IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MAIN SEAT)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

02/06/2022
DATE

LEGODI JP
SIGNATURE

CASE NUMBER 557/2016

DANNY J SIBIYA — PLAINTIFF

And

ROAD ACCIDENT FUND — DEFENDANT

AND

Case Number:1150/20

In the matter of:

ANITA ERNESTO CHIAU — PLAINTIFF

And

ROAD ACCIDENT FUND — DEFENDANT

JUDGMENT

LEGODI JP

[1] The Act, (referring to the Contingency Fee Act) does not authorise a legal practitioner to recover a contingency fee that is exploitative. Whilst the Act provides an incentive for legal practitioner concerned by allowing him or her to charge an increased fee, it is not, in the words of Plasket J in Erasmus v Williams[1] "intended to be a licence to plunder up to 25 percent of any award paid to a client who had entered into a contingency fee agreement ad who is usually indigent. The Act is therefore not intended to be a mechanism for a legal practitioner to charge fees that are unreasonable, and to unjustifiably increase his fees simply to place him or her in a position to recover the maximum of the success fee which the Act allows. To hold otherwise, would be inconsistent with the purpose of the Act, namely to enhance access to justice by enabling litigants who would otherwise not have been able to afford it, to engage the services of a legal practitioner[2].

[2] Contingency fee agreements facilitate access to justice as they enable litigants to obtain legal representation to prosecute their claims where the litigant may otherwise have been unable to do by reason of the prohibitive costs of litigation. However, such agreements carry with them the inherent risk of abuse and the incentive to profit. The undesirable features of contingency fee agreements were highlighted as follows in South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development, (Road Accident Fund, Intervening Party)[3]:

"*The first is that they compromise the lawyer's relationship with his client by introducing conflicts of interest, and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with financial interest in the outcome of the case, which may*

[1] 2016 JDR 2007 (ECG 3364/2016, 8 December 2016 at para [13]. See also Mathimba v Nomxuba 2019 (1) SA 550 (ECG) at para [101]
[2] Nowetu Mkuyana v RAF CASE NO4000/2017 at para 14, ZAECGHC/2020/73
[3] 2013 (2) SA 583 (GNP)

adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation; and on overriding desire to secure a successful outcome may tempt him or her into practices which may compromise his or her clients to the court, such as coaching witnesses, misleading the court, falsifying evidence, etc[4].

[3] Unregulated contingency fee agreements have the potential for earnings by legal practitioners which are excessive and disproportionate to the labour and risk invested. This will negatively impact on the public confidence in the legal system. The legislature was clearly conscious of the risk of exploitation when it legitimised contingency fee agreements. What the Act therefore sets out to do is to carefully regulate the extent to which a legal practitioner may agree with his client for the payment of an increased fee[5].

[4] What section 2 does is to place a limitation on the contingency fee that an attorney may recover from his client. In the scheme of the Act, this is achieved in three ways: The agreed increased fee, or as it is referred to in section 2 the success fee or uplift fee as it also known, is firstly limited to confining it to an amount that represents an increase in the attorney's normal fees. The principle is that the legal practitioner charges his normal fee, and as an added incentive to compensate him for the risk of undertaking the litigation, he be rewarded by being permitted to agree with his client to charge an extra fee over and above his normal fee, either equal or a percentage increase on the normal fee. The normal fee of the practitioner is therefore taken as the base fee from which a percentage increase is by agreement with the client permissible to arrive at the amount of the success fee. What is important is that there is a base (the normal fee) from which a percentage increase is permissible. This is the ordinary and only basis which the practitioner may increase fees. The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fee, and then increase it in terms of the contingency fee agreement. The success fee is a fee which has been increased from normal fee[6]".

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[4] Idem at (587-H-I) ----, see also Mkuyana *supra* at para 15

[5] Mkuyana *Supra* at para 16

[6] Masango v Road Accident Fund 2016(6) SA 508 (GJ) at para [12]

Otherwise than the success fee, the amount of the practitioner's normal fee is therefore not limited by way mutual consent in the contingency fee agreement, but rather by the provisions of the Act itself[7].

[5] Contingency fee agreements are accordingly subject to judicial oversight and intervention. This is consistent with the right vested in the courts at common law to determine the propriety of any agreement entered into between an attorney and his client with regard to fees. The authority of the court to set aside a fee agreement is founded upon considerations of public policy and in the context of the supervisory function of the court over the conduct of its own officers, and the protection of the court's dignity and reputation[8]. A contingency fee agreement that is not covered by the Act or which does not comply with the requirements of the Act, is invalid[9]. (My emphasis).

[6] Although the Act does state in express terms that a failure to fulfil the statutory requirements will render the contingency fee agreement null and void, there are clear indications that this was indeed the legislature's intention. The primary object of the Act was to legitimise contingency fee agreements which were otherwise prohibited by the common law. The purpose was also to promote access to courts subject to the strict control so as to minimise the disadvantages inherent in the contingency fee system and to guard against abuse. The safeguards introduced to prevent such abuse include sections 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would understandably have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions[10].

[7] In **Mostert and Others v Nash and Another**[11], Wallis JA once again confirmed that the intention of the legislature is that the provisions of the Act must be complied

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[7] See Mkuyana *supra* at para 17

[8] Cambridge Plan AG v Cambridge Diet Pty Ltd 1990 (2) SA 574 600 A-G and Muller v The Master and Others 1992 (4) SA 277 T at 284 B-C; see also Mkuyana *supra* at para 22

[9] Ronald Bobroff & Partners Inc v De La Guerre 2014 (3) SA 134 (CC); Masango v RAF 2016 (6) (GT) at para [1]; Fluxmans Inc v Levenson 217 (2) SA 520 (SCA); Mostert and Others v Nash & Another 2018 (5) SA 409 (SCA) at para [54]; Mfengwana v RAF 2017 (5) SA 445 (ECG) at para [12] and Mathimba and others v Nontwaba & Others 2019 (1) SA 591 C (ECG) at para [118.1]

[10] Tjatji v RAF 2013 (2) SA 623 (GSJ) at para [21], see also para [22] in Mkuyana.

[11] 2018 950 SA 409 (SCA) at para [54]

with strictly. He stated: "Any non-compliance with or departure from the requirements of CFA, either as to substance or to form renders the contingency fee agreement invalid and unenforceable".

[8] The reason for demanding strict compliance with the Act is that a contingency fee agreement is otherwise unlawful as it is prohibited at common law[12]. Another reasoning by **Plasket J in Mfengwana** is that it is *"...necessary to prevent an abuse on the part of the unscrupulous legal practitioners willing to take advantage of their clients – a phenomenon that is, in my experience, unfortunately all too common"*[13]. It is the responsibility of the courts to exercise strict control by ensuring that any contingency fee agreement that do not comply with the Act, for whatever reason, should be declared invalid[14]. (My emphasis).

[9] In this Division, what is stated in **Mfengwana** has sadly become a phenomenon and this is my experience. The practitioners would abuse and evade an oversight role of the court as contemplated in paragraph [5] above. By stating in the matters they are seized with on behalf of their clients that *'no contingency fee agreement has been concluded'*, has become fashionable This is seen as an attempt to avert the courts' authority in the exercise of their strict control or oversight role regarding fee agreements concluded between attorney despite the form and substance of such agreements amounting to contingency fee agreements.

