IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 12209/08

In the matter between:

LAW SOCIETY OF SOUTH AFRICA	**1st Applicant**
SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS	**2nd Applicant**
LUVUYO NICOLAAS MBELE	**3rd Applicant**

and

THE ROAD ACCIDENT FUND	**1st Respondent**
THE MINISTER OF TRANSPORT	**2nd Respondent**

JUDGMENT : 15 AUGUST 2008

TRAVERSO, AJP :

[1] This is an application for an interim order pending the determination of a judicial review to declare invalid and set aside the decision of the first respondent to implement a system known as the "*Direct Payment System*" ("*DPS*").

[2] The three applicants are The Law Society of South Africa, The South African Association of Personal Injury Lawyers and a certain Mr. Mbele. The respondents are the Road Accident Fund ("*RAF*") and the Minister of Transport. No relief is being claimed against of the Minister of Transport.

[3] The background to this matter is briefly the following. The RAF administers the compensation scheme established in terms of the Road Accident Fund Act, No. 56 of 1996 ("*the RAF Act*"). It has become practice for attorneys to undertake RAF work on a contingency basis. This is authorised by the Contingency Fees Act, No. 66 of 1997 and given recognition

in Section 19(d) of the RAF Act. Typically, attorneys who undertake RAF work on a contingency basis enter into contracts with their clients in which their clients agree that when their claims have been resolved, the RAF must pay the compensation into the attorneys' trust accounts, who are entitled to deduct from the award the fees and disbursements due to him or her and then pay the balance to their client.

[4] When the RAF settles a claim, or is ordered to effect payment of a claim, it is liable for payment of the party and party costs of the successful claimant. Party and party costs typically represent 50% to 70% of the total of the fees and disbursements due to an attorney. A substantial portion of the costs incurred in the running of a case forms part of the attorney and client component of costs, and are not recoverable from the RAF. The same applies to disbursements such as fees of experts, which are generally

taxed at a rate significantly lower than the actual fees charged. The consequence is that when a claim is finalised and compensation paid by the RAF into an attorney's trust account, part thereof is deducted by the attorney pursuant to his or her agreement with his or her client, and the balance is paid to the client. This system has been employed for decades and is the basis upon which attorneys undertake work of that nature and is the method by which claimants obtain representation in order to enable them to pursue their claims against the RAF.

[5] On 30 October 2007, and unbeknown to the first applicant, the RAF decided to introduce a Direct Pay System. The methodology of the DPS is that while the RAF will pay the party and party costs and disbursements to the attorneys, the compensation itself will be paid directly to claimants. It is not disputed that after the decision was made to introduce the DPS, discussions continued between

the RAF and the first and second applicants about the possible introduction thereof as if the negotiation process was still ongoing, whereas unbeknown to the applicants a decision had already been taken to implement it at some future date.

[6] On 21 July 2008 the RAF announced by way of a newspaper advertisement that it had decided to adopt the DPS and that it would come into operation 11 days later, namely on 11 August 2008. This advertisements states *inter alia*:

> ***"After careful consideration of the submissions and as part of its commitment to improve service delivery and reduce fraud and corruption, the RAF is introducing a system to pay the claimants directly…***
>
> ***After processing your claim the RAF would send you or your representative (if applicable) an offer of settlement. Upon acceptance of the settlement the RAF will pay your compensation directly to you…***
>
> ***The RAF will pay reasonable and necessary fees directly to your attorney as per tariffs*** (sic) ***guideline set in the Rules of Court. Other expenses (eg medical and other expert's*** (sic) ***costs) will also be paid directly to the attorney."***

[7] It is this decision that will form the subject matter of the review application. The grounds of the review are numerous. They include the following.

7.1 The decision of the RAF will, in effect, deprive claimants of access to legal representation. It is alleged that this is so because attorneys will have difficulty in recovering the attorney and client fees and disbursements from their clients if the compensation is to be paid directly to them.

7.2 It is contended that the DPS was implemented to eliminate the contingency fee arrangements, which it is alleged, will self-evidently reduce the participation of attorneys in the RAF system with all the negative consequences that will flow therefrom.

7.3 The decision is beyond the powers of the RAF because it does not have the power to institute an administrative system which is contrary to its statutory purpose and function, namely to pay the valid compensation claims of persons who have been injured in road accidents.

7.4 The decision is likely to discriminate unreasonably against poor people by depriving them of legal representation because it will effectively eliminate the contingency fee arrangements in RAF matters.

7.5 Further it was argued that the decision will unreasonably deprive attorneys from their property rights in existing claims.

[8] The first respondent on the other hand contended that the application is brought purely with a view of protecting the

commercial interests of the applicants' members rather than to protect the rights of claimants or to act in the public interest. The first respondent contends that public interest demands that the DPS be implemented so as to protect litigants against fraud and theft committed by attorneys.

