by the LSSA notice are reserved.

28 We look forward to your urgent response.

Yours faithfully,

Jeff Katz
Discovery
Tel no: 011 529 5143
Fax no: 011 539 5144
E-mail: jeffreyk@discovery.co.za

Affidavit

I, the undersigned

Jabu Cixakwa

do hereby make oath and state the following:

1. I am an adult male, identity number
My telephone number is 079 574 9744.

2. I was employed by Attorneys Norman Berger Inc as an agent to tout claims in respect of personal injury victims from various hospitals including the Natalspruit Hospital. I was paid R7000-00 per month by Norman Berger Inc.

3. During the 6(six) years I was employed by Norman Berger I touted about 16-20 clients per week. When I didn't bring clients in Anthony Millar would get angry and fight with me. I was given a car which I used to pick-up and drop off clients. Amongst the clients I touted, some were the following:

Lindiwe Cleopatra Banda obo Thabo Kapako
Siwopu Quawiya
Mazibuko Rajako
Siphiwe Madonsela
Sikhalo Witness Dlamini
Nakana David Phethole
Antonio Mablmber Monteiro

4. The procedure I followed was as follows:
I would be contacted by family member telling me someone they know was in an accident or I would go to the hospital and find the injured person. I would then take the client to the office. The client was never seen by an attorney

I SANELISO MUZI NDEBELE STATES FURTHER UNDER OATH

AFFIDAVIT

I, the undersigned,

NAME: Saneliso Muzi Ndebele

Do hereby make under oath or affirm and state that:

1.

I am an adult, 26 years of age and of full legal capacity.

Identity number: 8505175755081

Employed at: Genlux Lighting Unit 13 Premier Park Premier Street Germiston South

Residing at: Room 56 Block C 2nd floor Denver Men's Hostel Denver.

Contact details: Cell: 076 719 6006

Work: 073 710 9356

Home: 076 719 6006

E Mail: None

The facts herein are within my own personal knowledge and belief, unless otherwise stated or the contrary appears from the contexts, and are to the best of my belief both true and correct.

x M S Ndebele

Khomisani Constance Mabasa states under oath in English as follows:

1

I am a black female 34 years old with ID number 7710190255080. Residing at no 250 Motseki Street Mokoena Section Katlehong. I am currently unemployed. Cell phone number 0739230281.

2

On Monday 13/4/2009 at 08:00AM in Bela Bela I was involved in a vehicle accident. My left arm was severely injured. I received treatment in Bela Bela hospital and was later transferred to Natalspruit Hospital where I stayed for 6 weeks. While I was in hospital a person called Jabu came to my husband Nelson and said to my husband that he must accompany him (Jabu) to the offices of Norman Berger to claim from the road accident fund for me. This occurred when my husband Nelson visited me at hospital.

3

After I was discharged from hospital Jabu came to my residential address at 250 Motseki Street. Jabu took me to the offices of Norman Berger. I was attended to by a black lady speaking Tsonga. I don't know her name but she has the following description: slender build with long hair and neatly dressed in office clothing. No glasses. will recognize her if I see her again. I did not speak to Berger or Millar. While I was at Norman Berger the lady never spoke to me about fees or disbursements or contingency issues. I was at their offices 3 times. On the other occasions different black ladies attended to me. I don't know their names. Sometimes Jabu took me and sometimes 3 black males. I don't know their names. They drove a Hyundai Getz. Blue /green in color. With every visit I signed documents. They did explain the documents to me.

4

I did receive a statement of account. In January or February 2011 I received about R79000. In about March /April 2011 I received another R91000. After that payment I have never received any other money. I fetched these payments as cheques from the offices of Norman Berger. The first time I fetched the first cheque I was told by the receptionist who is also a black lady not to talk to anyone about the money that I received. I have not been contacted by anyone of these agents or employees of Norman Berger in the last 12 months.

5

I request and authorize either SAAPIL and /or The Law Society of the Northern Provinces or anyone instructed by either of them to obtain my complete file from Norman Berger and Partners INC. I do not wish to have any communication with Norman Berger and Partners INC, their employees or agents. I .quest SAAPIL and the Law Society of the Northern Provinces to investigate the manner in which I became their client and the way in which they dealt with me and my claim. I confirm that I make this affidavit out of my own free will and that I have not been threatened or offered any payment in return for doing so. I confirm that I this statement was translated to me in Tsonga by Mr. David Mamosebo.

6

I am familiar with the contents of this declaration. I have no objection to taking the prescribed oath. I see the prescribed oath as binding on my conscience.

24/5/2012
Katlehong
18:00 PM

C. Mabasa.

I certify that I David Mamosebo translated this declaration from the English language to the Tsonga language.

Name: DAVID MAMOSEBO
CELL: 076 836 0 3288
Address: 3727 NTSI'KANE STR
KAGISO

Khomisani Constance Mabasa states under oath in English as follows:

1

I am a black female 34 years old with ID number 7710190255080. Residing at no 250 Motsoki Street Mokoena Section Katlehong. I am currently unemployed. Cell phone number 0739230281.

2

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6

I am familiar with the contents of this declaration. I have no objection to taking the prescribed oath. I see the prescribed oath as binding on my conscience.

C Mabasa

24/5/2012
Katlehong
18:00 PM

I certify that I David Mamosebo translated this declaration from the English language to the Tsonga language.

Name: David mamosebo

CELL: 076 566 82.88

Address: 3727 Ntsi'leane Str
KAGISO

Affidavit

I the undersigned

Mr. Brandlo Maboya,

do hereby make oath as follows:

1. I am an adult male, with ID number 740309 5677 083 and currently unemployed residing at 747 Mangaung Village, Orange Free State, with cell phone number 073 5422 675.

2. I was involved in an accident on or about the 26th of March 2008. I was a passenger in a taxi travelling from Germiston to Natalsprult.

3. I was badly injured in the collision and was transported to the Natalsprult Hospital.

4. I remained under treatment at the Natalsprult Hospital for at least four months.

5. While I was in hospital I was approached in my ward by an African male known to me as Jabu who handed me a business card of a firm of attorneys called Norman Berger and Partners Inc.

6. Jabu told me that he wanted me to be the client Norman Berger and Partners Inc.

7. I enquired of Jabu as to how he knew about me and the accident in which I was involved in and Jabu replied that he was at the scene of the accident and took photos of the accident.

8. I asked Jabu the whereabouts of the photos and Jabu told me they were at the law offices of Norman Berger and Partners Inc.

9. Jabu said I must claim for my injuries sustained for the accident and I advised him this couldn't be done as I was still in hospital.

10. After my discharge form the Natalsprult Hospital Jabu visited me at my home.

11. Jabu advised me that he would come and fetch me the next day as he wanted me to be a client of Norman Berger and Partners Inc. and that monies will be deducted for the transport account of Norman Berger and Partners Inc.

12. Jabu collected me with a white Mazda 323 the next day and took me to the offices of Norman Berger and Partners Inc. in Johannesburg.

13. At the offices of Norman Berger and Partners Inc., Jabu read out documents to me which recorded how the firm of attorneys dealt with claims. I did not sign any documents.

14. I spent most of the day at the offices of Norman Berger.

15. A statement was taken from me by a female employee, a non-European lady and I do not recall her name. I did not sign the statement.

16. Jabu then gave me a lift back home with a Mazda 323..

17. I have travelled with Jabu on a number of occasions to visit doctors in Pretoria and Johannesburg with Jabu's white Mazda 323 accompanied by my cousin, Potlodt Ramoshebi - 072 917 5186

18. I received various letters from Norman Berger and Partners through the post from time to time and will be attached. I also received letters from Dube Attorneys which will be attached.

19. Jabu used to phone me regularly from cell phone number 079 574 9744, to advise me he would pick me up from an address in Natalsprult, 355 Phoko Section, Katlehong, where I used to stay and after visiting the doctors in Pretoria and Johannesburg, he would drop me off once again at the Natalsprult address.

20. On the 4th of March 2011 the matter was settled at trial in terms of the settlement agreement annexed herein, case number 09/50147

21. I knew nothing of attorneys Norman Borger and Partners and was taken there by Jabu directly.

22. I never ever consulted with any of the professionals at Norman Berger's offices and only dealt with Jabu apart from the first occasion when the statement was taken by the female employee.

23. I don't recall ever receiving a statement of account from Norman Berger and Partners in this matter and I am in the dark completely as to the amounts that they were paid.

24. Sometime prior to the trial Jabu advised me that he had had an argument with Norman Berger and Partners and no longer work there and he would arrange to hand my file to Dube Attorneys in Johannesburg who handled the matter at trial. I signed documents at Dube Attorneys.

25. I paid the cheque into my FNB account with account number 62315905605.

26. I received an amount of just over R 400 000.00(four hundred thousand rand) from Dube Attorneys.

27. I still don't know how the accounting was arrived at, how much Norman Berger and Partners received and how much Dube Attorneys was paid in respect of costs.

28. I was not in any way or manner forced to make this statement.

29. I have not received any compensation for making this statement.

30. I am making this statement out of free will.

DEPONENT

SIGNED AND SWORN to before me at GREENSIDE on this the 15TH day of April 2013 by the deponent who states that he knows and understands the contents of this affidavit and who has further acknowledged that:-

a) he has no objection to taking the prescribed oath;
b) he considers the prescribed oath as binding upon her conscience; and
c) he further uttered the words "So Help Me God" in my presence.

SUID AFRIKAANSE POLISIEDIENS
STATION COMMANDER
15 APR 2013
CLIENT SERVICE CENTRE
NORWOOD
SOUTH AFRICAN POLICE SERVICE

7195275 6

COMMISSIONER OF OATHS
M.W MATLUTSE
12 PATERSON ROAD
NORWOOD
WARRANT OFFICER
011 483 4600

I Comme Matshumele with ID number 7301040975084 states under oath in english:

1.

I am an African woman currently residing at 1063 Hanyane street Proven North Soweto Gauteng telephone number: 011 980 5676 I am currently unemployed. Cell number 083 403 8610

2.

Me and my daughter Beyonce Matshumele and Charmaine Matshumele were involved in a motor vehicle accident on 12 May 2007 where I sustained multiple injuries over my body and head.

3.

All three of us went to Lesedi Hospital in Soweto and we were admitted. We didn't use the ambulance because one of the bystanders offered to take us to hospital I don't know this person.

4.

The accident happened on Saturday and the three of us were admitted on Saturday in the hospital. On Monday one of my school friends Odette Matsila came with a male named Jabu and they told me that they are working for the attorneys Norman Berger and partners.

5.

Jabu then offered to help me to claim from the Road accident fund.

→

(6)

Jabu asked for a payslip and a copy of my Id dokument. I didnt have it on me so I gave him my home address.

(7)

After I was discharged and at home Jabu phoned me on the landline and I told him that I was discharged. Jabu then came and fetched my payslip and a copy of my ID document. He then opened a file for me at my house.