[10] The two cases before me, namely **Chiau v Road Accident Fund: case no 1150/2020 and Sibiya v Road Accident Fund: case no 557/2016,** in my view, involve contingency fee agreements which in their form and substance, are both null and void for non-compliance with the provisions of the Act. Before I deal with the background to each of the cases, it is important to deal first with the principle governing attorney and client costs. Attorney and client costs are the costs that an attorney is entitled to recover from his client for the disbursement made by him on behalf of his client, and for the professional services rendered. These costs are payable by the client whatever the outcome of the matter in which he or she engaged the attorney

[12] See Mkuyana at para 23
[13] See para 12 in Mfengwana
[14] See Masango (...) at para 54

services; and are not dependent upon any award of costs by the court. In the wide sense, it includes all costs that attorney is entitled to recover against the taxation of his bill of costs, but in the narrow and more technical sense, the term is applied to those costs, charges and expenses as between attorney and client that ordinary the client cannot recover from the other party[15].

[11] The relationship between a client and his attorney is that of principal and agent based on a contract of mandate[16]. The attorney is entitled to be remunerated for his services. His charges may be agreed in advance or they are the usual or normal fees due for the work actually performed. Irrespective of whether the attorney's fees are agreed, the fee charged must be reasonable[17].

[12] Based on considerations of public policy, the court receiving the right to decide what a fair and reasonable remuneration would be. A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an attorney to charge an unreasonable fee that amounts to overreaching will be unreasonable and consequently unenforceable[18]. An enquiry in terms of the Act into the legality of the attorney's normal fee is an objective assessment that will be conducted on the basis of certain specified considerations or factors which facts are aimed at achieving proportionately and consisting of amount that constitutes the basis for the agreed success fee.

[13] The purpose of incorporating into the enquiry the norms and principle applicable to the taxation or assessment of costs on an attorney and own client scale, is to achieve some measure of consistency and certainty of the amount of the normal fee. In that context, the role played by the principle that the court's tariff provides a guide for the determination of the reasonableness of fees an attorney charges his client, can simply be stated as that it provides a yardstick against which the attorney's normal fee

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[15] Hawkins v Bels & Another 1959 (1) SA 702 (WLD) at 705, see also Cilliers Loots and Nel, Herbstein and Van Winsen Civil Practice of the High Courts of South Africa vol 2 5th ed (2009) at page 1000g

[16] Blakes Maphanga Inc v OutSurance Co Ltd 2010 (4) SA 232 (SCA) at para [16]

[17] Ben McDonald Inc & Another v Rudolph and Another 1997 (4) SA 252 (T) at 256 – C - D

[18] Melamed & Hurwitz Inc v Goldberg (686/2007) [2009] ZASCA 15 (19 March 2009)

in the contingency fee agreement is to be measured in an overall assessment of the reasonableness of that fee[19].

[14] The point of departure of any enquiry into the enforceability of an agreed contingency fee is therefore the base fee, which the Act requires to be the attorney's normal fee that must be set out in the agreement. What the normal fee is, is clearly defined in section 1 of the Act. Consistent with the common law position it establishes "reasonableness" as the standard by which the base fee must be judged. The question is, how is reasonableness of the fee to be assessed? A reasonable fee is a fee that is fair. A fee is fair if it is appropriate for the work performed by the practitioner and falls within a range of fees that is usually charged for the same work[20].

[15] What is contemplated in the definition in section 1 is an objective assessment of the reasonableness of the fee essentially based on three factors. That is, the nature of the work to be performed by the legal practitioner in question, and the norms and principles that find application in the taxation or assessment of costs on an attorney and client scale in the absence of a fee agreement[21]. It is not necessary for the normal fees in the contingency fee agreement to reach a degree of unreasonableness to the extent that it would amount to overreaching and unprofessional conduct on the part of the legal practitioner concerned before it will constitute an unreasonable fee for the purpose of the Act. A determination of the reasonableness of the base fee is separate from the ethical basis of the right of judicial intervention in the fee agreements between an attorney and client where the enquiry is focused on the extent of the unreasonableness of the fee so as to constitute abuse, impropriety or overreaching and therefore unprofessional conduct.

[16] A determination of these reasonableness of the attorney's normal fees for purposes of the Act therefore requires an objective assessment of what is appropriate in the incentives of a particular case. Factors to be considered with regard to the nature and subject matter of the case, are its complexity and the time and effort likely to be spent on it. Factors relevant to the practitioner who will perform the work may in

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[19] See para 29 in Mkuyana *supra*
[20] See para 31 in Mkuyana *supra*
[21] See Mkuyana at para 32

turn include among others his experience, the skills level and expertise that is required to perform the work in question and the fee charged in the jurisdictional area by practitioners with comparatively the same level of skill and expertise[22].

[17] **In Mkuyana**, the question was whether the plaintiff's attorney's hourly fee, which the attorney disclosed in the fee agreement with the plaintiff, was a reasonable fee, as envisaged in the definition in section 1 of the Act. Counsel for the attorney in question asked the court to refer the issue to the Legal Practice Council for determination as envisaged in section 5 of the Act. The section provides that a client of a legal practitioner who has entered into a contingency fee agreement and who feels aggrieved by any provision or fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling, to such body or person as the Minister of Justice may designate. In terms of subsection (2), such controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust. On the other hand, the amicus in **Mkuyana** suggested a different course.

[18] In paragraph [38] **Van Zyl DJP** in **Mkuyana** held:

"*The issue is before us and we have been placed in position to deal therewith to finality. The issues have been fully ventilated on the evidence and the court should not lightly and without good reason refuse to exercise its supervising duties and functions alluded to earlier when it is placed in a position to do so. Further, as will appear more fully hereafter, the premise on which the attorney proceeded to determine his normal fee, was fundamentally flawed. Another reason for us to decide the matter is that the contingency fee agreement is also invalid for other reasons which falls outside the mandate and authority of the professional controlling body*"[23].

IN the matter of Sibiya v Raf, Case No. 557/2016

[22] See further Mkuyana at para 35

[23] See Mkuyana at para 38

[19] This is enquiry on the lawfulness or otherwise of the fee agreement concluded between the attorney of record Mr Eastes of Bremmer & Hough and his client, Ms A E Chiau an adult female person born on 4 July 1969, currently staying at the rural area called Sebokeng Naas Township, district Mpumalanga. She instituted an action against the Road Accident Fund arising from a motor-vehicle collision that happened on 20 July 2015 when she was injured as a passenger.

[20] The fee agreement was concluded on 11 September 2015. On 3 March 2022 this matter was laid before me on the close of the roll for allocation to any judge scheduled for trial during the trial week starting from 14 March 2022. On top of the court papers and as per the Consolidated Covid-19 Directive of this division, a practice note was filed. In paragraph 9 thereof is stated: *"The parties agree that the plaintiff did not enter into a contingency fee agreement as contemplated in the Contingency Fees Act, with the plaintiff's attorney"*.