[9] There undoubtedly are legal practitioners who exploit the system of contingency fee arrangements unreasonably. It is also beyond doubt that there are legal practitioners who commit theft and fraud at the expense of their clients. Such conduct cannot be countenanced, and steps should be taken to eradicate such practitioners from the profession. But such conduct is not the norm. Of all the many thousands of cases handled by the RAF, it managed to put together a sample of 50 cases in which complaints were made that theft, fraud, or overreaching was allegedly committed. Some of those cases date back to 1995 – the most recent being in 1999. To therefore suggest that it has become necessary as a matter

of urgency to take these far reaching steps to protect poor litigants against theft, fraud or overreaching by their attorneys, appears to be without a sufficient factual basis.

[10] Before dealing with the respective parties' arguments, I must point out that the first respondent appeared, from the outset, to acknowledge that the third applicant, Mr. Mbele, has a legitimate right which the Court must protect on a basis of urgency. The third applicant's entire affidavit remains to all intents and purposes common cause inasmuch as it was not denied by the first respondent. His affidavit is significant as it is typical of the plight of many other indigent litigants:

> ***"1. I am an adult unemployed male residing at 23161 Makhaya, Dula Omar Street, Khayelitsha. I am the Third Applicant herein. The contents hereof are within my personal knowledge and except where otherwise stated, are true and correct.***
>
> ***2. On 7 July 2006 I was a passenger in a Golden Arrow bus ('the first bus") which was involved in a collision with another***

Golden Arrow bus ("the second bus") as a result whereof I sustained severe injuries and was rendered paraplegic.

3. I consulted my current attorneys of record, A Batchelor and Associates, to advise me regarding a claim for compensation for the injuries sustained by me against the Road Accident Fund. At the time of consulting my attorneys I was financially destitute and as a result of my injuries have no prospect of earning an income.

4. My attorneys advised me that they would act for me on the basis that they would hold over payment of fees until the Road Accident Fund made payment to them of the proceeds of my claim and costs. They furthermore told me that they would also cover all the disbursements necessary to prosecute my claim and that these costs (fees and disbursements) would be deducted as a first charge from the proceeds of my claim. Without this arrangement I could not have pursued a claim.

5. As a result of the severe injuries suffered by me I required ongoing and extensive medical treatment both as an inpatient and as an outpatient. My attorneys gave an undertaking to UCT Private Academic Hospital to pay for my hospital expenses. Without this undertaking I would not have been transferred to a private hospital but would have been treated at a Provincial Hospital. My attorneys also paid various medical expenses including the costs of my obtaining a wheelchair.

6. At a later stage my attorneys also contacted Dr Shrosbree, who specialises in spinal cord injuries at UCT Private Academic Hospital regarding my need for further treatment.

With my attorney's financial assistance I was re-admitted to UCT Private Academic Hospital. My attorney gave a further undertaking so that I could obtain a more advanced wheelchair because I was getting bed sores from the existing wheelchair.

7. My attorney has made various undertakings on my behalf to pay for further hospital and medical expenses so I can continue to be treated appropriately. Without the various loans from my attorney and undertakings to pay hospital and medical expenses, I would not have been able to receive the treatment which I have received to date.

8. To date my hospital and medical accounts amount to approximately R350 000,00, which my attorney has guaranteed to various service providers will be paid out of the proceeds of my claim.

9. My attorney lodged my claim on 25 October 2006. As at today's date no offer has been forthcoming from the Road Accident Fund, in respect of either merits or quantum. In March 2007 my attorneys proceeded to issue and serve summons on the Road Accident Fund and a trial has now been allocated for the hearing of my case on 20 April 2009, in the above Honourable Court.

…

11. In January 2008 my attorney met with the Road Accident Fund when he was advised that the proverbial 1% would probably be conceded in respect of the merits. On this basis, my attorney requested the Road Accident Fund to make an interim payment in respect of my past hospital and medical treatment.

Despite this, no formal concession has been made by the Road Accident Fund, nor have they agreed to make an interim payment. On their own version, the Road Accident Fund is liable to pay me R25 000,00, arising from the negligence of the driver of the second bus. They have not even offered this amount.

12. My attorney has arranged for me to attend various medico-legal assessments for the purpose of obtaining medico-legal reports which I am advised are necessary for the proper quantification of my claim. My attorney is responsible for the costs of these medico-legal reports.

13. My attorney has advised me that he is prepared to incur all the expenses necessary to prosecute my claim and give the undertakings and expend the money he has done for my treatment on the understanding that he will be paid the proceeds of my claim by the Road Accident Fund. To this end I have signed a power of attorney appointing my attorney as my agent to receive payment from the Road Accident Fund on my behalf, so that my attorney can be reimbursed and also honour all the undertakings he has given for me. I understand the necessity for this arrangement as without adequate security my attorney would not be able to represent me and his other clients on the aforegoing basis.