(8)

In May 2009. I recieved a letter from Norman Berger and Partners dated 28 April 2009 stating the dates I have to visit the Doctors for Medical examinations for purposes of Medico-legal reports. I also recieved the same letter for my minor child Buhle Beyonce Mtshumeki as per annexure A1 and A2.

(9)

I was then picked up by the driver from Norman Berger and partners namely Norman to take me to the doctors appointments stated in these letters. If Dawn didnt take me Jabu took me to the appointments. The reception phoned me the day before the appointment and reminded me everytime.

(10)

In May 2007 I recieved confirmation of instruction to attend my claim for compensation for the damages I suffered and my minor child resulting from the accident. both letters dated 23 May 2007 acided to this statement as Annexure A3 and annexure A4. I recieved it also in the post.

(11)

In August 2007 I recieved 3 x letters in the post again from Norman Berger and Partners Dated 2 August 2007 stating that Road accident fund has not responded to the claim of my Minor child charmaine Matchumela and my own claim as well as the claim for my minor child Buble Beyonce Matchumele. The three letters recte exactly the same as per Annexure A5 Annexure A6 and Annexure A7

(12)

I was never asked by any body from the Norman Berger and Partners Inc to pay any money upfront. I know my hospital bill was payed by my medical aid but the rest of the doctors appointments I dont know who paid them.

(13)

In June 2008 I recieved a letter from Norman Berger and Partners Inc dated 17 June 2008 stated that our claim is set down

for hearing in the High court Witwatersrand local division on Tuesday 3rd February 2010. as per Annexure A8.

(14)

In November 2009 I recieved another letter in the post dated 22 October 2009 for Medical Examinations for purposes of Medico-legal reports as per Annexure A9.

(15)

In February 2010 I recieved a letter from Norman Berger and Partners Inc dated 29 January 2010. Stating that my instructions for my third party claim with the Road Accident fund were settled for R~~[illegible]~~94 446-00 plus High Court Costs as taxed or agreed. It also confirmed that they settled Charmaines claim with the road accident fund R40467-00 plus Highcourt costs as taxed or agreed as per Annexure A10.

(16)

On Tuesday 23 March 2010 I went to Norman Berger and Partners Inc with my ID document as requested telephonically by the receptionist Cleo.

(17)

On my arrival at the office of Norman Berger and Partners Inc I sat in the reception and Cleo the receptionist she was the only person I saw. She also handed

a cheque over to me for R4 650-41 which I signed for in an affidavit form as per annexure A11 this does not indicate where I signed for the cheque."

(18)

On 30 March 2010 I was contacted by Cleo the receptionist of Norman Berger and Partners Inc telephonically and were told that I must come and collect the second cheque for my claim. I then told her that I will come on the 8th April 2010.

(19)

On 8th April 2010 I went to the Norman Berger and Partners Inc with a taxi and met Cleo in the reception. I asked Cleo why they give me two cheques and I also asked her about the amounts because I wasn't happy about the amounts. Cleo then phoned Mr Berger and told him that I wasn't happy about the cheques and the deductions. I couldn't here Mr Berger's response on this matter. Cleo then just told me that the deductions was for the telephone bills and the transport and they still have to pay the doctors. I then received a cheque of R3 275-00 from Cleo and then recieved a settlement letter

stating all the deductions and there was also an amendment regarding future medical treatment as per Annexure A12.

(20)

I then made a statement right there at the offices of Norman Berger and partners Inc stating my unhappiness of how they handeld the payments. as per Annexure A13 Cleo also stamped the statement with Norman Berger stamp.

(21)

I never had a meeting with Mr Norman Berger or Mr Anthony Millar. during the whole time. The only time I saw them was when I was introduced to them by Cleo when I went to see the doctor somewhere in 2008.

(22)

I was never informed by any member of Norman Berger and partners Inc that there will be any deductions for travelling costs or telephone bills on my claim from the road accident fund

(23)

In May 2011 I received a letter from Norman Berger and partners Inc dated 28 April 2011 for medical examinations for my minor child Bubile Beyonce

(26)

On the 6th December 2011. I went to the Norman Berger and Partners Inc offices and met with Bruce Malabi and he informed me about the trustfund and then Introduced Mrs Geldenhuys to me as the Trustee. Mrs Geldenhuys told me that she is working with Norman Berger and Partners Inc. I then completed the forms regarding the bill for the attorneys and the settlement sum of R2014559-36 with taxation together with Mr. Geldenhuys. as per annexure A16.

(27)

In January 2012 when Buhle Beyonce started school I went telephonically told by Mrs Geldenhuys that I have to fax the proof of the receipt of thungs bought for Buhle Beyonce or if I want to request money for Buhle Beyonce I must also fax a letter to her. I recieve R3600.00 per month for food transport for Buhle.

(28)

In September 2012 I phoned Bernice the secretary of Mrs Geldenhuys and requested for a statement on the accounts. I was then told that they only issue statements after a year and up until today 19 April 2013 I have not recieved any statement for that account.

(29)

I also attach a letter that I received thru the post from Norman Berger and partners Inc. dated 9 May 2012 stating the statutory undertaking terms of section 17(4)a of the road accident fund as per Annexure A17.

(30)

I am giving this statement out of my own freewill and were never offered any compensation whatsoever to make this statement.
I was never forced in any way to make this statement.
I state that this is the truth and nothing but the truth.

(31)

I know and understand the contents of the above statement
I have no objection by taking the prescribed oath.
I find the prescribed oath as binding on my conscious.

SAPS SUIDERKRUISE POLISIEDIENS
STATION COMMANDER
19 APR 2013
CLIENT SERVICE CENTRE

I, Mariam Masala state under oath in English.

I am an adult female with ID Number 530312 0754 088 an currently residing at 11634 Thabana Street, Ext 7B, orange Farm, with cell phone number 071 110 9934.

On 29 November 2007 I was in a motor vehicle accident in Meadowlands, Soweto.

I was in an accident and Mvimo was a witness. The husband of Pinky, with cell phone number 082 632 8035, by the name of Joe – 078 359 7574 informed me about Norman Berger and Partners Incorporated.

I received a call from Norman Berger and Partners Incorporated and they informed me that they will be collecting me at Mvimo's house and to go to their offices at Norman Berger & Partners Incorporated to tell them the story of the accident.

In 20098 I was collected by a driver from Norman Berger & Partners Incorporated at Mviyo's house and went to Norman Berger & Partners Incorporated offices.

Mysalf and Mvuyo went into a boardroom where we found an African female and a white old male sitting at the table. The African female asked me if I want to make a statement regarding the accident. I then replied "yes".

The African female informed me that the injuries are serious and that I will be able to claim R 1000 000.00(one million rand). I told her that I am not worried about the money, but that I need help to be cured from all my injuries that occurred in the accident.

I handed over all medical documentation to the African female. The African female asked me questions regarding the medical documentation and many notes. Mvuyo was then asked questions regarding the accident and a statement was drafted.

I had pictures on my phone that was taken by my son, Kenneth Masala with cell phone number 076 451 2828 and handed them over to the African female that asked me if I have any evidence of eth accident. They extracted the pictures from my phone and then the African female took pictures of my head, arms and my body where I had visible injuries.

The African female then said we must go with the driver of Norman Berger & Partners Incorporated to the police station to sign a document that was not explained to me. Myself and Mvuyo arrived at the police station and the driver of Norman Berger & Partners Incorporated spoke to the police officer and I signed the documents. The police officer never explained to me what the document was that I signed.

The driver from Norman Berger & Partners Incorporated then took us home.

On several occasions I received letters from Norman Berger & Partners Incorporated informing me that I will be collected and taken to Norman Berger & Partners Incorporated offices, doctors and court by the driver of Norman Berger & Partners Incorporated. The letter received to be attached.

I was informed by the African female that no monies will have to be paid by me and that they will pay all the doctors and people involved. I was never informed that I will be paying for transport to

Norman Berger & Partners Incorporated offices, doctors and court and I could have asked my son, Kenneth to take me to these places.

I was contacted by Norman Berger & Partners Incorporated to collect a cheque at their offices.

I went to Norman Berger & Partners Incorporated and received a document dated 25 July 20121 and a cheque in the amount of R 41 862.24(forty one thousand, eight hundred and sixty two rand and twenty four cents). I then took the cheque and paid it into an FNB savings account with number 62 32 222 0196.

I received two letters by post as follows:

1. Dated 11 January 2012 stating: " In the circumstances we are unable to assist you any further."
2. Dated 20 January 2012 stating: " Balance of our costs due by you R 31 125,46(thirty one thousand, one hundred and twenty five rand and forty six cents)."

I know and understand the contents of the abovementioned statement.

I have no objection in taking the prescribed oath.

I find the prescribed oath to be binding to my conscience.

Johannesburg

2013-04-19

14:00

I was not in any way or manner forced to make this statement.

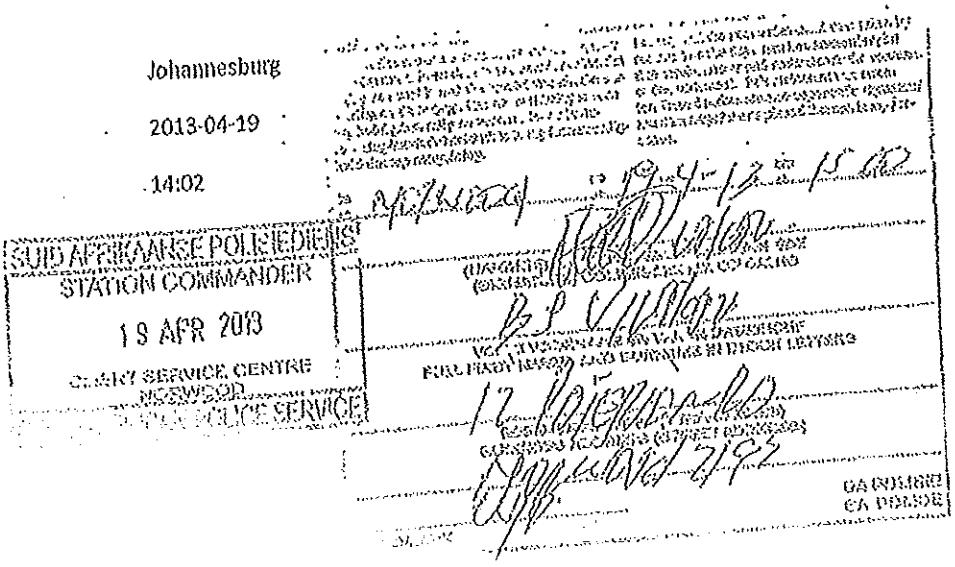
I have not received any compensation for making this statement.

I am making the abovementioned statement out of free will.