[21] Worried whether indeed no contingency fee agreement was concluded, the matter was not allocated to proceed on trial on 14 March 2022. Instead, the matter was removed from the roll and a directive was issued and of relevance worded as follows:

1. *"In **Merriam-Webster Dictionary** the meaning of contingency fee is 'a fee for services paid upon successful completion of services and usually calculated as a percentage'. Contingency fee is also described as 'any fee for services provided where the fee is payable if there is a favourable result'.*
2. *The suggestion that no contingency fee agreement has been concluded pre-supposes that the plaintiff and his or her attorney agreed on a specific amount of a fee for the litigation when the instructions were taken and that the agreed fee was so paid by the plaintiff. For this, the plaintiff's attorney is hereby directed as follows:*
   - *2.1. When was such a fee agreed upon?*
   - *2.2. When was such a fee paid in total?*
   - *2.3. What is the amount of the fee agreed upon?*
   - *2.4. If no fee was paid or was paid in part, when was such a fee or remaining part thereof supposed to be paid?*
   - *2.5. If no fee was paid, what is the basis upon which is alleged no contingency fee agreement was concluded?*

3. *If it is correct that the plaintiff and his attorney agreed on a fee as so required, the following information should be provided in an affidavit by the plaintiff and his attorney* ***by not later than 12h00 on Thursday 10 March 2022.***
4. *Lastly, it is noted in paragraph 9 of supplementary practice note, is stated that the parties agree that the plaintiff did not enter into contingency fee agreement. This pre-supposes, that the plaintiff and defendant agree that there will be no fee agreement.*
   4.1. On what basis the parties (plaintiff and defendant) could so have agreed?
   4.2. If it is alleged that the plaintiff and defendant did not agree to no contingency fee agreement, on what basis reference is made to "the parties" in paragraph 9 of the practice note?"

Mr Eastes affidavit of 3 March 2022

[22] In an affidavit deposed to on 8 March 2022, Mr Eastes alluded to the fact that the matter has since been settled with the State Attorney one Mr Sibiya and that notices of acceptance of offer, removal and settlement agreement will subsequently be served and filed. In seeking to deal with the issues as quoted in paragraph [21] above, he stated that a fee agreement was concluded on 11 September 2015, that on15 February 2022 and during consultation the plaintiff as a client confirmed that "she did not enter into a contingency fee agreement as defined in the Act". Then in paragraph 3.13 of the affidavit in question Mr Eastes reiterated that the fee agreement concluded between the plaintiff and her attorneys of record represented "normal fee", taking cognisance of years and expertise as he, Mr Eastes dealt with the matter from the onset. Having said this and emphasised by underlining he stated in paragraph 3.14 of his affidavit as follows:
"I respectfully submit that the payment of the professional fees is not subject to the successful completion of a claim against the defendant and I respectfully refer the above Honourable Court to paragraph 2 of the agreement of fees as between attorney and own client dated 11 September 2015 annexure B hereto and therefore is not a contingency fee agreement as contemplated in the Contingency Fee Act, Act 66 of 1997".

[23] Then in paragraph 4 of his affidavit Mr Eastes stated that "*...It was agreed with the plaintiff, pertaining to capital, party and party costs and attorney and own client*

costs at the conclusion of this matter". Mr Eastes in seeking to deal with paragraph 4 of the questions quoted in paragraph [21] quotation of this judgment proceeded to state that he considers it to be his fiduciary obligation in the legal field to acquaint himself whether the plaintiff entered into a contingency fee agreement as contemplated in the Contingency Fee Act. And if so, whether the requirements of the Act are being met. One must commend Mr Eastes for this, but what follows gives the impression that he too was not sure whether the agreement he concluded with the plaintiff was a simple fee agreement or a contingency fee agreement to which the Act applies.

[24] I say so because according to Mr Eastes it is his practice to disclose the fee agreement entered with the plaintiff to the defendant's attorney, normally at the pre-trial conference held between the parties. Then in paragraph 5.3 of his affidavit he continued:

"If can remember correctly, I did present a copy of the fee agreement entered with the plaintiff to the State Attorney and normally enquire from the defendant's attorney if they agree that the fee agreement entered with the plaintiff is not a contingency fee agreement as contemplated in the Contingency Fee Act…".

[25] True, the Road Accident Fund in matters that are settled should satisfy itself before payment is made that a contingency fee agreement does not apply. The Road Accident Fund is there through the public purse and most importantly it is there to serve the public in particular, the poor, uneducated and the vulnerable who could easily be taken for a ride by the unscrupulous legal practitioners. It therefore needs to ensure that the right award of damages goes to the right people. For this, before payment is made on settlement, the Road Accident Fund has to ensure that any settlement to which contingency fee agreement applies, meets the requirement for a valid agreement before payment is made. In other words, where contingency fee agreement applies and the matter is settled, payment should only be made on the basis of a court order to ensure that the court's oversight role is not subverted or side-stepped. The allegation of "no contingency fee agreement" when it comes to damages claim, in particular against the Road Accident Fund and in medical negligence matters where touts are mostly used, has to be investigated at all its corners, otherwise the Act will not worth the paper is written on.

[26] The fact that such an allegation is made, does not on its face-value make it a fee agreement to which the Act does not apply. The form, content and substance of the alleged simple fee agreement has to be looked at to ensure that no abuse takes place and that courts are not used to facilitate such an abuse. The enquiry herein was therefore necessary.

Mr Eastes affidavit of 17 March 2022

[27] This affidavit was prompted by the response contained in Mr Eastes affidavit of 8 March 2022. The response was meant to deal with the issues raised as quoted in paragraph [21] of this judgment. Worried by lack of sufficient particulars given, further directives were issued as follows:

1. *"The terms and conditions of the fee agreement with the plaintiff in this matter is noted and you are hereby directed to file further affidavits dealing with the followings:*
   - *1.1 Were the accounts in respect of disbursements and interim accounts in respect of attorney's fees ever delivered to the plaintiff as contemplated in clause 3 of the fee agreement?*
   - *1.2 If the answer in paragraph 2.1 above is in the affirmative, the following questions must be dealt with in the affidavit:*
     - *1.2.1 When were such accounts delivered?*
     - *1.2.2 What were the terms of payment for such accounts?*
     - *1.2.3 Was the plaintiff financially capable to pay the amounts as per such accounts and if so, when did she pay for such accounts?*
     - *1.2.4 If the accounts as per clause 3 were delivered and it is alleged that the plaintiff was financially capable of paying for such accounts, when did she pay for such accounts so submitted to the plaintiff in terms of clause 3?*
     - *1.2.5 If it is contended that the plaintiff was and is not financially capable of paying the amounts as per the accounts so submitted, on what basis is it contended that the fee agreement concluded did not amount to a contingency fee agreement? In dealing with this question, the plaintiff's attorney is hereby directed to indicate what is his definition or understanding of contingency fee agreement.*
     - *1.2.6 Did the plaintiff's attorneys before accepting the instruction to litigate on behalf of client consider whether client (the plaintiff) has reasonable prospects of success in the anticipated litigation? And if so, can it be assumed that if the prospects were not good, the plaintiff's attorney would not have proceeded with the litigation unless client was able to finance the litigation out of his or own pocket?*
2. *It is also noted in clause 4 that the plaintiff was to pay a deposit in respect of attorney's fees and or disbursements only when so demanded. In the light hereof the following questions should be answered:*

2.1 *Was any demand for such payment of the deposit ever made? And if so when was such a demand made?*

2.2 *If a demand was never made, why was it not made? In dealing with these questions it must also be explained why a deposit was not demanded upfront if indeed the contingency fee agreement is not involved here.*