14. My attorney has told me that he cannot continue to represent me unless he has security for the payment of the expenses he has incurred and will incur on my behalf. I want the RAF to agree to pay him in accordance with my instructions. I have been informed that it will not do so."

[11] It appears to be clear that the third applicant wants the contingency agreement between him and his attorney to be respected and given effect to. He makes it clear that without this arrangement he would not have been in a position to pursue his claim, and that if the DPS is implemented he would have to forego the further services of his attorney. The consequences of either of the two scenarios will be devastating.

[12] Mr. Cassim, for the first respondent, is correct in his submission that the entire scheme of the Act is aimed at ensuring that claimants get just compensation and that only party and party costs are guaranteed under thereunder. But in all litigation there is invariably an attorney and client component which has to be borne by the client.

[13] As can be seen from Section 1 of the Contingency Fees Act, No. 66 of 1997, even where a contingency fees agreement was not entered into, fees on an attorney and own client fees are regarded as constituting part of "*normal fees*". The mere fact that the RAF Act makes provision for the payment of party and party costs does not disentitle an attorney from recovering the attorney and client component of his fees from his/her client. To suggest that the accepted and normal practice of attorneys, to look to their clients for payment of the attorney and client costs amounts to theft, fraud or overreaching, is unfounded.

[14] The first respondent's attitude in this regard is without any foundation and displays a lamentable lack of appreciation of how the practice of law functions. I can find no factual basis for this generalisation in the papers filed by the first respondent. The alleged theft and fraud is the only

justification put forward by the first respondent for implementing the DPS on such short notice, and for its refusal to have given an undertaking for the *status quo* continuing to operate until the finalisation of the review application. But as emphasised above, the first respondent does not even attempt to mention a single recent example which necessitated the sudden implementation of the DPS, or renders the need that it be done so pressing that the *status quo* cannot be maintained until a Court has had the opportunity to consider the review in an orderly manner.

[15] Have the applicants established the requisites for an interim interdict? As set out above, the first respondent accepts that the third applicant has established a *prima facie* right. On that basis alone an interim order is justified. But it has, in my view, also been established as regards the first and second applicants. The applicants rely on a violation of a number of constitutional rights. The difficulty of applying

the ordinary civil standard of a *prima facie* right in constitutional matters has been the subject of some debate. After analysing this debate Heher, J (as he then was) concluded in Ferreira v. Levin N.O. & Others, 1995(2) SA 813 (W) at 836:

> ***"I can see no reason why the 'serious question to be tried' approach should not be awarded equal status with the traditional approach."***

In this matter the applicant has, at the very least, shown that there are serious constitutional questions to be tried, such as, *inter alia,* the attorney's right to property (Section 25) and the right to fair administrative action (Section 33) will be involved.

[16] From the facts it has, in my view, been clearly established that there is a well grounded apprehension of irreparable harm. It has not been placed in issue by the RAF in respect of the third applicant. If the DPS is implemented

the third applicant's case may not be finally resolved before the trial of his matter which has been set down for 20 April 2009. In that event trial preparations has to start some months before that date. The third applicant is a paraplegic and is unemployed. He desperately needs the compensation to which he is entitled from the RAF. If an interim interdict is not granted, he will be put to Hobson's choice. On the one hand he could simply settle his claim unrepresented (assuming of course that the RAF will admit the merits of his claim, which it has still not done). Alternatively he could seek to have the trial postponed because he does not have legal representation and re-apply for a trial date when the review application has been determined. In that event he would have to wait for at least another two years before he receives compensation for which he has an immediate need.

[17] If the DPS is implemented forthwith attorneys will be deprived of the fees and disbursements to which they are entitled by virtue of valid agreements. The DPS will interfere with their entirely lawful contractual arrangements with their clients. It will prevent them from effectively making binding agreements with their clients in the future, with a view to safeguarding their own interests when they advance funds to, or undertake work on behalf of their clients.

[18] What is more disconcerting is that the RAF has issued an internal instruction on 4 August 2008 (after this application had been launched) which reads as follows:

> ***"In respect of defended matters with trial dates, we request that you try and obtain the banking details of the Plaintiff on the form which will follow, and forward same directly to the Fund. Once this has been done, we will be in a position to make a tender in the matter. Should we not have the banking details of the Plaintiff, we request that you proceed to trial in respect of these matters."***

If implemented this will result in trials running even where all the outstanding issues between the parties have been or can be settled, and, in my view, is tantamount to an abuse both of Courts and of claimants.

