REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/22649

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

....
DATE SIGNATURE

In the matter between:

MOFOKENG, MATHABO FELICIA Plaintiff

and

ROAD ACCIDENT FUND Defendant

AND

CASE NO: 2011/19509

In the matter between:

MAKHUVELE, MPHEPHU LERISA Plaintiff

and

ROAD ACCIDENT FUND Defendant

AND

CASE NO: 2010/24932

In the matter between:

MOKATSE KATLEGO BRIDGET Plaintiff

and

ROAD ACCIDENT FUND Defendant

AND

CASE NO: 2011/20268

In the matter between:

KOMME MARGARET K. in his personal capacity and obo P T and L S (MINORS) Plaintiffs

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MOJAPELO, DJP:

[1] This judgment deals with the nature of proceedings before a court of law when an order is sought to confirm the settlement of a claim where one of

the parties (in this case the plaintiff) has entered into a contingency agreement in relation to the proceedings.

[2] The matter arose in the following circumstances:

(a) In making an offer of settlement in Cases No. 2009/22649, 2011/19509, 2010/24932 and 2011/20268 the defendant (Road Accident Fund) incorporated the following term into the offer:

> "*In the event of plaintiff having concluded a contingency fees agreement with his/her attorney, such settlement shall be deemed to denote that the plaintiff and his/her attorney had complied with section 4 of the Contingency Fees Act, 66 of 1997 through having filed required affidavits with either the court, if the matter is before court, or with the relevant professional controlling body, if the matter is not before court.*"

(b) In some cases the defendant is understood to have insisted that a clause was to be included in the court order recording that a contingency fees agreement was applicable and that the requisite affidavits had been filed. In other matters it seemed to this Court, that this was part of the offer and that the deeming term of the settlement would not be part of the court order.

(c) Prior to that day neither the defendant nor the plaintiffs had ever raised before this Court the provisions of the contingency fees agreement as part of the settlement.

(d) The defendant in all the four cases before this Court is the Road Accident Fund.

(e) In all the matters the plaintiff and the defendant had reached agreement as to the quantum of the claim and costs.

(f) The only outstanding issue in all the matters was the conditionality of the offer imposed by the defendant (Road Accident Fund). The plaintiffs appear to have been taken by surprise by the defendant's attitude and requirement.

(g) In some of the matters the plaintiffs' attorneys had filed no affidavits at all, but did so only after the defendant had raised the issue before court. In another matter only the affidavit of the plaintiff (and not that of the attorney) was filed. The attorney's affidavit was filed after the matter had been called before court. In yet another matter the affidavits of both the plaintiff and the attorney had been filed. Where the affidavits had been filed the contents were varied. In at least one matter the plaintiff filed both the affidavits as well as a copy of the purported contingency fees agreement.

(h) It is common cause that in all these matters, each of the plaintiffs had entered into some contingency agreement with its legal representatives. It is further acknowledged by all the

representatives, and it is common knowledge, that contingency fees agreements are entered into in almost all claims against the Road Accident Fund and other personal injury claims. The agreements are also some times entered into in other matters, not involving personal injuries.

[4] As the defendant and the plaintiffs in the affected matters were not agreed on how the matters were to proceed, this Court directed that the matters should stand down and that same would be argued at the same time. The parties were required to file heads of argument and the court is indebted to those who complied. It appeared necessary for this Court to consider the submissions raised and give guidance to the parties in these and similar matters that come before this Court.