3. *It is further noted that in clause 5 of the fee agreement in question, all accounts shall be payable upon receipt thereof. The plaintiff's attorney is hereby required to deal in his affidavit with the following questions:*

3.1 *Were such accounts ever sent to and received by the plaintiff?*

3.2 *If the answer in 4.1 above is "yes", then the following questions must be dealt with:*

3.2.1 *When were they sent and received by the plaintiff?*

3.2.2 *Did the plaintiff pay as per clause 5? If so, when was payment/s made? Proof of such payment/s must be provided.*

3.3 *If no accounts were ever submitted as per clause 5, when are such accounts intended to be submitted to the plaintiff for payment and why they have not been submitted if the fee agreement in not based on contingency fee?*

3.4 *It is further noted that in terms of clause 7.1 the client is obliged to pay attorneys fee and disbursements depending on the amount of quantum as may from time to time be applicable in respect of all services rendered, plus 100% surcharge, that is, double the tariff and any fixed surge on such tariff including inter alia, so many items in respect of which an attorney is entitled to charge client.*

3.4.1 *In the affidavit, you are hereby directed to indicate how does clauses 7.1 and 7.2 differ from what is envisaged in section 2 of the Contingency Fee Act. "*

3.4.2 *...*

[28] In dealing with the specific questions quoted in paragraph 21 of this judgment the followings were stated: That on 11 September 2015 the plaintiff agreed to pay her attorneys of record "attorney and own client fees and disbursements". As to when was a fee agree upon paid the answer is that "the fee has not been paid in total. Regarding the amount of the fee agreed upon a somewhat long answer is given, *inter alia*, as follows:

"*The plaintiff agreed to pay – attorney and own client fees and disbursements as per tariff (which includes surcharge) as provided for in Rule 70 of the High Court as may from time to time be applicable in respect of all professional services rendered, plus 100% surcharge*".

[29] I pause for a moment to deal with the meaning of "surcharge". According to Collins English Dictionary, '*a surcharge is an extra payment of money in addition to the usual payment for something. It is added for a specific reason*'. Therefore, for the

purpose of determining whether the fee agreement concluded by Mr Eastes, regard been had to the form, content and substance of the agreement in question, "surcharge mentioned in the agreement should be understood as meaning *'additional fees to the hourly normal fee charged by Mr Eastes'* as so stated in the fee agreement between Mr Eastes and his client.

[30] Of necessity this consideration will also become relevant to the meaning of "normal fee" and 'contingency fee' as defined in the Act read together with section 2(1) of the Act. I expand on this later in this judgment, in particular with reference to the fact that the agreement of fees entered into with the plaintiff in present case whilst is contingency in form and substance, it does not comply with the strict requirements of section 2 and 3 of the Contingency Fees Act.

[31] The answer to the question 'when was such a fee or remaining part thereof supposed to be paid?', is revealing. *'I decided to deliver a comprehensive account at the completion of the matter', as stated* in Mr Eastes's affidavit *deposed to on 17 March 2022,* can only flow from the fact that the plaintiff's case was taken up by Mr Eastes knowing that the plaintiff was in no financial position to pay for any of the attorney's fees or disbursements and that he proceeded to litigate on behalf of client on risk basis. Failure to deal with the plaintiff's financial ability to pay for the litigation would appear clearly later in this judgment. Therefore, one can comfortably assume that payment was to come from the capital amount on a successful finalisation of the litigation. No legal practitioner would be willing to incur disbursements of advocates and experts in a matter that has no prospects of success and without a full cover.

[32] In paragraph 2.2.1 of the directive issued on 9 March 2022 the attorney for the plaintiff was requested to indicate when the accounts in respect of disbursements and interim accounts in respect of attorney's fees, were delivered. The answer is that they were presented to the plaintiff. Having said this and without specifying the dates on which such accounts were "presented to the plaintiff", Mr Eastes in his affidavit alluded to the fact that he negotiated with the experts for extended payment periods on behalf of and to the benefit of the plaintiff. This is not for the benefit of the plaintiff but is for the attorney's benefit who is litigating on behalf of client on contingency basis. I say

so because payment of such disbursement is a matter between the attorney and the experts and not the client.

[33] Without stating when were the accounts delivered to the plaintiff regarding the accounts he had received from four of the experts mentioned in paragraph 4.2.1(c) of his affidavit deposed to on 17 March 2022, Mr Eastes alluded to the fact that his experts agreed to give him a grace of six months from a date unknown. I say so because no particulars were given regarding such accounts so allegedly presented to the plaintiff.

[34] What is however startling is the only invoice or account Mr Eastes referred to in paragraph 4.2.1 (g) of his affidavit. This is the only invoice in respect of which the particulars were given except to say no proof was provided that same was presented to the plaintiff. Why only this invoice was attached to the affidavit is not explained. I assume that no other invoices were issued despite the experts having apparently incurred costs in the compilation of the reports. Otherwise, if the experts submitted such accounts, Mr Eastes would gladly have submitted such accounts to this court as he did regarding the one account I refer to hereunder.

[35] Of note is the fact that the only invoice submitted to this court in terms of the directive is dated 1 October 2021. This is an invoice from an actuary in the amount of R14 260.00 payable on 1 October 2024. This seems to facilitate finalisation of the matter. Almost like waiting for the matter to be finalised before the amount becomes due and payable. The statement written in bold and capital letters: "**The amount DUE AND PAYABLE ON 01/10/2024 even if not settled by then**", is a strange kind of an arrangement. Firstly, why the statement "even of not settled by then"? Why an outsider as between attorney and client will attribute payment to a settlement as if he or she was told that the matter was being litigated on the basis of contingency fee agreement. In any event why an expert like Dr Robert J Koch, an actuary with vast experience of many years will find the need to issue such an invoice due and payable three years after it was issued? The irresistible conclusion is that he was told that the matter was dealt on contingency basis and that payment will only be possible after the matter shall have been settled. This brings me to consider another issue.

What is the object of the Act?

[36] Contingency fee agreements facilitate access to justice as they enable litigants to obtain legal representation to prosecute their claims where the litigant may otherwise have been unable to do by reason of the prohibitive costs of litigation. The Act was intended to facilitate this access by doing away with the prohibition at common law. The Legislature was clearly conscious of the risk of exploitation when it legitimised contingency fee agreements. What the Act sets out to do is to carefully regulate the extent to which a legal practitioner may agree with his or her client for the payment of an increased fee.

[37] As previously indicated in this judgment, unregulated contingency fees agreements have the potential for earning by the legal practitioners which are excessive and disproportionate to the labour and risk invested. Subsection (1)(a) of section 2 of the Act makes it plainly clear that notwithstanding anything to the contrary in any law or common law, a legal practitioner may, if in his her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings, unless such client is successful in such proceedings to the extent set out in such agreement.

[38] Section 2(1)(a) should therefore be interpreted to mean that if client is indigent or poor and unable to fund the costs of litigation and the attorney after having formed an opinion that there are reasonable prospects that his or her client may be successful in any proceedings, decides then to enter into an agreement, that will constitute a contingency fee agreement. That is so because the litigation is proceeded with in the context of inherent risk the attorney is prepared to take. And that is the risk the attorney in the present case was prepared to take as it would appear clearer later in this judgment

Was the plaintiff able to fund the costs of litigation?