Johannesburg

2013-04-19

14:02



Affidavit

I the undersigned

Mrs. Thandi Magaret Ndlovu

do hereby make oath as follows:

1. I am an adult female, with ID number 650510 0848 086. I am and currently unemployed and I reside at 1870 Senoane Soweto. My cell phone number is 076 800 6834.

2. I was involved in a motor accident on or about the 5th of May 2009. I was a passenger in a taxi travelling from Natal to Johannesburg.

3. I was badly injured in the collision and was transported first to the Hospital at Heidelberg, and thereafter to the Natalsprult Hospital.

4. I remained under treatment at the Heidelberg Hospital for approximately one day and was thereafter transferred to the Natalsprult Hospital where I remained under treatment for approximately one month and thereafter I was transported to the Sebokeng Hospital where I underwent an orthopaedic procedure on my hip.

5. While I was at the Natalsprult Hospital I was approached in my ward by an African male known to me as Jabu who advised me that he could help me bring a claim in respect of the injuries suffered by me as a result of my accident as this was what he did. He mentioned to me that he was employed by Norman Berger and Partners Inc, a firm of attorneys in Johannesburg and that he wanted me to be a client of that firm of attorneys.

6. Jabu had no knowledge of either me or the accident that I was involved in but apparently was walking from ward to ward trying to sign up accident victims for this firm of attorneys Norman Berger and Partners Inc . After I had received the orthopaedic procedure at Sebokeng(my treatment lasted there about five days) I returned to Natalsprult Hospital where Jabu once again visited me in a ward.

7. I remained at Natalsprult Hospital on the second occasion; after being transported back to Natalsprult Hospital for approximately three weeks. During that time Jabu communicated with me and took my telephone numbers and contact details.

8. After my discharge from the Natalsprult Hospital I lived with my husband in Jeppe Street in the Johannessburg City Centre.

T M Ndlovu

9. Approximately three weeks after I had moved in to my husband's apartment in the city centre, Jabu communicated with me telephonically and requested to learn whether he could collect me from my husband's flat to take to the offices of Norman Berger and Partners Inc.

10. Approximately a week after the telephone call I was collected from my husband's flat by Jabu and was driven by Jabu to the offices of Norman Berger and Partners Inc in Johannesburg.

11. At the offices of Norman Berger and Partners Inc a female employee, a non-European lady whose name I do not recall took a statement from me as to the circumstences of the accident. I recall signing the statement. I recall signing other documents at the first consultation but do not recall what the documents were. Jabu then gave me a lift back home.

12. I think the statement was taken from me round about September 2009 and I heard nothing from Norman Berger and Partners Inc and telephoned Jabu sometime during January 2010. Jabu then advised me that he no longer works at Norman Berger and Partners Inc. He was therefore not in a position to give me an update on what was happening with my claim. He did however give me the phone numbers of the firm Norman Berger and Partners Inc. to communicate with regard to my claim.

13. I telephoned Norman Berger and Partners Inc and spoke to people whose names I cannot recall who advised that they were not in possession of my phone numbers but that Jabu had my phone numbers and that they could not get hold of me that now needed to make appointments with various doctors to pursue my claim.

14. I do not recall the names of the drivers who collected me to take me to doctors but recall certainly that I visited at least four doctors at the instance of Norman Berger and Partners Inc in their preparation for my trail herein.

15. I was advised by Norman Berger and Partners Inc that this matter would be proceeding to trial but it did not go to trial. I was taken by Norman Berger and Partners Inc for an interview at the Road Accident Fund where I was interviewed by an employee of the fund as to the extent of my injuries and I had to explain my injuries to the fund's employee.

16. The matter was then apparently settled and I was handed a cheque by Norman Berger and Partners Inc in an amount of R 57 148.88(fifty seven thousand, one hundred and forty eight cents and eighty eight cents) which I deposited into my account on or about the 22nd of August 2011. I annex here a statement of account received from Norman Berger and Partners Inc handed to me at the time that I received the said cheque.

17. That was the last of my dealings with Norman Berger and Partners Inc.

T. M ndlen

18. I record that I have not in any way or manner been forced to depose to this affidavit, I have not received any compensation for making this affidavit and such affidavit has been made out of my own free will.

DEPONENT

SIGNED AND SWORN to before me at Johannesburg on this the 24 day of April 2013 by the deponent who states that she knows and understands the contents of this affidavit and who has further acknowledged that:-

a) she has no objection to taking the prescribed oath;

b) she considers the prescribed oath as binding upon her conscience; and

c) she further uttered the words "So Help Me God" in my presence.

SUID AFRIKAANSE POLISIEDIENS
STATION COMMANDER
24 APR 2013
CLIENT SERVICE CENTRE
NORWOOD
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS

(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

BESIGHEIDSADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)

SA POLISIE
SA POLICE

RANK

I, Ntemi Doreen Phalane stated under oath in English.

1

I am an adult African female with ID 6701020713084 and residing at 44 Fluffetail Street, Rabie Ridge with cell phone number 0844036730.

2

On 2009 I was approached by an African male by the name of Jabu, he informed me that he is employed by Norman Berger & Partners Incorporated. I asked Jabu why he is coming to me, whereby he replied that he saw the accident in the papers. He then told me that he went to Rabie Ridge Police Station and obtained all the information there. Jabu then collected me with a sky blue Polo Classic and took me to Norman Berger & Partners offices.

3

We arrived at the offices of Norman Berger & Partners Inc. ~~Associates~~, whereby a white lady collected my marriage certificate, death certificate of my husband and all the children's birth certificates. The lady made copies of the documents and handed back the originals to me. I then returned home without signing any documents. D.Phalane

4

In 2011 I started receiving letters from Norman Berger & Partners Incorporated. They requested me to go to their offices. I met Thembi, ~~[illegible]~~ Darby (a short man with a big button and black hair) and a white lady that is unknown to me. I will be able to point them if I see them again. I signed documents but never received any copies I signed. N.D.P. x

N.D.Phalane

O.P.S. 01/02

5

I RECEIVED SEVERAL DOCUMENTS AS LETTERS OF CORRESPONDENCE I WANT TO COUNT UP TO FIVE TIMES TO ATTEND TO THIS MATTER AND WAS COLLECTED AND TAKEN BACK TO HOME BY NORMANS BERGER & PARTNERS INC. I WAS INFORMED BY THOMBI THAT I WILL NOT BE CHARGED FOR TRANSPORT.

6

I RECEIVED A ENVELOPE SEALED WITH A STATEMENT OF ACCOUNT WITH A CHEQUE INSIDE DATED 30 OCTOBER 2017 WITH THE AMOUNT OF R6625.40 (SIX SIX TWO FIVE FOUR, FOUR ZERO), I WENT TO THE STANDARD BANK MIDRAND BRANCH AND DEPOSITED THE CHEQUE, I ASKED NORMAN BERGER & PARTNERS INC IF THERE ARE ANY OTHER OUTSTANDING MONIES, WHEREBY THE RECEPTIONIST INFORMED ME "NO".

7

ON 05/02/2018 I RECEIVED ANOTHER CHEQUE BROUGHT TO ME BY THE RECEPTIONIST FOR THE AMOUNT OF R20485.62 (TWO ZERO FOUR EIGHT FIVE, SIX TWO), I WENT STRAIGHT TO THE BANK AND DEPOSITED THE CHEQUE, I NEVER SAW JABU SINCE THE FIRST DAY WE MET, WHEREBY HE STATED THAT HE IS A LAWYER. HE OPENED THE BOOT AND SHOWED ME ALL THE NORMAN BERGER & PARTNERS INC. PAPERS,

8

JABU INFORMED ME THAT NORMAN BERGER & PARTNERS INC. WILL ONLY BE TAKING 10 (TEN) PERCENT OF THE AMOUNT THAT WOULD BE WON OR SETTLED IN COURT. JABU INFORMED ME ALSO THAT ALL THE CHILDREN WILL RECEIVE MONEY FROM THE ROAD ACCIDENT FUND.

9

I WAS IN NO WAY OR MANNER FORCED TO SIGN THIS

S.A.P.S. 01/02

STATEMENT.

I HAVE NOT RECEIVED ANY COMPENSATION FOR MAKING THIS STATEMENT,

I'M MAKING THIS STATEMENT OUT OF FREE WILL,

I KNOW AND UNDERSTAND THE CONTENTS OF THE ABOVE MENTIONED STATEMENT.

I HAVE NO OBJECTION IN TAKING THE PRESCRIBED OATH

I FIND THE PRESCRIBED OATH TO BE BINDING TO MY CONSCIENCE.

Rabie Ridge

2013-04-03

x [signature]

Ek verklaar dat ek die inhoud van hierdie verklaring ken en verstaan. Ek het geen beswaar teen die aflê van die voorgeskrewe eed nie. Ek beskou die voorgeskrewe eed as bindend op my gewete. | I certify that the above statement was taken by me and that the deponent has acknowledged that he/she knows and understands the contents of this statement. This statement was sworn to before me and deponent's signature/thumbprint was placed thereon in my presence.

Rabie Ridge 2013-04-03 19:20

(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

1212 ... Street ...

BESIGHEIDSADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)

RANG/RANK

SA POLISIEDIENS
SA POLICE SERVICE

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2013-04-03
RABIE RIDGE
SUID-AFRIKAANSE POLISIEDIENS

Norman Berger & Partners Inc

Attorneys, Notaries, Conveyancers & Administrators of Deceased Estates

84 – 6th Avenue corner Louis Botha Avenue
Highlands North JOHANNESBURG
2192

P O Box 250
Highlands North
2037

Telephone: +27 (11) 786 3096
Telefax: +27 (11) 786 3111

Deeds Office Lodgement No: 9 Johannesburg

e-mail: info@normanberger.co.za
website: www.normanberger.co.za

Registration Number: 2000/011637/21
VAT Number: 4180185295

Our Ref: [redacted]
Your Ref:

Email: [redacted]

[redacted]

[redacted].

OUR CLIENTS, DISCOVERY HEALTH

OUR DISCUSSION WITH YOU
TO ENLIGHTEN YOU ON DISCOVERY'S NEED FOR INFORMATION, THE REASON THEREFORE AND WHAT WE NEED TO INFORM YOU REGARDING ANY POSSIBLE CLAIMS FOR THE INJURY YOU SUSTAINED

IN REGARD TO CLAIMS AGAINST THE ROAD ACCIDENT FUND FOR INJURED PERSONS, WE WORK ON <u>A NO-WIN, NO-FEE BASIS</u> BUT NOT ON A PERCENTAGE BASIS – MORE INFORMATION FOLLOWS BELOW

Dear

DISCOVERY HEALTH MEMBERSHIP NO: [redacted]

MOTOR VEHICLE ACCIDENT (MVA) ON [redacted]

"Introduction and our initial phone call and discussion with you regarding the injuries, our instructions from Discovery Health and our information to you in regard thereto"

AS PER De LA GUERRE MANDATE WHICH IS NOT ITO THE CONTINGENCY FEES ACT

1. [redacted]

2. We advised of our having been referred to you by our client, Discovery Health, your medical aid scheme.

Your information that you were in a motor vehicle accident (MVA) and what we told you in regard thereto

3. [redacted]

4. We indicated that with negligence on the part of another vehicle a claim could be made against the Road Accident Fund (RAF).