[5] The need for compliance by the plaintiffs with section 4 of the Contingency Fees Agreement Act, 66 of 1997 (the Act) was raised at roll call on the first day of the third term of 2012 on 23 July 2012. It had the potential of affecting close to 70% of the 80 matters on the civil roll that day and potentially on everyday thereafter. I considered it necessary for the question to be considered and decided upon fairly soon. An alleged non-compliance with the law could not be allowed to continue. The four matters first stood down to be argued the following day on 24 July 2012. On that day the parties requested more time to prepare and possibly brief senior counsel to come and argue the matters. The four cases were accordingly postponed, by agreement with all the affected parties, to 07 August 2012 for argument. On

the latter day the court refused further postponement on application by the defendant on the ground that the parties' senior counsel was not available to argue the matter. As a further ground for postponement the defendant argued that it would withdraw the point that it had raised in three matters, and that those matters could be disposed of. The defendant would not raise the point in any other matter until it had been argued and decided in the one matter that was to be postponed. This undertaking was not sufficient to justify the postponement. Possible non-compliance with the law had been raised and had to be considered. I indicated that even if the defendant would not raise the issue this Court would consider and decide the question raised without assistant of legal argument and give appropriate guidance to the many litigants. The application for postponement was accordingly refused.

[6] The matter was accordingly argued in the afternoon of 07 August 2012. Although the defendant did not have heads of argument at the beginning, Mr Opperman, who appeared for the defendant in two of the matters, submitted abridged heads of argument later that afternoon.

Argument and Submissions

[7] An examination of the argument advanced by all the five counsel (four for each of the plaintiffs and one for the defendant), reveals that they are all agreed that the affidavits had to be filed, one by the attorney and the other by the client before accepting an offer of settlement. If not filed before accepting the offer of settlement, same had to be filed before the court makes the

settlement an order of court. The court would not make the settlement an order of court before such affidavits are filed. This concurrence of views appears to be correct, as will appear later. The filing of the prescribed affidavits is a prerequisite for acceptance of the offer. Certainly the court should not make a settlement an order of court unless the prescribed affidavits have been filed. A requirement of the law is that they are to be filed before the offer is accepted. It is questionable whether an acceptance without filing the affidavit is binding and enforceable.

[8] Argument was however divergent on (a) the function of the court in relation to the affidavits and the Act when making settlement an order of court and (b) whether the contingency agreement itself ought to be placed before the court.

[9] Mr F A Saint, for the plaintiff in Case No. 2009/22649, argued that all that the court had to do before making the order was to satisfy itself that the affidavits had been "*filed*". The court did not have to consider the contents of the affidavits or adjudicate thereon. The Act, he argued, places "*no obligation on a court to look at, let alone consider, the contents of the affidavits inasmuch as it merely required them to be filed. Had the legislature intended that the court considers the contents of the affidavits to adjudicate on the validity, correctness or otherwise of same, it would have categorically done so*". He says the purpose of having the affidavits filed is to commit the legal practitioner in the event of the client seeking to have the agreement on the fees reviewed as contemplated in section 5 of the Act.

[10] It appears that he supports the view that affidavits must be filed; the court must then consider these affidavits to ensure that same are filed together with any settlement. He says the court need only satisfy itself that *prima facie* the plaintiff has complied by filing the affidavits and no more. He does not deal with the nature of the power exercised by the court in considering the affidavits or what the power of the court is if the affidavits are found to be non-compliant with the provisions of the Act.

[11] Mr A P den Hartog, for the plaintiff in Case No. 2010/24932, argues that section 4 imposes an obligation on plaintiff's attorney to file an affidavit in terms of section 4 in the event of a contingency agreement having been entered into between the plaintiff and his attorney. The provisions are thus peremptory and, he submits, the court may not make an order until the provisions of section 4 have been complied with. In other words, the filing of the affidavit with the court is a prerequisite before the court can make such offer of settlement an order. He argues specifically that an order of settlement cannot be made an order of court subject to compliance of section 4 of the Act. He argued further that the defendant's requirement that a clause be included in the court order stating that section 4 is deemed to have been complied with was incorrect in law. He argued that at best for the defendant the court order could incorporate a statement in the preamble stating that the plaintiff has complied with section 4. He did not argue that such a statement in the preamble was a requirement of law.