[39] In paragraph 2.2.3 of the directive dated 9 March 2022 the plaintiff's attorney was required to indicate whether the plaintiff was financially capable to pay the amounts as per the amounts so submitted and if so, the plaintiff's attorney was required to indicate when the plaintiff so paid. In paragraph 4.2 of his affidavit, Mr Eastes devoted his attention to paragraph 2 of the directive issued on 9 March 2022. In so doing, he neglected to specifically respond to the question raised in paragraph 2.2.3 of the directive. Failure to respond to this question is not in my view inadvertent. It was deliberate because clearly regards been had to the facts of the case as disclosed in the two affidavits deposed to by Mr Eastes, the form, content and substance of the agreement upon which the attorney relies on for his assertion that the fee agreement concluded did not amount to contingency agreement, clearly do not support such an assertion.

[40] Seeking to deal with a follow-up question to question 2.2.3 of the directive, Mr Eastes, in my view, also found himself being confronted with a difficulty to justify his assertion of no contingency fee agreement. The assertion in paragraph 4.4.2 of his affidavit to the effect that '*the fee does not depend on the outcome of the case, and because we advise our clients properly, there is no need to enter into a contingency fee agreement*', is wrong in law and is not supported by the facts of the case. Unfortunately, this appears to be wide-spread practice which tends to undermine the imperative in the Act. His unilateral suggestion to deliver a comprehensive account at the conclusion of the matter as alluded to in paragraph 4.4.1 of his affidavit, serves to show the extent of the abuse. Almost abandoning a fee agreement by going contrary to the alleged agreed terms and conditions of the agreement which are not realisable because client is not and has never been in any position to afford any such fees and disbursements. This was clearly common cause when the fee agreement relied upon was concluded.

[41] The abuse is obvious. That is, to avoid the strict requirements for compliance in sections 2 and 3 of the Act coupled with the court oversight in terms of section 4. In terms of clause 4 of the fee agreement, the plaintiff as a client was to pay a deposit on demand. In question 3.1 Mr Eastes was directed to indicate if such a demand was

made. Having made such a demand on 11 September 2015 when the agreement was concluded, question 3.2 as quoted in paragraph [21] of this judgment was probing. To this, Mr Eastes resorted to stating that he unilaterally decided to deliver a comprehensive account at the conclusion of the matter. This would only mean that payment was to come from the capital amount after the matter shall have been successfully concluded. This in my view, arises from the fact that '*before accepting the instructions, taking cognisance of how the collision occurred giving rise to the plaintiff's claim and nature, extent and sequence of the injuries the plaintiff sustained*' as so stated in paragraph 4.2.8 of his affidavit, Mr Eastes advised the plaintiff of her chances of success. To suggest that the fee agreement was not based on "success" has no merits. It is actually at odds with the facts of the case to conclude or contend that the fee agreement concluded was not based on a success agreement or "no win, no fee" agreement.

[42] The statement, "*clause 7.1 and 7.2 of the agreement of fees entered into with the plaintiff differs from section 2 of the Act in that payment of fees as per agreement was not subject to successful finalisation of the claim*" in paragraph 4.4.3 of Mr Eastes' affidavit, cannot be correct. The assertion that Mr Eastes or his firm of attorneys 'will be entitled to its normal fee, and that the agreement of fees entered into with the plaintiff does not comply with sections 2 and 3 of the Act', cannot be considered without having regard to the facts of the case, the form, content and substance of the fee agreement concluded. It is a fee agreement based on a risk taken by the attorney and that constitutes "contingency" which means "*an event that may or may not occur in the future. In other words, it depends on fulfilment of a condition which is uncertain*". Whist Mr Eastes seeks to distance himself from this definition, the facts of the case do not support his assertions.

[43] As indicated earlier, the facts of the present case fits into the provisions of I have section 2(1)(a). Similarly, section 2(1)(b) of the Act also fits into the facts of the case and content of the fee agreement Mr Eastes relies on. An undertaking by the plaintiff in clause 7.1 of the fee agreement to pay attorney and own client fees and disbursements as per tariff (which includes any surcharge) as provided in Rule 70 - as may from time to time be applicable in respect of all professional services rendered plus 100% (One Hundred Percent) (i.e double the tariff and any fixed surcharge on

such tariff, including, *inter alia* consultation, attendance, telephone calls, including *inter alia* preparation, settlement claims, settlement as taxation of costs, accounting in respect of capital and or costs; advice on and arrangements made in respect of investments, travelling costs, making copies (irrespective of the number of copies made of each and every document); sending out or receiving of fares, should in my view, dispose of and burry any suggestion that no contingency fee agreement has been concluded.

[44] For reasons best known to Mr Eastes he put emphasis by bolding and using also capital letters to the words "PLUS 100% (ONE HUNDRED PER CENT) surcharge". In paragraph [29] of this judgment the meaning of "surcharge" was given. Clearly in the context of the present case "surcharge" means that not only the "normal fees" as defined in section 1 of the Act will be charged, but also 100% additional charges. This in my view, falls squarely within section 2(1)(b) of the Act.

[45] Section 2(1)(b) allows a legal practitioner to charge in a contingency fee agreement fees equal to or subject to subsection (2), higher than his or her normal fee set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement. "Surcharge" referred to in paragraph 7.1 of Mr Eastes's affidavit of 17 March 2022, is an added higher fee than his or her normal fees. So, whatever way you look at the facts of the case and the agreement concluded on 11 September 2015, you are led to one conclusion. The fee agreement concluded is a contingency fee agreement which is invalid and unenforceable for non-compliance with the provisions of the Act.

[46] There is another issue to deal with. This statement in paragraph 4 of Mr Eastes's affidavit deposed to on 16 March 2022, is telling: "*I confirm that it was agreed with the plaintiff that we will account to the plaintiff pertaining to capital, party and party costs and attorney own costs, at the conclusion of this matter*", in paragraph 4 of Mr Eastes' affidavit deposed to on 16 March 2022, is telling. First, this term and condition of the fee agreement if it had actually arisen, must have arisen after the written agreement was concluded on 11 September 2015. I say so because in terms of clause 3 of the written fee agreement, the attorney was obliged to deliver to the plaintiff particulars of the disbursements as soon as they are incurred and interim accounts in

respect of attorney's fees from time to time. The plaintiff was expected to make payment in regard thereto. In terms of the fee agreement in question, all accounts shall be payable upon receipt thereof by the plaintiff.

[47] Mr Eastes in his affidavit alluded to the fact that all expert accounts were submitted to the client. He did not specify when and for how much. But all what is known is that client paid nothing despite what is stated in clause 5. So, if the agreement relied upon is now that client will pay after the capital amount is paid and that a comprehensive account in relation thereto including party and party costs paid and that an attorney and own client costs will be deductible from the capital amount awarded, that should dispose of any suggestion that contingency fee agreement was not concluded. This way of litigating on behalf of a client amounts to an abuse intended to side-step the prohibition at common law and also to side-step the imperative in the Contingency Fees Act.

