**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE DIVISION – GRAHAMSTOWN**

 **CASE NO: 1753/2015**

 **DATE HEARD: 28/11/2016;**

**13/12/16**

 **DATE DELIVERED: 15/12/16**

**REPORTABLE**

In the matter between:

**ZAMA MFENGWANA PLAINTIFF**

**and**

**ROAD ACCIDENT FUND DEFENDANT**

**JUDGMENT**

**PLASKET J**

[1] On 28 November 2016, the legal representatives of the plaintiff, Mr Zama Mfengwana, and the defendant, the Road Accident Fund (RAF), settled the former’s claim against the latter. I was requested to make the settlement an order.

[2] I was informed, however, that Mr Mfengwana had entered into a contingency fee agreement with his attorney, Mr Bulelani Rubushe of BR Rubushe Attorneys in East London. I informed Mr Mfengwana’s Grahamstown attorney, Mr Dumile Mili, that it was necessary for me to peruse the contingency fee agreement and the affidavits required by s 4(1) and s 4(2) of the Contingency Fees Act 66 of 1997 (the Act), and that I could not make the settlement an order before doing so.

[3] Mr Mili provided me with the contingency fee agreement and an affidavit deposed to by Mr Rubushe. As the contingency agreement appeared to be in conflict with the Act in one important respect, Mr Rubushe’s affidavit was wholly inadequate and no affidavit deposed to by Mr Mfengwana was filed, I made an order in the following terms:

‘1. Mr Bulelani Rubushe, the plaintiff’s attorney, is directed to show cause on Tuesday 13 December 2016 why the contingency fee agreement between him and the plaintiff should not be set aside.

2. Mr Rubushe is furthermore directed to furnish affidavits deposed to by himself and the plaintiff, by 09h30 on Tuesday 13 December 2016, that comply fully with s 4 of the Contingency Fees Act 66 of 1997.’

[4] I have received no affidavits at all and no representations have been made as to why I should not set aside the contingency fee agreement.

[5] The Act was promulgated to facilitate access to court – a fundamental right[[1]](#footnote-1) – for the large number of people in this country who cannot afford the considerable cost of legal services. Typically many of those who are injured in motor vehicle accidents enter into contingency fee agreements with attorneys in damages claims against the RAF.

[6] The basic idea behind a contingency fee agreement is that the attorney takes on the risk of financing his or her client’s litigation in the hope – or anticipation – of succeeding. If the litigation is not successful, the attorney will not be paid. If the litigation is successful, the attorney will be entitled to a success fee that is higher than his or her normal fee.

[7] The context and background of the Act was considered in *Price Waterhouse Coopers Inc. & others v National Potato Co-operative Ltd*[[2]](#footnote-2)in which Southwood AJA stated:

‘The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a “no win, no fees” agreement (s 2(1)(a)) and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)). The Act has detailed requirements for the agreement (s 3), the procedure to be followed when a matter is settled (s 4) and gives the client a right of review (s 5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s 6) and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal. What is of significance, however, is that by permitting “no win, no fees” agreements the Legislature has made speculative litigation possible. And by permitting increased fee agreements the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action.’

[8] Section 3(1) of the Act requires all contingency fee agreements to be ‘in writing and in the form prescribed by the Minister of Justice’. In terms of s 3(2), a contingency fee agreement must be signed by the client and the attorney. Section 3(3) prescribes what must be included in a contingency fee agreement. The section states:

‘A contingency fees agreement shall state-

(a) the proceedings to which the agreement relates;

(b) that, before the agreement was entered into, the client-

 (i) was advised of any other ways of financing the litigation and of their respective implications;

(ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;

(iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and

 (iv) understood the meaning and purport of the agreement;

(c) what will be regarded by the parties to the agreement as constituting success or partial success;

(d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;

(e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;

(f) either the amounts payable or the method to be used in calculating the amounts payable;

(g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;

(h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and

(i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.’

[9] Section 3(4) places an obligation on an attorney to deliver a copy of the contingency fee agreement to his or her client ‘upon the date on which such agreement is signed’.

[10] Section 4 concerns settlements of cases in which contingency fee agreements have been concluded. It provides:

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

 (a) the full terms of the settlement;

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

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

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

 (e) the reasons why the settlement is recommended;

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

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

(2) 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 he or she understands and agrees to them; and

 (c) his or her attitude to the settlement.

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

[11] Section 2 of the Act is the core of the Act. It makes provision for contingency fee agreements and for the higher than normal fee that an attorney may charge to ‘offset’ the risk of earning no fee in the event of him or her not concluding a case successfully. It provides:

‘(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

(2) Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.’

[12] It is apparent from the case law that contingency fee agreements that do not comply with the provisions of the Act are invalid.[[3]](#footnote-3) Strict compliance with the Act is necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients – a phenomenon that is, in my experience, unfortunately all too common.