5. If you did not in any way contribute to the MVA, then you should be entitled to compensation in full (subject to any capping that may be imposed by law in regard to past or future loss of income). If however you are considered to have contributed to the accident, your recovery may be reduced by what is called an "apportionment of liability", so may be less than 100 %.

Possible meeting to be arranged to discuss the matter further and to inform you more fully

6. [redacted]

7. We mentioned to that we are on the panel of approved attorneys appointed by Discovery Health to deal with MVA matters and to assist both Discovery and its members.

The annexure hereto gives more details as mentioned below

8. The attached annexure gives more details in respect of:

   - the assistance that we offer on a no-win, no-fee basis and the free consultation offered; as well as
   - some basic information regarding claims against RAF.

Summary -- we look forward to hearing from you and in the meantime we will report to Discovery Health on our contact with you

9. [redacted]

10. Should you have any queries in regard to the matter and wish to raise them before arranging any meeting, please do not hesitate to contact our offices (please talk to Ms Leslie Maltman or Mr Berger personally -- they will be happy to clarify matters for you without obligation).

11. We wish you a speedy recovery.

Yours faithfully
Norman Berger & Partners Inc

Per: Mr Berger

(Please note that this letter is being sent electronically and is therefore unsigned)

NORMAN BERGER & PARTNERS INC

Attorneys, Notaries, Conveyancers & Administrators of Deceased Estates; 84-6th Avenue corner Louis Botha Avenue Highlands North JOHANNESBURG Republic of South Africa 2192 - P O Box 250 Highlands North 2037; Tel: 27 11 786-3096 Fax: 27 11 786-3111, email info@normanberger.co.za

THE ASSISTANCE THAT WE OFFER ON A NO-WIN, NO-FEE BASIS AND THE FREE CONSULTATION OFFERED

1. We will assist those who do in fact have a claim against RAF and who choose to use our services to assist in the recovery of damages for the injuries.

   1.1 When we accept instructions to represent an injured claimant, we work on a no-win, no-fee basis, which means there is no charge at all except if the case is successful.

   1.2 For successful claims, RAF would have to pay a portion of our costs and the client the remainder of our costs.

   1.3 Please note that we do not work on a percentage basis and we must stress this because there are some attorneys who claim to work on a percentage basis, but then charge a higher percentage than what they are allowed to by law and

   1.4 In addition, those attorneys fail to account to the clients for what is recovered in costs from RAF and the result is that not only is the excessive percentage taken, but in addition, there is no accounting to clients for the costs recovered which should have been credited to the client.

2. We want to assure you that you will be under no obligation when meeting with us. Please note the following:

   2.1 We offer the consultation at no cost to you.

   2.2 In that consultation we should be able to ascertain sufficient facts to get a prima facie view on whether a claim can or cannot be made.

   2.3 Obviously when some matters are borderline, we would prefer to take steps to get additional information such as police Accident Reports, information from independent witnesses, photographs of the scene, photographs of damaged vehicles, etc, etc to see whether such additional information helps you in any way to make the position clearer.

3. Furthermore after meeting with us you will be under no obligation to use our services.

SOME BASIC INFORMATION REGARDING CLAIMS AGAINST RAF

4. We want to indicate in general terms the following regarding claims against RAF, but stress that at a meeting we could discuss the matter in greater detail.

5. We recommend such a meeting to discuss the matter so we can explain the whole situation and quell any fears or misconceptions you may have regarding claims against RAF and Discovery's rights to recover from third parties, such as RAF, any disbursements Discovery may have made for the treatment of injured persons.

6. Besides representing any member who decides to instruct us in regard to the claim, we will represent Discovery because Discovery is entitled to recover its disbursements from RAF arising out of MVA's (if the negligence of another is not 100 % as already explained above, that percentage less than 100 % that may be finally awarded by a Court will guide what percentage of the medical expenses Discovery can in fact recover).

7. Where an MVA results in personal injuries such as were sustained in the circumstances of the accident referred to above, the following is a brief summary of the situation regarding claims against RAF:

- With negligence, as you indicated above, a claim could be made against RAF;
- RAF is obliged in such circumstances to compensate in the following respects (to the extent of the percentage of the negligence of the negligent person and taking into account any contribution towards negligence that may be apportioned to you (assuming there is any negligence on your part)):
  - Past medical expenses (those disbursed by Discovery would be refunded to Discovery and any that you may have paid yourself will be refunded to you);
  - Future medical expenses in the form of an Undertaking by RAF to cover such future expenses which Undertaking Discovery would administer on your behalf to ensure that any further disbursements they paid in the future for any treatment would be refunded to Discovery;
  - Past loss of earnings arising from the MVA (note that if the injured person was not in employment at time of the accident (eg on account of age), future loss of earnings may still be of relevance because of the affect of the injuries on a claim for future loss of earnings that has to be taken into account during the injured person's life time);
  - Future loss of earnings (note what has already been set out above in regard to past and future loss of earnings);
  - Pain and suffering which has a limitation to serious injuries only;

(1) DECLARE CONFLICT OF INTEREST
(2) NO MENTION OF COMMISSION/ % CONTINGENCY FEE ON THIS REPAYMENT

Discovery Health

25.2 Which members of the Society were involved in any way in the meeting(s) / deliberation(s) referred to in paragraph 25.1 above? And which members were involved in formulating and/or settling the LSSA rejection?

26 Should you remain of the view that Discovery is entitled to none of the information called for above, kindly provide us with your considered basis for this view so that we may address it in the PAIA notice / application which will follow.

27 Meanwhile we advise that Discovery is suffering ongoing, mounting harm as a result of the Society's failure to date either to withdraw or to correct the LSSA notice circulated at the start of the month. We confirm that, since the LSSA notice Discovery has recovered less than 25% of its usual recoveries of past medical expenses for a corresponding time period. Discovery knows of no other factor of significance that may account for this drop-off in recoveries and concludes that it is attributable to the LSSA notice. Indeed many firms of attorneys – including Ronald Bobroff & Partners – have in recent weeks relied on the LSSA notice as the basis on which they or their clients are withholding amounts due to the scheme. (In this regard we annex RBP's telefax dated 23 February 2011 addressed to clients who are members of Discovery.) Discovery's rights in regard to losses caused by the LSSA notice are reserved.

28 We look forward to your urgent response.

Yours faithfully,

Jeff Katz
Discovery
Tel no: 011 529 5143
Fax no: 011 539 5144
E-mail: jeffreyk@discovery.co.za

Discovery
Health Medical Scheme

Discovery Health has appointed the following attorneys as our preferred providers:

Johannesburg, Sandton	Munro Flowers Vermaak	Tel: 011 327 5418
Johannesburg	Israel Goldberg Attorneys	Tel: 011 485 4242
Johannesburg	Hirschowitz Flionis Attorneys	Tel: 011 880 3300
Johannesburg	Norman Berger & Partners INC	Tel: 011 786 3096
Gauteng, East Rand	Clive Unsworth Attorneys	Tel: 011 618 2209
Gauteng, West Rand	Podbielski Mhlambi Attorneys	Tel: 018 786 2919
Gauteng, Randburg	Levin van Zyl Inc Attorneys	Tel: 011 886 0915
Gauteng, Randburg	A Wolmarans Inc Attorneys	Tel: 011 781 6050
Pretoria, Limpopo Province and Mpumalanga	Riette Oosthuizen Attorneys	Tel: 012 460 6359
	Wilsenach van Wyk Attorneys	Tel: 012 348 8859
	Gert Nel Inc Attorneys	Tel: 012 333 8290
Cape Town and Western Cape	Sohn Wood Attorneys	Tel: 021 424 2638
	De Vries, Shields Chiat Attorneys	Tel: 086 1465879
	Smith Tabata Buchanan Boyes Attorneys	Tel: 021 406 9233
Knysna, George and Plettenberg Bay	Mosdell Pama & Cox Attorneys	Tel: 044 382 5333
Durban, Pietermaritzburg and KwaZulu Natal	Thorrington Smith & Silver	Tel: 031 307 5171
	Friedman & Associates	Tel: 031 304 6045/6/7
	Berkowitz Cohen Wartski	Tel: 031 314 9300
Bloemfontein and Free State	Naudes Attorneys	Tel: 051 400 4000
Port Elizabeth, East London and Eastern Cape	Eugene Raymond Attorneys	Tel: 041 487 2664
	Struwig Hattingh Attorneys	Tel: 041 364 2624
	Jock Walter Attorneys	Tel: 041 363 5501

Contact us

If you need more information about claiming from the Road Accident Fund, please contact Charmain le Grange on 011 529 5097.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No. 025/2012
Reportable

In the matter between:

ELIZABETH CATHERINA STEYN NO **Appellant**

and

RONALD BOBROFF & PARTNERS **Respondent**

Neutral citation: *Steyn v Ronald Bobroff & Partners* (025/12) [2012] ZASCA 184 (29 November 2012)

Coram: BRAND, BOSIELO AND SHONGWE JJA AND SOUTHWOOD AND SALDULKER AJJA

Heard: 8 November 2012

Delivered: 29 November 2012

Summary: **Attorney – duty of an attorney to client – breach of mandate – claim for damages for loss of interest on the amount of damages awarded to the appellant's minor son in consequence of a delay in prosecuting and finalising the claim against the Road Accident Fund (RAF) – whether the respondents acted in breach of the written mandates – whether a delay of 14½ months in finalising the claim falls short of the standard of diligence, care and skill which can reasonably be expected of a practising attorney – whether the appellant can legitimately claim mora interest as damages when the respondents did not owe her any debt.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Tsoka J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (BRAND AND SHONGWE JJA AND SOUTHWOOD AND SALDULKER AJJA CONCURRING):

[1] This appeal raises the contentious question of the duties and obligations of an attorney to his/her client and the circumstances under which an attorney can be held liable for want of the requisite care, skill and diligence which he/she is expected to exercise in handling the affairs of his/her client.

[2] In order to appreciate and understand the crucial role which a present day attorney plays in many people's affairs, I deem it necessary to give a brief evolution of the profession of an attorney over the years. In his book, *The Judicial Practice of South Africa,* (4 ed) vol 1, at p 31 G B Van Zyl said the following about the profession

of an attorney:

'In ancient days the profession of an attorney was considered as "*infamissima vilitas*," servile, of no value, and contemptible. But under the Roman Emperors Diocletian and Maximilian it became an office of respect and good repute. Many people still think at the present day as the ancients did before the period of these Emperors. Even Lord Macaulay, the learned historian, who in all his professional career held only one brief, for which he received a guinea, could not refrain from remarking: "That *pest* whom mortals call attorneys." But the present consensus of opinion, all the civilised world over, is that the profession of an attorney is an honourable and respectable one, and to be held in the utmost esteem. An attorney is nowadays an indispensable adjunct to everyone, not only in lawsuits but in many other private affairs, and his office is deemed both necessary and praiseworthy. It is essential, therefore, that the relationship between him and the public should be better known; as also what is expected of him and what his obligations are.'