Lack of information regarding reasonableness of the agreed fees

[48] Mr Eastes's attention was drawn to the decision in **Mkuyana**. In this case, the full court also had to deal with the unlawfulness of the fee agreement based on the unreasonable nature of the fees to be charged to the client. There is a long standing practice in the attorneys' profession which is repeated in section 35 of Legal Practice Act, although the provisions of the section are still to be proclaimed.

[49] Just to paraphrase what is provided for in section 35 which deals with fees in respect of legal services: When an attorney first receives instructions, he or she is obliged to specify in writing all the particulars relating to the envisaged costs of the legal services including the attorney or advocate's hourly rate. An explanation to client's right to negotiate the fees payable to the attorney or advocate, should be provided to client. Similarly, the likelihood of engaging an advocate as well as explanation to client of the different fees that can be charged by different advocates depending on aspects such as seniority or expertise, should also be provided to client. Non-compliance with section 35 entitles the client to refuse to pay the attorney any legal costs until the Legal Practice Council has reviewed the matter and made a determination regarding the amounts to be paid. Whilst subsections 7 to 12 of section

35 of the Legal Practice Act have not been proclaimed yet, they cannot be ignored as this has always been the practice which every attorney in my view, ought to emulate and practise.

[50] Mr Eastes in his affidavit elected not to be open to the court and explain what his hourly rate is. Instead, in clause 7.2 of the fee agreement concluded on 11 September 2015 it is stated that court appearance by Messrs Bremmer and Eastes shall be equivalent to that of senior/junior counsel. It cannot be expected that a client like the plaintiff in the present case coming from a rural area of Sebokeng at Nkomazi, will know what appearance fee rate for senior/junior counsel is. Secondly, Mr Eastes's hourly rate for other legal services is not specified. This generalisation of legal costs is susceptible to an abuse and that is what the Contingency Fees Act and the long standing practice in the attorneys' profession due to be converted into law in terms of section 35, are intended to curb the abuse.

[51] Van Zyl DJP in **Mkuyana** dealt at length with what should be considered in dealing with the reasonableness or otherwise of the fees charged by a legal representative. Whilst the reasonableness thereof has to be determined by the Taxing Master in terms of rule 70, when everything is placed before the court, there is nothing preventing the court from dealing with the issue.

[52] Van Zyl DJP in **Mkuyana** held that the attorney is entitled to be remunerated for his services. His charges may be agreed in advance or they are the usual or normal fees due for the work actually performed. Irrespective of whether the attorney's fees are agreed, the fee charged must be reasonable. Reasonableness is the standard aspect when the attorney's fee ultimately be measured. Based on consideration of public policy, the court retains the right to decide what a fair and reasonable remuneration would be. A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an attorney to charge an unreasonable fee that amounts to overreaching will be unreasonable and consequently unenforceable.

[53] In paragraphs [48] to [50] of this judgment I referred to section 35 and the long standing practice in the attorney's profession. The attorney for the plaintiff on more than one occasion missed an opportunity to deal with the legality of his fee charges

based on the fee agreement concluded. In other words, he missed an opportunity to deal with the reasonableness of his fees. He had an opportunity to specify his fee charge in the agreement concluded on 11 September 2015. Second, the opportunity was also missed when he was asked to deal with the directive dated 3 March 2022. Instead, he attached a fee agreement which was couched in general terms without specifying his hourly rate and that of counsel where applicable.

[54] Failure to disclose in detail costs of litigation in circumstances where client pays nothing until the matter is finalised is one of the things the Act sought to avoid when the Legislature did away with the prohibition of contingency fee agreement at common law. To allow and sees no illegality in the present facts of the case, would only promote the abuse and this will make the Act not to be worth the paper is written on. It is expected that at the first consultation with client, client will be placed in a position to understand the costs implications of the contemplated litigation. It is at this stage that client's assessment of the means and ability to feed the bill costs should be ascertained and not just resort to "no contingency fee agreement is concluded". When in actual fact fees are payable upon and deductible from the capital amount. The tendency and practice of concluding fee agreements as we have lately discovered, is worrisome especially if officers of the courts are behind it. I find that the agreement concluded, is illegal and unenforceable. This then leaves the issue of remedy to be dealt with later in this judgment

In the matter of D.J Sibiya v RAF. Case Number 557/2016 – Mbombela

[55] On 24 January 2022 the plaintiff's attorneys Du Toit-Smuts filed notice of set down for taxation by the Taxing Master scheduled for 2 February 2022. Upon receipt of the bill of costs in the amount of R66 949.50 for fees and R24 595 for disbursements, the Taxing Master directed the following questions to the plaintiff's attorney:

"5. However, as a follow-up on our conversation, I have the following question to ask, as a follow-up to the issue of "no contingency"

(a) My question was whether the client paid cash or not?
(b) When was the fee agree upon?

(c) When was such a fee paid in total?

(d) What is the amount of the fee agreed upon?

(e) If no fee was paid or was paid in part, when was such a fee or remaining part thereof supposed to be paid?

(f) If no fee was paid, what is the basis upon which is alleged no contingency fee agreement was concluded?

6. *I asked the above questions, so that I can approach one of the Judges in Chamber in terms of Rule 70(5A)(d)(ii), for the purposes of getting direction in order to tax the bill of costs to finality."*

[56] In a letter dated 8 February 2022 to the Taxing Master, Mr Krige on behalf of the plaintiff sought to respond to the questions raised as in paragraph [54]. In paragraph (iii) of his letter he stated: "Only after the quantum is finalised and the matter is finalised in *toto* are we able to compile an attorney and client bill of costs"

[57] Mr Krige then proceeded and made this statement:

"In this matter, the merits have become settled and we are now entitled to tax the plaintiff's party and party costs against the Road Accident Fund:

Any proceeds from the party and party bill of costs will be utilised to appoint the necessary medical experts. The party and party bill of costs will be taken when compiling the attorney and client bill of costs, of which the latter is payable by the client. We are however, at this stage, in no position to compile an attorney and client bill of costs as the matter is not yet finalised.

Our firm did not enter into a contingency fee agreement in terms of the Contingency Fee Act No. 66 of 1997. The Legal Practice Act, Act 28 of 2014 stipulates the requirements regarding attorney and client fee agreements which is governed by the Legal Practice Council. We respectfully submit that our attorney and client fee agreement is in accordance thereof".

[58] Starting with the latter statement, reference to requirements regarding attorney and client fee in terms of the Legal Practice Act, can only be with regard to section 35. "Our attorney and client fee agreement in accordance thereof", can only be in accordance with section 35. The section does not only set out the requirements for a valid fee agreement, but it also outlaw any fee agreement which is not compliant

therewith. In addition, non-compliance therewith constitutes a misconduct and renders the agreement unlawful and unenforceable.

[59] In terms of subsection (7) of section 35 of the Legal Practice Act, an attorney when he or she first receives instructions from a client, the costs estimate notice must be provided to client in writing. In such a notice all particulars relating to the envisaged costs of the legal services must be specified including (a) the likely financial implications including fees charges, disbursements, and other costs, (b) attorney's or advocate's hourly fee rate and an explanation of the client of his or her right to negotiate the fees payable to the attorney or advocate, (c) an outline of the work to be done in respect of each stage of litigation process, where applicable, (d) the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocate, depending on aspects such as seniority or expertise, and if the matter involves litigation, the legal and financial consequence of the client's withdrawal from the litigation as well as the costs recovery regime.