[12] It is not clear to this Court why this should be a requirement. The plaintiffs, and indeed the parties, comply with a number of laws (including the Road Accident Fund Act), which do not need to be referred to in the settlement agreement or court orders. It seems to me that by granting an order, the court signifies that it is satisfied that the provisions of the relevant laws have been complied with to the extent necessary, without specifying the relevant laws. What is required, is thus for the court to satisfy itself, for present purposes, that the Act has been complied with, where applicable, before making an order. In order to determine whether the Act is applicable to a particular case, the court cannot establish this other than by requiring the parties to disclose whether any of them has entered into a contingency agreement. The Act is not an issue between the parties in the litigation but applies only between clients and their legal practitioners or representatives. Although there is nothing to prevent a defendant entering into such an agreement, in practice it is the plaintiffs who often enter into such agreements.

[13] Mr Den Hartog argued strongly that the Act did not provide that the contingency fees agreement itself is to be presented to the court. The analogy, he said, is that it is not to be presented because it is a privileged document as between the legal practitioner and his or her client. He argued that for the same reason the defendant should not have sight of the document.

[14] In Case No. 2011/19509, Mr L P Mathebula, counsel for the plaintiff, appears to support the practice of handing in the prescribed affidavits as well

as the contingency agreement itself. He argues that: "*It is clear that this Act was designed to have legal assistance available to would-be claimants who are not in a position to pay for their legal fees at the same time to protect the claimants against unlawful conduct by legal practitioners who may take an advantage out (sic) of unsuspecting clients who may be illiterate or not familiar with how the law operates and overcharge them on the basis that they have entered into a contingency agreement with them*."

He reads the Act to mean that: "*It requires attorneys who have entered into contingency agreement with their clients, to file same with the court if the matter is before court.*"

He specifically states that he has no "*problem if the court would require that in all matters that are settled, the draft order must be accompanied by the required affidavits*". In respect of his client he argued that "*the affidavits together with the contingency agreement comply with the defendant's condition*".

[15] He does not deal with the nature of the function that the court has to perform in relation to the affidavits and the contingency agreement. He concludes however that if the court notices any blatant non-compliance, it should deal with same and, if necessary, refuse to confirm the settlement to the extent that the nature and degree of non-compliance makes it necessary.

[16] I will deal later with the document that the plaintiff in Case No. 2011/19509 submitted and which purports to be the contingency agreement in this case.

[17] Counsel for the plaintiff in Case No. 2011/20268, Mr M I E Ismail, has submitted the most comprehensive heads of argument. He makes a strong call for judicial monitoring of compliance by the practitioners with the provisions of the Act not only where matters before court are settled but also at the time of judgment on quantum where the matter has proceeded to trial. He submits that the courts must exercise a monitoring function by calling for and examining not only the prescribed affidavits but the contingency agreement as well. The court, he submits, needs not examine the affidavit and contingency agreement in the same detail or closeness as it would, in the face of a formal complaint and in the course of adjudicating on an application to review the agreement. He argues that there is a clear intention on the part of the legislature that contingency fees be carefully controlled. The court should intervene for this purpose. As a practical way, the court should perform the monitoring function (a) by ensuring that the attorneys confirm under oath that the contingency agreements are indeed compliant; and (b) by requiring that counsel affirms to the court that (i) he/she has read the contingency agreement and that (ii) same is indeed compliant. He agrees with Mr Saint that when exercising its monitoring function the court needs only be satisfied that "*on the face of it*" there is compliance. This, he says, will assist the client in the event of such client seeking to take the agreement and the fees charged on formal review. It is his contention that the overall

provisions of the Act, examined against the various decisions of the courts and the Constitution of the country, confer such powers on the courts. He argues that the monitoring function is necessary to ensure compliance, to prevent abuse of legal process and to protect vulnerable plaintiffs. I shall deal with these submissions to the extent necessary when examining the legal position later in this judgment.