[13] In this matter, the particulars of claim are four pages long, although the fourth page only contains the signature of Mr Rubushe, his firm’s details and the RAF’s address. The plea is also four pages long, and the fourth page contains similar formal details only. The miscellaneous index contains the return of service, the notice of intention to defend, the RAF 4 report, the medico-legal report of Dr Z Badi, what is described as a medico-legal report of Spear Actuaries and a further ‘medico-legal report’ of Munro Actuaries. This bundle comprises of 37 pages, inclusive of formal documentation such as filing sheets.

[14] No pre-trial conferences appear to have been held but, of course, some negotiations must have occurred as the matter was settled. Counsel does not appear to have been briefed on behalf of Mr Mfengwana.

[15] The quality of the work done on behalf of Mr Mfengwana leaves much to be desired. Paragraph 3 of the particulars of claim purports to provide detail of the accident concerned. It reads:

‘ON OR ABOUT 12 SEPTEMBER 2014 near 113 Zone 3 at Ezibeleni coming from a meeting on our way to Taxi rank walking on the side of the road there came a vehicle on high speed with registration numbers and letters FYG 416 EC NISSAN BAKKIE colliding with us .plaintiff just head a sound as it crushed to another vehicle parking outside correctional services center with my plaintiffs leg attached to that Bakkie , Lost consciousness and was taken by the Ambulance to KOMANI HOSPITAL where was treated for the injuries sustained.’ (sic)

[16] Mr Mfengwana’s claim was settled in the total amount of R904 889.17 in respect of past medical expenses, future loss of income and general damages, and an undertaking in respect of 85 percent of future medical expenses and costs.

[17] Clause 5 of the contingency fee agreement deals with Mr Rubushe’s fee. It provides:

‘The Attorneys hereby warrants that the normal fees on an attorney and own client basis perform work in connection with the aforementioned proceedings are calculated on the following basis: 25% of the total of damages awarded,

(Set out hourly, daily, and or applicable rates)’ (sic)

[18] Clause 6 then provides:

‘The Parties agrees that if the Clients is (sic) successful in the aforementioned proceedings;

An amount shall be payable to the Attorney, calculated according to the following method;

see paragraph 5

For purpose of calculating the higher fee, costs are not included,’

[19] It is clear from what I have said about the amount of work involved in this matter that a ‘fee’ of 25 percent of R904 889.17 – R226 222.30 – is grossly disproportionate and amounts to overreaching on an outrageous scale. When to that is added the poor quality of the work done, Mr Rubushe’s conduct is cause for very serious concern. It is, perhaps, apposite to cite the oft-quoted passage from the late Judge RPB Davis’ foreword to the first edition of Herbstein and Van Winsen’s well-known book on civil procedure:[[4]](#footnote-4)

‘But after all, industry is one of the attributes of an honourable character: no honourable and honest legal practitioner will accept a client’s money for doing his work to the best of his ability, and then not do it. And before he ever accepts it, he will have qualified himself to do the work properly, for, where skill is required, lack of it is equivalent to negligence. Indeed, to undertake to do something and then not do it with reasonable efficiency, either because of unskillfulness or [because] of lack of diligence, is something very closely akin to obtaining money by false pretences.’

[20] It is evident that both clauses 5 and 6 are in conflict with s 2(2) of the Act. That section does not permit an attorney to charge 25 percent of the damages awarded to his or her client. It is clear from the cases that a fee may be charged that is higher than the attorney’s usual fee but there are two limitations: first, that fee may not exceed twice the attorney’s usual fee; and secondly, the fee may not exceed 25 percent of the damages awarded to the client. The position was set out thus by Morrison AJ in *Thulo v Road Accident Fund*[[5]](#footnote-5) in very clear terms. He stated:

‘[51] The true function of a proviso is to qualify the principal matter to which it stands as a proviso — as to which see, for example, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 79F – J and the cases there cited. In other words, a proviso taketh away, but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double — 100% more than — the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.

[52] As this principle of interpretation is not always applied there is a danger of a misinterpretation of this section by legal practitioners. Incorrectly interpreted it can be used to argue that the client has to pay (i) double the normal fee or (ii) 25% of the total amount awarded in a claim sounding in money, whichever is the higher. That is completely wrong. The practitioner's fee is limited, on a proper reading of the section, to (i) 25% of the amount awarded in the judgment, or (ii) double the normal fee of that practitioner, whichever is the lower. If double the normal fee results in the client having to pay a fee higher than 25% of that which was awarded to the client in a money judgment (costs aside) the legislature has put a ceiling on such fee and said, in effect, 25% of the money amount awarded is the maximum fee that can be raised. Where, however, double the normal fee does not exceed 25% of the money amount awarded then double the normal fee is the maximum fee that can be raised.’