[60] Mr Krige does not in his letter explain how he allegedly complied with the requirements stipulated in the Legal Practice Act. Probably he did. If he did, he would have seized the opportunity to provide the written agreement as required in terms of the intended legislative imperative in subsection (7). I say "intended" because the section has not been proclaimed yet. The statement "We are however at this stage in no position to compile an attorney and client bill of costs as the matter is not yet finalised" is in direct conflict with the provision of subsection (7) which requires a costs estimate in writing specifically the particular relating inter alia, the attorney's or advocates' hourly fee rate as contemplated in paragraph (b) of subsection (7).

[61] Furthermore, the statement: "...the merits have become settled and we are now entitled to tax the plaintiff's party and party costs against the Road Accident Fund. Any proceeds from the party and party bill of costs will be utilised to appoint the necessary medical experts", is a clear concession that client in the present case is in no position to fund the costs of the litigation against the Road Accident Fund. At common law to litigate on behalf of client on this basis is prohibited unless the attorney and client enter into contingency fee agreement in terms of the Contingency Fee Act, something which

did not happen in the present case and thus making the agreement illegal and unenforceable.

[62] Speaking about the legality and enforceability of the agreement, subsection (11) of section 35 of the Legal Practice Act provides that if any attorney or advocate referred to in section 34(2)(b), does not comply with the provisions of the section, the client is not required to pay any legal costs to that attorney or advocate until the council has reviewed the matter and made a determination regarding amounts to be paid. This is an aspect to consider when dealing with the remedy later herein.

[63] I may however mention that whilst subsections 7 to 12 of section 35 of the Legal Practice Act are not proclaimed yet, what is stated in these subsections has always been a good practice in the legal profession. It is for this reason, I want to believe, that Mr Krige is talking about the requirements in the Legal Practice Act despite that the subsections have not been proclaimed yet.

[64] The Taxing Master having been provided with the explanation by Mr Krige, invoked the provisions of rule 70(5A)(d)(iii) and referred the matter for direction. Upon receipt of the request from the Taxing Master, the plaintiff's attorneys were on 8 March 2022 directed to file an affidavit and to give specific response to each of the questions raised by the Taxing Master as quoted in paragraph [55] of this judgment. An affidavit deposed to on 16 March 2022 has since been filed.

[65] In dealing with the question whether client paid any fee for the litigation, the respondent was given as follows:
"No the client did not pay cash. The matter has not been finalised. Only merits have been settled and the client only has to pay when the matter is finalised in toto."

[66] The answer is revealing. This is not a pro-bono matter. A clear concession is made that client is not able to fund the litigation. Obviously the matter is litigated on the basis of contingency. In dealing with the question when was the fee agree upon, the response on affidavit is articulated as follow:
"No fee has been agreed upon. That is the reason for taxation. The amount taxed and paid by the defendant will be taken into account once the matter has been finalised."

[67] If this explanation does not amount to a contingency fee agreement to which the Act applies, then the Act will not be worth the paper is written on. Subversion of the imperative in the Act will continue to be nation wide-spread and our courts would be used as a facilitator for the abuse or subversion of the Act. The oversight power of the court as contemplated in section 4 of the Act was meant to ensure that there was a strict compliance with the provisions of section 2 and 3 of the Act.

[68] Section 4(1) of the Act provides that any offer of settlement made to any party who has entered into a contingency fee agreement, may be accepted after he has filed an affidavit with the court, if the matter is before, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating (a) full terms of the settlement; (b) an estimate of the amount or other relief that may be obtained by taken the matter to trial; (c) an estimate of the chances of success or failure at trial; (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial; (e) the reason why settlement is recommended; (f) that the matter contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

[69] The effect of section 4 (1) is that if a fee agreement is found to be a contingency fee agreement based on its form, content or substance and there is an offer of settlement, that offer cannot legally be accepted unless an affidavit is filed with the court or controlling body in which the requirements as indicated in paragraph 68 above are found to have been met. In terms of subsection (2) of section 4 of the Act, the affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating (a) that he or she was notified in writing of the terms of the settlement; (b) that the terms of the settlement were explained to him or her and that she understands and agrees to them; (c) and his or her attitude to the settlement.

[70] Therefore, an offer of settlement must be preceded by the filing of an affidavit deposed to by the legal practitioner in a matter where a contingency fees agreement has been concluded. As indicated elsewhere in this judgment, the assertion by some

of the legal practitioners that *"no contingency fee agreement was concluded"*, contrary to their assumptions, does not mean that a fee agreement in question is not subject to the provisions of the Act.

[71] The content, substance, form of the fee agreement and the surrounding facts in each case is what determines whether a particular fee agreement amounts to a contingency fee agreement or not. The facts of the present case under discussion does not support the assertion that no contingency fee agreement was concluded. The statement: *"there was no fee agreed upon. The plaintiff will be debited for professional services rendered as per the attorney and client fee agreement once the matter is finalised in toto"* points to the conclusion of contingency fee agreement that is illegal and unenforceable in law for failure to comply with the imperative in sections 2, 3 and 4 of the Contingency Fee Act.

[72] On 17 March 2022 and in the matter of **Mucavele v MEC for Health (3352/2016) Mbombela Main Seat (17 March 2022)** another fee agreement was found to be illegal and unenforceable. The matter was referred to the Legal Practice Council for investigation. Mr Krige was provided with a copy of the judgment and directed to indicate whether he was still insisting that the fee agreement he concluded with the client was legal. He did not heed to the directive. Perhaps he has no answer to the enquiry. The plaintiff in Mucavele was represented by another firm of attorneys not involved in the present two cases. This is the extent of the wide-spread practice that turns to undermine the imperative in sections 2, 3 and 4 of the Contingency Fee Act.

Remedy

[73] An agreement that is illegal, null and void cannot be relied upon or become enforceable. The fee agreements concluded in the two cases cannot be enforceable in law as they are illegal in their form, content and substance coupled with the explanation given on affidavits, constitute contingency fee agreements concluded without complying with the provisions of the Contingency Fee Act. In addition, they offended against the legal profession rules of game or conduct in that they did not

enter into a proper and acceptable fee agreement as set out in this judgment. Therefore, the two agreements in the two cases ought to be set aside.

[74] This then raises the question what kind of remedy is in the offering. **In Sibiya case**, the matter has been settled on merits only. In the circumstances, the appropriate order or remedy would be to refer the conduct of Mr Krige to the professional body for investigation and where appropriate take whatever it might find befitting to the facts of the case. The fee agreement having been found unlawful, the Taxing Master is under no obligation to tax the bill of costs presented to him. In fact, it would be improper to do so as that will facilitate and put into effect the illegal fee agreement between an attorney and client.

[75] Paragraph 15.11.4 of the division's Practice Directive dated 9 January 2020 as amended provides that in selected damages claim matters like the RAF and medical negligence matters, if a bill of costs is submitted where a settlement agreement has been reached and is suggested that no contingency fee agreement has been concluded with client in whose favour a settlement has been reached, the party or party's attorney filing such a bill of costs, shall also file an affidavit confirming that no contingency fee agreement has been concluded with client, failing which the taxing master shall return the bill. The fee agreement in **Sibiya matter** has been found to constitute a contingency fee agreement which did not comply with the provisions of the Act and thus illegal and unenforceable.