[19] The balance of convenience in my view clearly favours the applicants. The system of contingency fees and the payment of compensation to the claimants' attorneys have existed for decades. It is difficult to conceive of any material prejudice that may result to the RAF's legitimate interests if the system of contingency fees would continue to operate for some months whilst the review application is determined. It appears to me to be clear that there is no need for the urgent implementation of the DPS. The RAF took the decision to adopt the DPS on 30 October 2007, but delayed for nine months before implementing it. This counters any suggestion that there is an urgent need for its

implementation. In my view it is self-evident that the applicants do not have an alternative satisfactory remedy.

[20] This brings me to the question of costs.

[21] In normal circumstances the costs of an application for interim relief would be reserved for the determination on the return day. The circumstances of this case are not normal. Firstly, the RAF is a public body dealing with public funds. It is mandated in terms of Section 195 of the Constitution to maintain a high standard of professional ethics and to respond to people's needs and to foster transparency by providing the public with timely, accessible and accurate information. The RAF appears to have withheld information from the members of the public, including claimants, by having kept its decision of 30 October 2007 secret. It in fact it held out to the first and second applicants that no decision had been made. The inference is irresistible that, in

implementing the DPS in the manner that it has done, it endeavoured to thwart any attempt to have the lawfulness of the DPS considered by a Court before it was implemented.

[22] It was not challenged by the first respondent that implementation of the DPS will be in violation of the agreements which were entered into by most attorneys and their clients in respect of RAF claims, and the instructions given by claimants to the RAF pursuant to such agreements. This nothwithstanding, and despite the fact that claimants may have instructed the RAF to make payment to their attorneys or anyone else, the RAF simply refused to do so and insisted on paying the compensation directly to claimants.

[23] The introduction of the DPS will, by its very nature, deprive indigent and other litigants of access to justice. This is apparent from the third applicant's case which self-

evidently will hold true for thousands of other indigent persons. A Court should not permit an organ of State to deprive litigants of access to justice.

[24] Then there is the manner in which this application was brought. I have referred to the e-mail instructing the various attorneys to simply run trials if the banking details of the claimants are not available at the time. During the course of argument when I put the problem to Mr. Cassim, who appeared for the first respondent, that the implementation of the DPS would be in violation of the agreements entered into between most of the attorneys and their clients in respect of RAF claims as well as the instructions which the claimants have given to the RAF pursuant to the agreements, he informed me that the agreements will be honoured. When it was pointed out to him that that has not been the stance of the respondents, in the advertisement or on the papers, he retorted "*but that is the law*". The debate continued. At one

point Mr. Cassim handed up a further e-mail, ostensibly emanating from the first respondent. It reads as follows:

> ***"1. Make all attempts to get the Plaintiff's attorney to agree that regarding payment they will abide by the Court order that will be handed down in the CPD on 8 August 2008;***
>
> ***2. If they will not agree, then the RAF staff must try and contact the Plaintiff to establish if he/she wants the amount paid into their account or the attorneys account. Once the Plaintiff has made a considered decision, knowing their rights, then we will abide by what the Plaintiff wants. If they want us to pay then*** (sic) ***directly, they must give us a letter to this effect;***
>
> ***3. If you cannot get hold of the Plaintiff and if the attorney has a valid Power of Attorney in which the Plaintiff agrees that the compensation be paid to the attorney and we are satisfied that it is a valid POA, then we can agree to pay the attorney."***

[25] This has never been the attitude of the first respondent who was hell-bent on paying compensation directly to clients regardless of any agreements or arrangements that are in existence. The respondents were asked to give an undertaking pending the finalisation of the review application. This was refused for no obvious reason and

despite this their affidavits were filed at the last possible moment. Furthermore the first respondent acted with a continuing disregard for the affect of the decision to implement the DPS on the operation of Courts by directing that trials take place when a claimant did not have a bank account or provide the RAF with its details. In other Divisions of the High Court, claimants were driven to seek the intervention of the Courts in order to force the first respondent to pay their compensation to their attorneys in terms of the existing agreements.

[26] In all the circumstances I held the view that I should articulate the displeasure of the Court and show that Courts will not tolerate litigation to be conducted in that manner, and in the circumstances I ordered the first respondent to pay costs on an attorney and client scale.

[27] This brings me to the application for intervention.

[28] The application for intervention was completely misguided. In fact when Mr. Patel, for the intervening party commenced his argument, he immediately conceded that his client could not intervene in the proceedings before me, but rather wished to intervene in the application for review. He informed me that they had hoped that I would be prepared to make such an order. It is self-evident that I cannot make any order in a matter which will serve before another Court in the future.

[29] I considered dismissing that application with costs. But in view of Mr. Patel's ambivalent attitude, and in view of the fact that the application for intervention was not pursued with any rigour before me by the intervening party, I considered it in the interests of justice to make no order

therein, and leave it to the intervening party to apply for intervention to the review proceedings.

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TRAVERSO, AJP

15 August 2008