[21] In less eloquent terms, in *Erasmus v Williams*,[[6]](#footnote-6) I said the following of the meaning of s 2(2) in circumstances in which an attorney had claimed to be entitled to 25 percent of the damages awarded to his client:

‘It is clear that the respondent’s understanding of s 2 of the Act is erroneous. It is not intended to be a licence to plunder up to 25 percent of any award paid to a client who has entered a contingency fee agreement (and who is usually indigent). All that s 2 does is to allow an attorney who is party to a contingency fee agreement to recover from an award to his or her client a success fee based on the work done at a maximum of twice his or her usual fee. That amount may not, however, exceed 25 percent of the award, no matter how much work the attorney has done. What an attorney is certainly not entitled to is 25 percent of the client’s award.’

[22] Mr Rubushe has, in the affidavit he filed on 6 December 2016 (which I found to be inadequate), attempted to remedy the predicament he has found himself in. He stated that he wished to confirm that ‘I had complied with Contingency Fee Act 66 of 1977 (sic) in that I will charge fee of 25% from the client or (double my fees and take whichever is lesser which would not be more than 25% agreed fees)’. In the following paragraph he stated:

‘Any fees referred to in paragraph 5 of the Contingency fee Agreement shall be calculated as follows; the client shall owe the Attorneys fee calculated in terms of Rule 70 of the Rules of the High Court plus 100% thereof. (hereafter referred to as the success fees) provided that in the case of claims sending (sic) in money, the total of any such success awarded, or any amount obtained by client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating fee, include any costs. This was explained to client on 26th November 2014.’

[23] 26 November 2014 is the date of signature of the contingency fee agreement. Two problems arise from the passages of the affidavit that I have quoted. First, what Mr Rubushe said about his fee and its computation is contrary to what is contained in the contingency fee agreement. He appears to accept that the contingency fee agreement is contrary to the Act and now seeks to tender to amend it unilaterally and retrospectively. That cannot avail him in his attempt to sidestep the difficulty posed by clauses 5 and 6 of the contingency fee agreement. Secondly, he could not have given the information he claims to have given to Mr Mfengwana when the contingency fee agreement was signed for the simple reason that it did not contain that information. The affidavit is transparently disingenuous.

[24] Clearly, clauses 5 and 6 of the contingency fee agreement are in conflict with the Act. The effect of non-compliance with the provisions of the Act was dealt with by Boruchowitz J in *Tjatji v Road Accident Fund and two similar cases*:*[[7]](#footnote-7)*

‘[21] Although the Act does not 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 encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts, but subject to strict control so as to minimise the disadvantages inherent in the contingency fee system, and to guard against its abuse (see the report of the South African Law Commission, chs 2, 3 and 4; KG Druker op cit, chs 6 and 7). The safeguards introduced to prevent such abuses include ss 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would undoubtedly have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions.

[22] A further indication that non-compliance would be visited with invalidity arises from the fact that ss 2 and 3 are couched in peremptory language. The word “shall” is used extensively in s 3 (see ss (3)(1)(a), (3)(2), (3)(3) and (3)(4)). The word “shall”, when used in a statute, is generally an indication that the provision is peremptory rather than directory.’

[25] Clauses 5 and 6 are essential terms of the contingency fee agreement because they ‘go to the principal purpose of the contract’.[[8]](#footnote-8) For this reason, they cannot be severed from it. As a result, the contingency fee agreement as a whole is invalid for its failure to comply with s 2(2) of the Act.

[26] As the contingency fee agreement is invalid, the common law applies. That means that Mr Rubushe is entitled to ‘a reasonable fee in relation to the work performed’, with taxation being the means by which ‘the reasonableness of a fee is assessed’. In other words, he is ‘only entitled to such fees as are taxed or assessed on an attorney and own client basis’.[[9]](#footnote-9)

[27] This is yet another case in which an attorney – an officer of the court who is supposed to act with integrity and comply with the highest ethical standards – is guilty of an attempt to grossly overreach his client, of rapacious and unconscionable conduct. Unfortunately, in this jurisdiction, this is a problem that is all too common. That said, however, it seems to me that the problems in relation to contingency fee agreements that come to the attention of the courts are, in all likelihood, but the tip of the ice-berg.

[28] Anecdotal evidence within the legal profession points towards wide-spread abuses. In a matter I heard recently, counsel contended that s 2(2) of the Act was ambiguous because many attorneys he had spoken to interpreted it to mean that they were entitled to take 25 percent of their client’s award.[[10]](#footnote-10) In Grahamstown, a local costs consultant has been so alarmed by the abuses that he has come across in the course of his work that he wrote a detailed memorandum to the judges of the Eastern Cape Division. The judges, in turn, have established a committee to consider the problem and appropriate responses to it.