[76] As regard the matter of **Mr Chiau,** a settlement agreement was concluded some few days before the date of hearing on 14 March 2022. On 3 March 2022, the defendant delivered an offer of settlement. On 7 March 2022 the plaintiff duly accepted the offer. On the same day, and at the close of the roll this matter was not allocated because of the statement which appeared in paragraph 3 of the plaintiff's Practice Directive. The statement reads as follows: '*...the parties agree that the plaintiff did not enter into a contingency fee agreement as contemplated in the Contingency Fee Act with the plaintiff's attorney'*. It was this statement which prompted the launch of the present enquiry on the legality or otherwise of the fee agreement in question.

[77] As things are now, the matter between the plaintiff and defendant has been settled in the amount of R1 034 470.00 being for general damages and loss of earnings. In the settlement agreement reduced to writing by the plaintiff's attorney and state attorney on 7 March 2022, it is recorded that the plaintiff did not enter into a contingency fee agreement as defined. The intention is obvious. For now, it suffices to mention that the fee agreement is unlawful and unenforceable. The plaintiff's attorneys cannot through the court benefit from unlawful fee agreement.

[78] In dealing with the remedy, one should take queue from what is envisaged in section 35 although not proclaimed yet. First, subsection (12) provides that the provisions of the section do not preclude the use of contingency fee agreements as provided for in the Contingency Fees Act. Second, and I do this at the risk of repetition, subsection (11) provides that if any attorney or advocate referred to in section 34(2)(b) does not comply with the provisions of this section, the client is not required to pay any legal costs to that attorney or advocate until the Council has reviewed the matter and made determination regarding amounts to be paid. I take it before any such a determination is made in accordance herewith, the Council will accordingly advise client that he or she is entitled to object to his or her attorney benefitting from an illegal and unenforceable agreement. In other words, that he or she should be advised that there is no obligation in law to pay any fee or disbursements arising from the illegality and unenforceability of the fee agreement in question.

[79] Section 35(11) of the Legal Practice Act should also be read in the context of section 5 of the Contingency Fee Act which allows the professional controlling body to review any fees chargeable in terms of a contingency fee agreement concluded between a legal practitioner and client and in terms of subsection (2) of section 5 of the Act, the professional body or a designated body or person may review any such agreement and set aside any provision thereof.

[80] However, I do not find it necessary to refer the review or setting aside of the fee agreement in the present case to the professional body as this court has all the facts before it to deal with the review and setting aside of the fee agreement concluded. However, the agreement between the defendant and plaintiff remains intact and the payment agreed on should be paid direct to the plaintiff. The Legal Practice Council

insofar as practically possible to duly advise the plaintiff in the recovery of the capital amount including costs of litigation that the plaintiff might be entitled to. But the Road Accident Fund should take the lead in ensuring that the plaintiff is directly paid what is due to him or her in terms of the agreement so reached between the plaintiff and the RAF.

Payment upon offer of settlement where contingency fee agreement applies.

[80] Earlier in paragraph [24] of this judgment I dealt with the practice adopted by Mr Eastes in dealing with the Road Accident Fund. As I said, that is not a bad practice. The difficulty however is when is stated that no contingency fee agreement was concluded when in actual fact the form, content and substance of the fee agreement in question amounts to a contingency fee agreement.

[81] The assertion of "no contingency agreement has been concluded", has an abuse inherent in it. The RAF officials or attorneys for the RAF with whom settlement discussions are undertaken, may not have the legal understanding of what constitute a contingency fee agreement. That however, should not be an excuse to let contingency fee agreements slip through their fingers. If this was to happen, that would defeat the essence of the Act which is aimed at protecting not only the profession, but also the vulnerable through an oversight authority of the courts.

[82] If the RAF in the present case came to the conclusion that the fee agreement that was presented to it during the settlement negotiations, was a contingency fee agreement, it would, in my view, have been entitled to refuse to make an offer of settlement or payment thereof unless review process as envisaged in section 5 of the Act or as envisaged in section 35 of the Legal Practice Act has taken place. In any case, referral for the review of fees chargeable or agreement thereof by the professional body, is a long standing standards generally recognised by the profession. This will also be as contemplated in paragraph 3.3.4 of the code of conduct which provides that ....

[83] The point I am making is that a defendant who settles and pays on the basis that a contingency fee agreement is not applicable, should be wary of accepting such an

assertion by the plaintiff's attorney and his or her client. Acceptance of such assertion without due consideration and interrogation might result in a wide-spread abuse that tends to undermine the Act. The RAF as a defendant including other defendants in general damages claims like in medical negligence cases where it is expected that many indigent and uneducated litigants would be involved, should be proactive to ensure that it is not used as facilitators of a potential abuse. The present case is an example of such an abuse. What was said not to be contingency fee agreements, on the facts of the two cases, have turned to be such agreements which did not comply with the provisions of the Act. This was despite the fact that in **Chiau matter** and according to Mr Eastes, the RAF was asked to confirm if it was happy that the fee agreement in question was not a contingency fee agreement.

[84] Consequently, an order is hereby made as follows:

In Chiau Case

84.1 The fee agreement concluded between Chiau and his attorneys is hereby reviewed and set aside for the reasons set out in this judgment.

84.2 The defendant to pay the costs of litigation to the defendant on a party and party scale as agreed between the parties.

84.3 An amount of R1 034 470.00 awarded to the plaintiff by the defendant to shall be paid directly to the plaintiff within 90 days from date of this order and the Road Accident Fund to take reasonable steps to ensure that the capital amount is directly paid to the plaintiff.

84.4 The Legal Practice Council to consider the appropriateness or otherwise of the conduct of the plaintiff's attorneys of record.

84.5 The plaintiff's attorneys of record to bring this judgment to the attention of the plaintiff by explaining the contents thereof to the plaintiff and to provide an affidavit by not later than Friday 10 June 2022 confirming that the order in this paragraph has been complied with.

In Sibiya's case

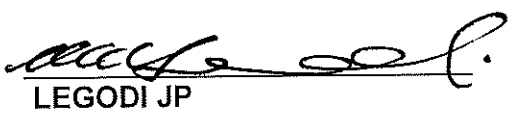
84.6 The fee agreement concluded between the plaintiff and his attorneys of record is hereby reviewed and set aside due to its illegality as set out in this judgment and the plaintiff is not obliged to pay any fee or costs to his or her attorneys of record.

84.7 Settlement of the matter on merits between the plaintiff and defendant is hereby noted and taxation thereof to be stayed over until finalisation of the case in its entirety.

84.8 The Legal Practice Council to consider whether the conduct of attorney Krige in concluding the fee agreement as he did which has now been found to be illegal, constituted unprofessional conduct and if so to take such steps as it might deem appropriate.

84.9 The Legal Practice Council is hereby directed to advise the plaintiff to consider instructing another attorney to proceed with her matter to its finality and the plaintiff should also be advised that she is not obliged to pay anything to the attorneys of record due to the illegality of the fee agreement.

8.10 The plaintiff's attorneys are hereby directed to bring this judgment to the attention of the plaintiff and explain the contents therefore to the plaintiff and confirm in an affidavit to be filed by not later than Friday 10 June 2022 that the order in this paragraph has been complied with.



LEGODI JP

JUDGMENT DATE: 2 June 2022

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