[3] Many years ago and whilst grappling with the liability of an attorney who failed to give sufficient care and attention to the affairs of his/her client, De Villiers CJ said the following in *Van der Spuy v Pillans* 1875 Buch 133 at p 135:

'I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where this is proved the Court will give damages against him.'

See also *Armitage Trustees v Allison* 1911 NDP 88. The attorney's profession having become more diverse and sophisticated, these wise words are, to my mind, more apt today than they were during the time of De Villiers CJ. Indubitably, this is the yardstick against which the respondent's conduct in this case has to be adjudged.

[4] This matter is on appeal before us from the South Gauteng High Court (Tsoka J) with the leave of this court. To a large extent, the facts of this case are

relatively simple and undisputed. Furthermore, the points of law raised herein are short and crisp. They are: whether in its preparation, formulation, collation, submission and eventual prosecution of the claim of the appellant's minor son (Micah), the respondent (a firm of attorneys) failed to act in accordance with the reasonable diligence, care and skill expected of a practising attorney or, as the appellant contended, as 'pre-eminent specialists' in the field of personal injury claims. And if not, whether the respondent can be held liable for the consequential damages suffered by the appellant, being the amount representing the interest which the appellant lost on the capital amount paid by the Road Accident Fund (the Fund) 14½ months late. Simply put, is it competent for the appellant to claim mora interest as damages in a matter where the respondent is not her debtor.

[5] The salient facts underpinning this case can be succinctly set out as follows: On 17 March 2006, the appellant instructed the respondent to institute a third party claim against the Fund on behalf of Micah for damages resulting from injuries sustained in a motor vehicle accident which occurred on 28 August 2005. It is common cause that Micah had sustained a fractured skull. The appellant and respondent had entered into three written agreements which in essence gave the respondent the mandate to investigate, process, lodge and prosecute the claim to finality. These written agreements contain the essential terms and the fee arrangements agreed upon between the parties. Pursuant to the mandate, the respondent lodged the claim with the Fund on 27 February 2007. When the Fund failed to respond to the claim, the respondent issued and served summons against the Fund on 12 December 2007. On 16 May 2008 and after the pleadings had closed, the respondents applied for a trial date. Subsequently, the matter was enrolled for trial on 1 February 2010. The trial date was allocated some months after it was applied for.

[6] The appellant testified that some time in 2008 or 2009 (she was not certain of the date) she met Mr Bezuidenhout of the respondent's firm who advised her that the case had been enrolled for trial on 1 February 2010. It is common cause that some time in October 2009 and after the respondent had notified the appellant about the trial date, she terminated the respondent's mandate and took her file to another firm of attorneys, Norman Berger & Partners Inc. She never gave the respondents any reason for the termination of its mandate.

[7] The trial was held from 1-5 February 2010 and judgment delivered in her favour on 11 February 2010. Insofar as it is relevant to this appeal, the Fund was ordered to pay the appellant R500 000 in respect of Micah's general damages and R2 060 099 in respect of his future loss of earnings.

[8] On 16 February 2010, a mere five days after the judgment referred to above, the appellant issued summons against the respondent wherein she claimed R479 485.20, representing damages she suffered as a result of the interest which she allegedly lost and which could have accrued on the capital sum of R2 560 099 if the respondent had lodged her claim timeously, ie 14½ months earlier.

[9] In order to understand the appellant's claim, it is important to have recourse to her particulars of claim. Essentially, the appellant alleges that she instructed the respondent on the strength of the fact that it had advertised itself widely, and publicly held itself out to be a firm of specialist personal injury attorneys. The appellant avers further that it was an express, alternatively implied, term of the agreements between

the parties that the respondent would carry out its mandate with due skill, care, diligence and professionalism expected of a specialist firm of attorneys who held themselves out to be pre-eminent experts and specialists in the field of personal injury claims and third party matters. Importantly, the appellant alleged that, in accepting the mandate, the respondents tacitly undertook to prepare, formulate, collate, submit and prosecute her claim against the RAF with due diligence and expedience and within a reasonable time.

[10] The essential facts which are alleged to constitute negligence and breach of duty on the part of the respondent are set out as follows in the appellant's particulars of claim:

'12 In breach of the written agreements aforesaid, Annexures "B1", "B2" and "B3", and the duty of care owed by the Defendant to the Plaintiff in her capacity aforesaid, the Defendant negligently and wrongfully failed and/or neglected properly to timeously prepare, formulate, collate, submit, institute and prosecute the Plaintiff's claim to recover damages in that it:-

12.1 failed to deliver the claim to the Road Accident Fund on or before 30 July 2006 when the Defendant could and should have done so;

12.2 delivered the claim to Defendant on 27 February 2007, some 7 months after it could and should have done so;

12.3 failed to issue and serve the Summons within a reasonable time after the expiry of the 120 day period referred to in Section 24(6) of the Road Accident Fund Act 56 of 1996 which would have expired on 28 June 2007 and that Summons accordingly could have been served on the Road Accident Fund at any time after 29 June 2007;

12.4 only issued and served Summons on 12 December 2007, some 5½ months after it could and should have done so;

12.5 failed to have any regard to the fact that after the Road Accident Fund's Notice of Intention to Defend was served on 11 January 2008 and that its Plea was due for service on or before Friday 8 February 2008;

12.6 failed to deliver a Notice of Bar in terms of Rule 26 of the Rules of this Honourable Court

when it could and should have done so on 11 February 2008;

12.7 failed to have regard to the fact that had it served the Notice of Bar aforesaid the pleadings would have closed alternatively the Defendant's Plea would have received by no later than Monday 18 February 2008 and the Plaintiff's Plea to the Defendant's Counterclaims delivered by Monday 17 March 2008 at which time the pleadings in the action would have closed;

12.8 failed to deliver the Notice of Bar aforesaid until 2 April 2008 with the result that the Road Accident Fund's Plea was only served on 11 April 2008;

12.9 only delivered the Plea to the Road Accident Fund's Counterclaims on 7 May 2008 at which time the Pleadings closed;

12.10 only applied for a trial date on 16 May 2008 when it could and should have applied for a trial date on 17 March 2008, some two months later that it could and should have done so had it not been negligently dilatory as set out above;

12.11 omitted

13. It was foreseeable alternatively ought to have been foreseen by the Defendant that the failure to timeously:-

13.1 deliver the Plaintiff's claim;

13.2 issue Summons;

13.3 ensure the close of pleadings;

would result in the Plaintiff suffering damages in her representative capacity.'

[11] Before I can deal with the merits of this appeal, it is imperative to decide first, whether the claim herein is based on delict or contract. Mr Ancer argued without conviction that this claim was delictual. His main premise seems to be that it is because the respondent held itself out to be a firm of pre-eminent expert personal injuries attorneys and further that by failing to lodge the claim expeditiously, the respondent was in breach of that duty. He was however at great pains to explain how this claim could be said to be delictual whilst the appellant relied on a breach of a duty arising out of the three written agreements she had signed with the respondent. When confronted with this intractable difficulty, he conceded, rather reluctantly, that the

pleadings herein were not felicitously drawn.

[12] I agree with Mr Ancer that plaintiff's particulars of claim are not a model of clarity. The seeds of Mr Ancer's confusion lie in para [12] quoted in full in para [10] above. It is plainly incongruous for the appellant to allege a breach of the written agreements aforesaid, Annexures 'B1' 'B2' and 'B3' as the basis of her claims (which is clearly contractual) and in the same breadth rely on an alleged breach 'of the duty of care owed by defendant to Plaintiff' which is plainly a delictual claim.

[13] What is clear from the pleadings however, is that the appellant relied on the three written agreements she had entered into with the respondent. Evidently, these are the three agreements which regulated the relationship between the appellant and the respondent. It follows ineluctably that the appellant's case is contractual and not delictual. Dealing with a similar problem in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), the Grosskopf AJA stated the following at p 499D-E.

'...In the present case we do not have an infringement of any of the respondent's rights of property or person. The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed.'

[14] Having had to determine whether the Acquilian action could be comfortably accommodated in a purely contractual setting like in this case, Grosskopff AJA concluded in *Lillicrap* at p 501G-H that he considered that policy considerations

militated strongly against delictual liability being imposed for the negligent breach of a contract. The learned judge enunciated the principle lucidly as follows at 499A-501H.

'In applying the test of reasonableness to the facts of the present case, the first consideration to be borne mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services.

The learned judge continued at 499D-F to emphasize that: the only infringement of which the respondent complains is the infringement of the appellant's duty to perform specific professional work with due diligence; and the damages which the respondent claims, are these which would place it in the position it would have occupied if the contract had been properly performed.'

Based on the fact that the appellant's main contention is that the respondent, being a firm of attorneys, failed to execute the necessary diligence, skill and care required of a reasonable attorney as contemplated in their written agreements, I find as Grosskopf AJA did in *Lillicrap* that this case has to be resolved on the principles of contract and not of delict. I find further support for this conclusion from *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) where Cloete JA dealing with this legal conundrum said at para [6]:

[15] Based on the fact that the appellant's main contention is that the respondent, a firm of attorneys, failed to execute their mandate with the necessary diligence, skill and care required of a reasonable attorney as contemplated in their written agreements, I find, as Grosskopff AJA did in Lillicrap that this case has to be resolved on the principles of contract and not delict. See also *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at para [6].

[16] I now revert to the salient facts of this case. In her evidence, the appellant

emphasized the fact that she had advised the respondent through its candidate attorney, one Ms Jacqueline Boucher (Boucher) that Micah required urgent medical attention because of his condition and as a result she needed this case to be finalized quickly. Importantly the appellant conceded that Boucher had advised her that such matters do take some time to finalize.

[17] I interpose to state that the appellant was the only witness who testified during the trial. The respondent closed its case without presenting evidence. It is clear from the appellant's evidence that at all material times during the processing of this claim, she was uncertain of the nature, extent and possible sequelae of the head injury suffered by Micah. However, what is clear from her evidence is that she was at all times seriously worried about what would happen to Micah. An EEG examination had revealed some abnormalities. Furthermore, during an MRI scan on 12 June 2006, it was discovered that Micah had a tumor in the brain. During a subsequent visit to Dr Anderson, he advised her after consultation with one Dr Omar, Head of Neurology, that Micah needed an urgent operation. This operation was done on 28 June 2006. Initially there was some doubt and fear whether the tumour was linked to the head injury until one Dr Louw opined that he could not link the tumour to the head injury.