[29] This is all cause for grave concern and, if I am correct, a manifestation of endemic corruption embedded in the attorneys’ profession. For this reason, I intend requesting the Registrar of this court to deliver a copy of this judgment to the Cape Law Society so that it, as custodian of the ethical standards of the profession in the public interest, may consider ways and means of stopping the rot.

[30] As the contingency fee agreement is invalid and will be set aside in the order that I make, I am able to make an order, in the absence of compliance with s 4(1) and s 4(2) of the Act, to settle Mr Mfengwana’s claim against the RAF. I do so because, it seems to me, he will be prejudiced by any further delay, which is not of his making, and because, having been seized of the matter, I have satisfied myself (to the extent that I am able) that the settlement is fair. I am strengthened in this by the fact that the RAF was represented by an experienced advocate who is well-versed in matters such as this, and Mr Mfengwana was represented by his attorney at the seat of the court, Mr Mili.

[31] Given the circumstances of the case, I intend building into my order safeguards to protect the interests of Mr Mfengwana.

[32] I make the following orders.

[A] It is ordered, by agreement, that judgment is granted in favour of the plaintiff and against the defendant as follows:

1. The defendant is to pay the plaintiff:

1.1. the sum of R904 889.17 in respect of past medical expenses, future loss of income and general damages within 14 days of the date of this order;

1.2. interest on the sum referred to above at the prescribed legal rate from a date 14 days from the date of this order to the date of payment.

2. The defendant is directed to pay the plaintiff’s party and party costs of suit, either taxed or agreed, such costs to include the costs of the experts in respect of whom the plaintiff has given notice in terms of rule 36(9)(a) and (b), within 14 days of the date of taxation or allocatur.

3. The defendant is directed to pay interest, at the prescribed legal rate, on the plaintiff’s costs of suit from a date 14 days after taxation or allocatur to the date of payment.

4. The defendant is directed to provide an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 85 percent of the costs of future accommodation in a hospital or nursing home or the treatment of or rendering of a service or the supplying of goods to the plaintiff arising from the injuries caused in the collision forming the plaintiff’s cause of action.

 [B] It is further ordered that:

1. the contingency fee agreement entered into by the plaintiff and his attorney, Mr Bulelani Rubushe of BR Rubushe Attorneys, dated 26 November 2014, is declared to be in conflict with the Contingency Fees Agreement Act 66 of 1997 and is hereby set aside;

2. BR Rubushe Attorneys may only recover from the plaintiff their attorney and client costs on the High Court scale, such costs to be taxed by the Taxing Master prior to the presentation of the bill of costs to the plaintiff;

3. The Registrar is requested:

3.1. to contact the plaintiff and to explain to him the import of this judgment and the rights that it accords him; and

3.2. to deliver a copy of this judgment to the Cape Law Society.

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C PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES (on 28 November 2016)

For the plaintiff: Mr D Mili instructed by BR Rubushe Attorneys, East London

For the defendant: Mr A Frost instructed by Nolte Smit Inc, Grahamstown

1. Constitution, s 34. [↑](#footnote-ref-1)
2. *Price Waterhouse Coopers Inc. & others v National Potato Co-operative Ltd & others* 2004 (6) SA 66 (SCA) para 41. [↑](#footnote-ref-2)
3. *Price Waterhouse Coopers Inc. & others v National Potato Co-operative Ltd* (note 2) para 41; *Tjatji v Road Accident Fund and two similar cases* 2013 (2) SA 632 (GSJ) para 13. [↑](#footnote-ref-3)
4. Reproduced in Cilliers, Loots and Nel *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) (Vol 1) at xvi. [↑](#footnote-ref-4)
5. *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) paras 51-52. See too *Mofokeng & others v Road Accident Fund* GSJ 22 August 2012 (case nos. 22649/12; 19509/11; 24932/10; 20268/11) unreported, para 48. [↑](#footnote-ref-5)
6. *Erasmus v Williams* ECG 20 October 2016 (case no. 3364/2016) unreported para 13. [↑](#footnote-ref-6)
7. Note 3 paras 21-22. See too *Darries v Fillies* WCC 9 June 2014 (case no. 14788/2013) unreported, para 16; *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* (note 2) para 41. [↑](#footnote-ref-7)
8. *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 17D-E. [↑](#footnote-ref-8)
9. *Tjatji v Road Accident Fund and two similar cases* (note 3) para 26. See too *Darries v Fillies* (note 7) para 16; *Nomala v Road Accident Fund* ECG 23 October 2014 (case no. 1432/2013) unreported at 8. [↑](#footnote-ref-9)
10. *Erasmus v Williams (2)* ECG 8 December 2016 (case no. 3364/2016) unreported, para 15. [↑](#footnote-ref-10)