[18] Importantly, the appellant testified that as Micah had never manifested these symptoms in the past, she was confused and required a second medical opinion to allay her fears. This is understandable. This second opinion was given later by Dr Marus. Sometime in September 2009, she met Bezuidenhout of the respondent who advised her that the case had already been enrolled for trial and further that they might get about R2 million as damages.

[19] In October 2009, the appellant cancelled her mandate to the respondent and instructed her present attorneys. Asked why she did so, she explained that she was aggrieved by the fact that, instead of taking Micah to various doctors for further medical examination and reports, the respondent expected her to do that. She found this to be cumbersome and unacceptable. It is clear cause that the appellant never complained to the respondent of any delays regarding the preparation, submission and prosecution of this claim. Neither did she write any letter to the respondent to register her dissatisfaction in this regard. Even at the crucial time when Bezuidenhout advised her that the case had been enrolled for trial, she never voiced any complaint regarding the alleged delays.

[20] The primary issue to be decided in this appeal is, whether, given the circumstances of this case, it can be said that the respondent's conduct by delaying the finalization of this claim by 14½ months (the delay is not disputed) amounted to a failure to measure up to the conduct expected of a reasonable attorney acting with due care, skill and diligence.

[21] Mr Ancer for the appellant, argued forcefully that the respondent's conduct must be measured not against that of an ordinary reasonable attorney but that of a 'pre-eminent specialist personal injury attorney'. This argument was premised on the fact, which was common cause, that the respondent had widely advertised themselves as 'specialists in major personal injury law'. The logical conclusion is that it should be held to the standard which it professed to possess. It was contended further that a pre-eminent specialist personal injury attorney would have appreciated that the appellant required this claim to be finalized without any undue delay and further that any undue

delay would cause her financial loss in the form of interest which she could earn on the money if the claim was finalized timeously and the money received was invested.

[22] The other issue closely allied to the above, was the correct quantification of the appellant's damages. Mr Ancer submitted that the appellant was entitled to claim interest at 15,5% over a period of 14½ months on the capital amount of R2 560 099. This is alleged to be interest which she could have earned if the claim had been lodged timeously and the money invested. The 14½ months period represent the period during which the claim should have been lodged and finalized (this was not disputed). He contended that the interest rate of 15,5% was based on the interest rate prescribed by the Minister of Justice in terms of the Prescribed Rate of Interest Act 55 of 1995. In consequence no evidence was adduced to prove this.

[23] On the other hand, Mr Stockwell for the respondent submitted that the appellant is bound by the written mandates she entered into with the respondent. He submitted that there is nothing in the three written mandates to the effect that the respondent had agreed or undertaken to execute the mandate as 'pre-eminent specialist personal injury attorneys'. He contended that as the respondent had accepted the mandate as a firm of ordinary reasonable attorneys, its conduct had to be measured against that of an ordinary reasonable attorney. He contended further that, in order to determine if the respondent failed to live up to the standard of a reasonable attorney, it was imperative that evidence of an expert in third party claims should have been adduced to explain to the court how a reasonable attorney, faced with the same facts as in this case, would have dealt with this claim. Absent such evidence, he contended that the court had nothing against which to measure the respondent's conduct. Mr Stockwell submitted

further that a determination of such a tricky question would depend on the facts of the case, the nature of the injuries, their sequelae and the complexity of the case, all of which was, admittedly, never put before the court below.

[24] Regarding the quantum, Mr Stockwell contended that as the respondent did not owe the appellant any money, there was no underlying debt and therefore the appellant was in law not entitled to claim mora interest at the prescribed rate. He submitted further that it was incumbent upon the appellant to adduce evidence of what she would have done with the money, in other words, whether she would have invested it and, crucially, what interest she would have earned on such investment. He concluded by contending that the mere fact that there was some delay (which was not disputed) does not, without more, mean that the appellant suffered any financial loss. He submitted that on the contrary, the delay might have resulted in the amount ultimately awarded to the appellant having appreciated in the interim.

[25] The question that we need to answer therefore is whether by lodging the claim 14½ months late, the respondent breached the tacit terms of its written agreements with the appellant. Otherwise stated, the question is whether in so failing to comply, the respondent failed to act with the necessary care, skill and diligence expected of an ordinary reasonable attorney.

[26] What is clear from the above is that due to his injury to the head, Micah underwent numerous medical tests to determine the nature and extent as well as the sequalae of his injuries. No evidence was led regarding the amount of time which was

spent in attending to the various doctors, the time it took to secure the appointments and how long it took for the respondent to receive the medical reports from the various doctors. It is clear from the appellant's evidence that this was a sensitive and complicated case which required patience and care for it to be handled properly. It could not be rushed as it was important that the true nature, extent and sequelae of Micah's injuries be accurately assessed. Manifestly, such an assessment was necessary for the accurate quantification of Micah's damages.

[27] The answer to the two critical questions posed above lies paradoxically in another question, namely, how does one determine how a reasonable attorney would have acted in similar circumstances. It is unfortunate that there is a paucity of evidence regarding the nature and extent of the injuries sustained by Micah, their impact and sequelae and, importantly, whether Micah still required further medical treatment and if so, what kind of medical treatment and what its duration would be. All that one could glean from the record is that Micah had suffered a fractured skull. Importantly, the first EEG test revealed some abnormalities whilst the CT scan showed calcification of the back of his spine. The appellant feared that Micah might develop epilepsy. To compound her anxiety a tumor was discovered on his brain during an MRI scan. She was later advised by Dr Anderson, after discussion with Dr Omar that Micah needed an urgent operation. In the midst of all these, Dr Louw gave her a report that he did not think that the tumour in Micah's brain was caused by the accident. Understandably, as a result of all these developments, she was confused and required a second opinion. To my mind, all this is eloquent testimony that this case was not one of the run-of-the-mill cases. It was complex and required due and proper care and attention by a conscientious attorney. Importantly, the appellant was alive to this and as a result she was even amenable to a postponement of the trial. I am driven to

conclude that her belated complaint of the alleged delay was contrived and ill-conceived. Given the above scenario, I am unable to find that a delay of 14½ months was unreasonable.

[28] In the absence of clear evidence to prove what a reasonable attorney in the position of the respondent, faced with a similar case under similar circumstances, would have done, I am unable to conclude that the respondent failed to act with the necessary care, skill and diligence which would ordinarily be expected from a reasonable attorney. It is axiomatic that the conduct of a reasonable attorney concerning a case that he/she handles will primarily be determined, amongst others, by the facts and circumstances of the case, the investigations which had to be done, the nature and extent of the injuries suffered and the complexity of the matter. It would in my view be unwise to attempt to determine the conduct of a reasonable attorney in vacuo. As Van Zyl eloquently stated in his work, The Judicial Practice of South Africa (above) at p 46, '...the degree of negligence or want of prudence, or useless work, must depend upon the nature of each case.'

[29] In any event, none of the three written mandates concluded and signed by the parties stipulated any specific time frames within which the respondent was expected to finalize this claim. The appellant never testified that there were any such specific time limits. All she could say and did state is that she had impressed it on Boucher, the candidate attorney that she would like this matter to be finalized as soon as possible. In the same vein she had been forewarned by Boucher that such matters take time. Regrettably, she never explained what she meant by the expressions 'as soon as possible' or 'within a reasonable time'. Suffice to state that the phrases 'as soon as

possible' or 'within or reasonable time' are nebulous and relative and can only be determined in relation to the facts and exigencies of the case as well as its complexity. On the facts of this case, I am unable to find that the respondent failed to act within a reasonable time, or for that matter with due diligence, care and skill as an ordinary reasonable attorney would have acted.

[30] To encapsulate:

(a) The appellant set out to prove that the respondent had failed to execute its mandate with the skill, diligence and care required from a reasonable attorney.

(b) The only evidence proffered was, however, that of the appellant herself who did not practice nor was she qualified as an attorney.

(c) Shorn of unnecessary detail, her evidence established two things. First, that her claim against the Road Accident Fund could notionally have been brought before the court much earlier and, secondly, she wanted her claim to be finalized as a matter of urgency.

(d) In argument counsel for the appellant contended that in the circumstances the delays were so unreasonable that it justified the inference of negligence on the part of the respondent. Or, in legal parlance, *res ipsa loquitur,* which literally means that the facts spoke for themselves.

(e) But having regard to the authorities, this is clearly not a case of *res ipsa loquitur.* That expression only comes into play if the accident or occurrence would ordinarily not have happened unless there had been negligence, the court is not entitled to infer that *res ipsa loquitur* (see eg *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) para 41). As I see it, the mere fact that the respondent did not bring

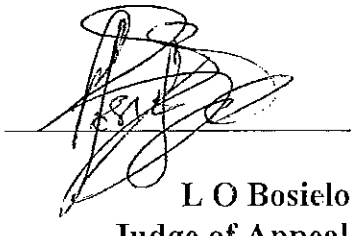
the matter before court in the shortest possible time-frame does not necessarily justify the inference of negligence. Even on the assumption that the appellant took a long time which could, on the face of it, conceivably be described as unreasonable, the enquiry whether this constituted lack of skill, diligence and care on the part of the respondent would, in my view, still raise the question: what were the circumstances? Logic dictates that once that question is raised *res ipsa loquitur* cannot apply.

(f) It follows that the appellant could only establish her case through the expert testimony of a practicing attorney that, in the prevailing circumstances, a reasonable attorney would have brought the matter to court earlier, and if so, how much sooner.

(g) It is true, as the appellant contended in argument, that the respondent led no evidence to explain the delay in bringing the matter to court. But the onus remained on the appellant. Unless and until she established a prima facie case of negligence, which she did not, the respondent was under no duty to give any explanation.

[31] Based on the above exposition, I am of the view that the appellant failed to make out a case entitling her to the relief sought.

[32] In the result the appeal is dismissed with costs.



L O Bosielo
Judge of Appeal

BRAND JA (BOSIELO, SHONGWE JJA, SOUTHWOOD AND SALDULKER AJJA CONCURRING IN THE JUDGMENT OF BRAND JA)

[33] I have read the judgment of my brother Bosielo JA in this matter and I agree with his reasoning as well as his conclusion that the appeal cannot succeed. Yet I thought that perhaps I should say something about the quantification of the damages claimed by the appellant because it appears to proceed from a premise which is fundamentally flawed. Unless attention is called to this fundamental flaw, it may perpetuate and snare future litigants in the same trap.

[34] The appellant led no evidence that, if she had received the award of R2 560 099 fourteen and a half months earlier she would have earned any particular rate of interest or, indeed, that she would have invested the money at all. She simply quantified her claim on the basis of the award times 15,5 per cent per annum divided by twelve months times the fourteen and a half months. In argument counsel for the appellant confirmed the suspicion that the 15,5 per cent was the rate prescribed by the Minister of Justice in the *Government Gazette* of 1 October 1993 in terms of the Prescribed Rate of Interest Act 55 of 1975. For the proposition that the appellant could legitimately calculate the damages sustained by her minor son in this way, she sought to rely on the following statements in *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145D-H:

'It may be accepted that the award of interest to a creditor, where his debtor is *in mora* in regard to the payment of a monetary obligation under a contract, is, in the absence of a contractual obligation to pay interest, based upon the principle that the creditor is entitled to be compensated for the loss or damage that he has suffered as a result of not receiving his money on due date . . .. This loss is assessed on the basis of allowing interest on the capital sum owing over the period of *mora* . . .. Admittedly, it is pointed out by Steyn, *Mora Debitoris*, p. 86, that there were differences of opinion

among the writers on Roman-Dutch law on the question as to whether *mora* interest was lucrative, punitive or compensatory; and that, since interest is payable without the creditor having to prove that he has suffered loss and even where the debtor can show that the creditor would not have used the capital sum owing, this question has not lost its significance. Nevertheless, as emphasized by CENTLIVRES, C.J., in *Linton* v. *Corser*, 1952 (3) S.A. 685 (A.D.) at p. 695, interest is today the "life-blood of finance" and under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.'

[35] In the circumstances contemplated in *Bellairs*, where the claimant is entitled to *mora* interest at the rate prescribed by the Act, our courts accept that interest constitutes a form of damages. But they do not require a claimant to prove that damages were actually sustained. They act on the assumption that, had the payment been made, the capital sum would have been productively employed by the claimant during the period of *mora* and that the *mora* interest consequently represents the damages flowing naturally from the default (see eg *Bellairs* 1146H-1147A; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) paras 82-83). What is more, liability for *mora* interest is not dependent on fault. The claimant is therefore not required to prove that the delay in payment was due to the negligence of the debtor. All that the claimant need prove is that payment was not made on due date (see eg *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) paras 15-17).

[36] But I believe that reliance on *Bellairs* in the circumstances of this case demonstrates a fundamental misconception. *Bellairs* deals with *mora* interest. So does the Prescribed Rate of Interest Act. The term *mora* simply means delay or default. The

mora interest provided for in the Act is thus intended to place the creditor, who has not received due payment of a monetary debt on due date, in the position he or she would have occupied had due payment been made. Thus understood the *mora* interest contemplated in *Bellairs* and in the Act is what the Roman Dutch authorities described as 'belangende het gene aan de principale saak toevallig is' which was translated in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 177, with reference to these authorities as 'ancillary or accessory to the principal obligation'.

[37] This is to be contrasted with a case such as the present where the interest is not ancillary or accessory to any principal monetary debt, but is used as a component in the calculation of damages for alleged breach of mandate. Differences between the two situations are explained thus by Fagan JA in *Union Government v Jackson* 1956 (2) SA 398 (A) at 411C-H:

'In considering this question of taking into account the time that may elapse between the date when a man is deprived of an asset and that of his being reimbursed by receiving compensation for it, we must be careful to distinguish between two different approaches that call different legal principles into play and may therefore diverge greatly in their application to particular circumstances. The one approach is to treat this lapse of time as merely an element – one of many items – which the Court may be urged to bring into its reckoning in computing or estimating the damage which a plaintiff has suffered and for which he should be recompensed. . . .

The other approach is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation . . . automatically attaching to some principal obligation by operation of law. The best illustration of this type is the liability for interest *a tempore morae* falling on a debtor who fails to pay the sum owing by him on the due date. Here the Court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest-bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation: the legal rate of interest on a definite sum from a definite date until date of payment.'

[38] The same differences between the two situations can be illustrated with reference to *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga* [2012] ZASCA 128. What the appellant, Crookes Brothers, claimed was *mora* interest at the prescribed rate of 15,5 per cent on the purchase price of land which was not paid on the date agreed upon in the deed of sale, but only some months later. The court of first instance dismissed the claim, essentially, on the basis that the claimant enjoyed the benefit of remaining in occupation of the land during the period of its debtor's default. On appeal this court, however, referred to the distinction between *mora* interest, on the one hand, and interest as a component in the calculation of damages, on the other, which was underscored by Fagan JA in *Jackson*. With reference to this distinction, this court then held that the claim in *Crookes Brothers* fell within the first category of *mora* interest. In this light, so it was held, the claimant was entitled to *mora* interest calculated at the prescribed rate in terms of the Act; that it was not required to prove any actual damages; and that, in that event, the fact that the claimant enjoyed the benefit of possessing the land during the period of *mora* was of no consequence.

[39] By contrast, it is clear to me that in this matter interest was not claimed as an accessory or an ancillary obligation to a principal debt. The Road Accident Fund was the appellant's debtor for the amount of the award. The respondent was not. There was therefore no principal debt owing by the respondent. The rate of interest prescribed under the Prescribed Rate of Interest Act therefore simply did not apply. In consequence I agree with the respondent's argument that, absent any evidence that had the appellant received the amount of the award fourteen and a half months earlier, it would have been invested at a certain rate of return, the appellant had failed to establish a quantified claim for damages. For this reason alone – and apart from all the

other reasons that appear from the judgment of Bosielo JA – I therefore believe the appeal should fail.

F D J BRAND
JUDGE OF APPEAL

APPEARANCES

For Appellant:	B Ancer SC
	Instructed by:
	Norman Berger & Partners Inc, Johannesburg Lovius Block, Bloemfontein
For Respondent:	R Stockwell SC
	Instructed by:
	Maluleke, Msimang & Ass., Johannesburg Matsepes, Bloemfontein

STATEMENT

I, undersigned,

MARK BELLON

do hereby state as follows:

1. I am a member of Discovery Health Medical ("Discovery").

2. After I was involved in a motor vehicle accident, and whilst I was in intensive care my wife was contacted by persons representing Discovery who demanded that she sign an undertaking compelling me to make a claim against the Road Accident Fund and reimburse Discovery whatever medical costs it had or would pay relating to my accident.

3. The demand was accompanied by a threat to immediately terminate medical care to me and to reverse the cost of any treatment which I had already received because of the accident.

4. I did pursue a personal injury claim and instructed Attorneys Ronald Bobroff & Partners Inc. The claim was successfully finalized.

5. I instructed my Attorneys not to furnish any undertaking to reimburse Discovery or its collection agents as I did not believe they were entitled to this given that I had never at any stage prior to joining, on joining or at any time thereafter ever been informed that my benefits excluded non-illness generated medical care or that same were subject to exclusions and conditions.

6. I was recently approached by Alan Jacobson, an acquaintance of mine, employed at Discovery, who informed me that Jeff Katz ("Katz"), wished to meet with me to discuss my unhappiness with Discovery. I thereafter received subsequent communications from Katz via Jacobson as set out below.

7.

7.1 Katz stated that Ronald Bobroff & Partners were secretly retaining money in respect of medical costs without disclosing this to clients and that they would do the same to me.

MB/SP
CJ.

7.2 That Katz was prepared to have Discovery waive any claim against me with respect to the amount of approximately R500 000.00 they had, and were demanding from me in respect of medical expenses.

7.3 The impression I got was that Katz was very emotionally involved and wanted to "buy" me off so that I be used by him to neutralize Ronald Bobroff in his endeavours to protect his clients, as also the clients of other Attorneys, who had been and were being harassed for payment of monies by Discovery/Katz under circumstances the same as applied to me.

7.4 It was further my understanding that Katz was very concerned that it would become public knowledge and that the Registrar of Medical Schemes Council would also become aware that Discovery had not and was not complying with the Medical Schemes Act.

7.5 I understand that the Act requires medical schemes to see to it that prospective members and members are fully informed as to exclusions or conditions applicable to benefits and of course, that members initially receive a detailed summary of the rules of the scheme and the rules themselves. Clearly this never happened prior to and during my membership of the scheme.

8. I confirm that I am entirely satisfied with the service I have received from RBP Inc, the outcome of my case and the fees and disbursements charged to me.

9. I believe that Discovery/Katz's conduct in threatening and seeking to intimidate Discovery members who have suffered the misfortune of sustaining injury in a road accident, especially at a time when such members may be fighting for their lives, is immoral and wholly unethical, if not illegal.

10. I have been advised that a substantial portion of the medical costs which Discovery/Katz have been demanding from me fall under Prescribed Minimum Benefit Care and which may not be refused or made conditional in terms of Regulation 8 (10) of the Medical Schemes Act.

11. My wife, who was the recipient of the threats I refer to in paragraph 7 above will sign at the foot hereof to confirm the aforesaid.

SIGNED AT JOHANNESBURG THIS 30TH DAY OF JUNE 2011

AS WITNESSES:

1. _____

2. _____

_____
Mark Bellon

_____
Jody Bellon

Rs/30.6.11

B

AFFIDAVIT

I the undersigned

DEAN ALMEIDA

do hereby make oath and state as follows:

1. My personal injury claim was attended to by Ronald Bobroff & Partners Inc. to my satisfaction.

2. At the time of the accident, I was a member of Discovery Health medical scheme but had never from the time I had originally joined until today ever received a copy of the Rules applicable to my membership nor any notification of any changes to such Rules.

3. I was never informed from the time of joining Discovery Health to date that there were any conditions or exclusions relating to motor vehicle accident medical care or that I would be obliged to make any claim against the Road Accident Fund and reimburse Discovery Health any medical costs recovered and previously paid by them.

4. Some two years after my claim was settled, I was contacted by Bonny of Discovery health telephonically who informed me that I still owed Discovery Health money.

5. She invited me to meet with Mr. J Katz of Discovery Health and the meeting took place in due course. Katz informed me that there was still an outstanding amount due to Discovery Health arising out of the accident of APRIL 2006.

6. I enquired from him why I had to pay Discovery back anything when I paid premiums to cover what I believed to be all my medical expenses from whatever cause and that I had never been advised at the time of or any time prior to contracting with Discovery that there were exclusions or conditions relating to motor vehicle accident generated medical costs.

7. Katz responded "it's in your contract". I replied that no-one had ever told me and brushed off the comment again reverting to the fact that I owe Discovery money and that I am responsible for it.

8. He then interrogated me as to how I came to instruct my attorneys Ronald Bobroff & Partners Inc. I informed him that the firm had been contacted by my fiancé to come and see me as there were informative pamphlets and posters at the hospital offering advice to accident victims such as myself.

9. Katz then described the fact that my attorneys had seen me in hospital as "ambulance chasing". I told him I did not understand what that meant to which he replied "lawyers wait in hospital reception areas or get others to wait and recruit client's like that, and that this practice is

LS

common but illegal". I understood that he was referring to my attorneys as being ambulance chasers.

10. He enquired as to whether I had signed any documents to which I responded that I had and that my fiancé was present at the time and was assisting me and had received an explanation concerning all the documents which were required to be signed for the case.

11. He went on and on trying to extract a statement from me that it was in fact the attorneys who had approached me and not the other way around. He was clearly hostile towards Ronald Bobroff & Partners Inc. and in my opinion, he was trying to twist my words.

12. Eventually, I told him that I was very pleased that I had instructed Ronald Bobroff & Partners Inc., in particular, that Darren Bobroff had attended to my claim and that during the years I have worked with him, he was at all times courteous and helpful in every way. Further, that they had carried the cost of my case for years and had never requested any money.

13. I concluded by informing Katz that in my opinion Ronald Bobroff & Partners Inc. was a great legal practice.

14. At the end of the meeting, he asked me to forward him the awards document and the breakdown of who got what in the deal. I asked him if this would affect my Discovery claims in future, his response was "It won't affect it too much, just help us to help you". I did not know what that meant until the next phone call from him.

15. Katz requested certain documentation from me which I did not have in my possession. I contacted my attorneys to provide me with such documentation. My attorneys advised that they had in fact already provided Discovery with the requested information. I in turn, contacted Katz to advise and question why he was requesting documentation from me which he already had in his possession and furnished by my attorneys. His response was "No, some of the documents are incomplete.

16. Katz then requested I attend another meeting with their attorneys because he wanted to take Bobroff to Court as they had misled me. This meeting did not occur as I was not available.

17. I then contacted my attorney to advise him of this and was advised not deal with Discovery Health directly but refer them to my attorney.

18. I emailed Bonny and advised her to deal directly with my attorney. Shortly after she received my email, she contacted me telephonically and tried to convince me to come to the meeting say that it was in my best interest. When I reiterated that she should deal with my attorneys, Katz got onto the phone, was rather aggressive saying "that the money is owed and that Bohroff and myself are responsible for this outstanding amount. It would be easier if I just cooperated with his department to straighten things out".

19. Katz and Bonny continually phoned me on several occasions in order to make arrangements to attend the meeting. I agreed simply to get him off my back. However, I never did attend the meeting as I lost my job and had to make certain adjustments.

20. I was then contacted again by Bonny and on the second occasion, Katz got onto the phone asking "what do you think you are doing, do you want to make this easy for yourself or hard?" He replied that "if you sit with us and our attorneys, you won't be responsible for the amount because you were misled".

21. I responded by saying that I thought it was Discovery Health who was misleading me and harassing me. I told them it was unfair them giving me an ultimatum like that to which Katz responded "Well you either helping us or you not". I told him I was not prepared to help him. He was rather aggressive and put the phone down.

DEAN ALMEIDA

Thus signed and sworn before me on this the 17th March day of 2011, the deponent having acknowledged that he knows and understands the contents of this Affidavit and has no objection to taking the prescribed oath which he/she considers binding on her conscience.

COMMISSIONER OF OATHS

LOUIS SUN
Commissioner of Oaths
Practising Attorney
31 Ashford Road
Parkwood, Johannesburg
South Africa

STATEMENT

I, the undersigned,

ZVAWDA

do hereby state under oath the following:

1. I am an adult female.
2. On 21 September 2002 I was involved in a motor vehicle accident and subsequently contacted attorneys Ronald Bobroff & Partners Inc to institute a claim against the Road Accident Fund on behalf of my husband, my son and myself.
3. At the initial consultation on 27 September 2002 my husband and I signed mandates authorising Ronald Bobroff & Partners Inc to act on our behalf and was also provided with a new client letter which provided an outline of the claim and in particular the basis of fees charged.
4. At the time of the accident my family and I were members of Discovery Health Medical Aid and believed at all times that we were covered for all medical and hospital treatment required in particular all trauma related costs.
5. At no stage was my husband or I ever informed about any exclusion clauses in Discovery's rules in particular that relating to excluding liability for all road accident generated medical costs.
6. At no stage was my husband or I ever provided with Discovery's rules and or a detailed summary of such rules. We were also never provided with any written notifications as to any proposed amendment to their rules.
7. Both my husband's and my claim finalised in September 2008 and at that stage we were still not aware of any exclusion clause in Discovery's rules relating to motor vehicle accident generated expenses.
8. Both my husband and I were extremely satisfied as to the service received from Ronald Bobroff & Partners Inc and in particular the result obtained.
9. Our attorney Pippa Farraj explained the fee options available and both my husband and I elected to be charged on a time basis so as to be guaranteed a net settlement amount taking into account the possible risks of not recovering

the full disbursement costs.

10. Upon receipt of the costs both my husband and I were provided with a final payment and a full statement of account which we signed for in early 2009.
11. In December 2010 we were contacted by Discovery Health demanding payment of the medical expenses incurred as a result of our motor vehicle accident. This was some eight years after the incident and nearly two years after my matter settled.
12. I was shocked as I had no idea what Discovery was referring to as I had paid my premiums for what I believed was full cover and was never requested to reimburse them at any stage.
13. I was harassed by Bonny and/or Charmaine of Discovery's legal department who insisted that we had been misled and that our attorneys retained the medical expenses for themselves without paying them over to Discovery.
14. Bonny and/or Charmaine further advised that if we assist him then Discovery would not sue us for the medical expenses owed but would seek this from my attorneys.
15. We felt that we had no option but to cooperate and Bonny and/or Charmaine requested we meet with Discovery's attorneys.
16. I was advised by Discovery's attorneys that they would assess Ronald Bobroff's files and would be able to prove that they retained the medical expenses for themselves without disclosing this to me.
17. If we were concerned as to their conduct or the manner in which they charged us we would surely have questioned this or even complained to the law society and would have transferred our daughters matter elsewhere.
18. I have read statements from some other Discovery members who are clients of Ronald Bobroff and it is clear that Discovery has adopted the same extortion tactics so as to try and manipulate members into believing they owe Discovery money and that if they do not cooperate with Discovery they will be sued.
19. It is now clear to me that I and my family were simply being used as pawns by Discovery in an attempt to intimidate and silence Ronald Bobroff from exposing Discovery's non compliance with the law.
20. It is disgraceful that such a large public entity treats its members in this manner and deliberately fails to disclose these unjust exclusion clauses but

years later seeks to rely on them.

21. I believe this is a matter for the Council of Medical Schemes to investigate so as to prevent other members of Discovery from being victimised and taken advantage of.

DATED AT JOHANNESBURG THIS 23 DAY OF SEPTEMBER 2011

Z VAWDA

STATEMENT

I, the undersigned

PULENG MKHATSHWA (nee SIBISI)

do hereby state that:

1. I joined Discovery Medical Aid on the 1st February 2002 through a Broker, Mr Paul Kemp after a presentation by him.

2. I had heard good things about Discovery from Mr Kemp who advised me about the Vitality Plan.

3. At no stage did Mr Kemp advise me that if I was involved in a road accident that there were exclusions and conditions and that I had to sign documents undertaking to claim at my own risk and cost from the Road Accident Fund.

4. The only exclusions I was told about was the exclusion for me and my son's pre-existing acne condition.

5. I never received a detailed summary of the rules when I joined Discovery in 2002 and have never ever received a copy of the rules from Discovery.

6. When I was involved in the car accident on the 16 June 2005 till after the accident I was never told by any member of Discovery's staff that I had to

claim from the Road Accident Fund and reimburse Discovery for any payment made in respect of my accident.

7. I never received any notice from Discovery at any time that they were going to amend the Rules.

8. I received a letter in December 2010 from Discovery requesting that I reimburse them medical costs paid by them in connection with my accident and that failure to do so would result in my medical aid being cancelled. This was three years after my claim had become settled and six years after my accident

9. On Monday the 22nd August 2011, I received a call from Gcinile of Discovery Health. She enquired from me whether my third party claim had become settled. I informed her that my case had been settled "long ago" and enquired from her why she was asking. She even threatened to stop my medical aid.

10. She requested that I call into their offices in order to discuss the monies I had received from the Road Accident Fund in respect of medical expenditure.

11. I told her to contact Ronald Bobroff & Partners Inc, my attorneys who had dealt with the matter. I declined to do so and expressed my satisfaction with the result my attorneys had obtained from me and I also informed her that I had been fully accounted to and that my attorneys had not retained any amounts due to Discovery as she was alleging.

12. She then terminated the call.

13. Within an hour, she once again telephoned me and enquired from me if I still was not prepared to come to their office to discuss the matter. I again informed her that she had to contact my attorneys to discuss the matter.

14. She then informed me that if I did not attend a meeting at their office, my medical aid would be cancelled.

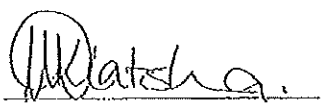
15. The call was then terminated.

16. Discovery's conduct has in my opinion been immoral and unlawful.

17. I have noted the provisions of the Medical Schemes Act especially Section 28 (1)(h).

18. I require the Council for Medical Schemes to investigate Discovery's non-compliance with the Law and the way it oppresses members to who have already suffered injuries and pain in road accidents.

19. I also request Council for Medical Schemes to investigate why Discovery Medical Aid's Trustees do not observe their duties in terms of Section 57 (4) (d) of the Medical Schemes Act



PULENG MKHATSHWA

HOUGHTON HARPER
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19 October 2011

MR JEFFREY KATZ
PO BOX 784262
SANDTON
2146

BY REGISTERED MAIL

Dear Sir

RE: DISCOVERY MATTERS

The above matter and the telephone call on 11 October 2011 between Judy Harper and yourself refers.

It is common cause that you contacted our offices with the intention to speak to the writer, and when informed she was unavailable, you insisted to be put through to the writer's personal assistant, Judy.

Judy recorded that you have alleged that Houghton Harper has a complaint against Discovery. Further, that there were a number of issues that the writer needs to understand, further yet that if the writer did not call back, she would be dragged into the issue with a "big firm" and reported to the Law Society.

The writer has chosen to conduct our interaction in writing.

The writer requires you to kindly explain the above as in the writer's opinion it is a very definite threat against her and her firm.

Your urgent written advises are awaited.

Yours faithfully

MRS G HARPER
HOUGHTON HARPER INC

THE LAW SOCIETY
OF THE
NORTHERN PROVINCES
Incorporated as the Law Society of the Transvaal
Serving Gauteng, Mpumalanga, Limpopo & North West Provinces

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Tel: 012 338 5902
Fax: 012 321 7733
E-mail: director@lsnp.org.za

Your ref:

Our ref: MJSG / sl

1 February 2013

To whom it may concern

Dear Sir / Madam,

DISCIPLINARY PROFILES: DIRECTORS – RONALD BOBROFF & PARTNERS INC.

I hereby wish to confirm that I have perused the disciplinary records of the Law Society and that the partners of the above practice (Mr R Bobroff, Mr D R Bobroff and Mr S D Bezuidenhout) have, since the practice was established on 1 October 1975, never been found guilty on any charges of unprofessional conduct by the Law Society.

Yours faithfully,

M J S GROBLER
Director