[18] Although he had relatively short time to prepare heads, Mr Opperman, who appeared for the defendant in two of the four matters, placed the motivation and concerns of his client (the Road Accident Fund) before court in six paragraphs which I quote below. I do not follow his numbering as I do not quote everything he said. He states:

> "*(a) This matter concerns the legality and enforceability of contingency fees agreements which are concluded in terms of the Contingency Fees Act 66 of 1997 (the Act).*
>
> *(b) The Road Accident Fund has raised this issue and believes that it is entitled to do so in order to ensure that legal practitioners comply with this Act.*
>
> *(c) It appears to be the case that a significant number of personal injury lawyers make use of contingency fees agreements without complying with the procedural or substantive requirements of the Act.*
>
> *(d) The RAF is of the view that this is an issue of considerable importance and acute concern for both the RAF itself and members of the public.*
>
> (e) *It prevents the checks and balances in the Act and plays a critical role in preventing the abuse of contingency fees agreements.*
>
> (f) *Moreover, while the abuse of contingency fees is a concern in all areas of law, it is a particular concern in the present context. This is because the present context involves public funds which ought to be received by the road accident victims concerned but*

> *which are instead being received by personal injury lawyers, above and beyond what the Act permits.*"

[19] He supports the submission of Mr Ismail that the court must require not only submission of the affidavits, as required in section 4, but it must also call for and examine the contingency fees agreement itself in order to render an effective monitoring function.

[20] He referred the court to the case of *Fikile Manyeu Mnisi v Road Accident Fund*, Case No. 2009/37233 (unreported), delivered in the North Gauteng High Court on 18 May 2010, per Southwood J, where the court on noting an apparent non-compliance, demanded to see the contingency fees agreement and subsequently directed the Law Society to investigate the contingency fees agreement entered into by the attorney in question for compliance with the Act as it appeared to the court that the agreement did not comply.

Legal Position

[21] I proceed to examine the nature of the proceedings and the appropriate practice against the legal position.

[22] The current legal position regarding contingency fees is set out in the Contingency Fees Act No. 66 of 1997 ("*the Act*"). It is a fairly short Act, comprising of six sections including sections that deal with definitions (s 1), a provision for rule making by controlling professional bodies (s 6), regulations (s 7) and the short title (s 8). It therefore has only four operative sections (ss

2 to 5). It is not necessary to reproduce its provisions and I will do so only where necessary.

[23] The legal position as set out in the Act must be understood against the history of the contingency fees and the relevant case law.

[24] A fairly comprehensive history of the legislation is set out in *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) paras [26] to [46]. The history stretches from the old English law of maintenance and champerty, the various reforms in the United Kingdom, which were mirrored in South Africa, up to the promulgation of the Act, following a report of the South African Law Commission. Its constitutionality has also been considered and endorsed. In this judgment I abridge and set out the historical position only briefly.

[25] In line with English law, a number of cases decided in South Africa in the last years of the 19th and early part of the 20th century show that the courts took an uncompromising view of agreements which are referred to as champertous (that is, any agreement whereby an outsider provided finance to enable a party to litigate in return for a share of the proceeds of the action if that party was successful or any agreement whereby a party was said to traffic, gamble or speculate in litigation), and refused to entertain litigation following on such agreements or to enforce them.

[26] However, the law, in both countries acknowledged one exception. It was accepted that if anyone, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interests in the suit, the agreement would not be unlawful or void.

[27] An important qualification for these exceptions was founded on the statement made by the Privy Council in *Ram Coomar Coondoo and Another v Chunder Canto Mookerjee* [1876] 2 APP CAS 186 at 210. In that case the Privy Council issued an important warning, stating:

> "*that agreements of this kind ought to be carefully watched, when found to be extortionate and unconscionable, so as to be inequitable against the party; … – so as to be contrary to public policy – effect ought not to be given to them.*" (my emphasis)

[28] So, from the onset, the rule that recognised exceptions from the illegality of champertous agreements required that the exempt agreements be *'carefully watched*'". They were not to be "*extortionate and unconscionable, so as to be inequitable against the party*". When, within the exception, such agreements were found to be "*extortionable and unconscionable, so as to be inequitable*" against the client, effect were not given to such agreements. The move from the unenforceability of champertous agreements was from the onset accompanied by a need for careful and close monitoring, with courts not hesitating to refuse to enforce agreements that appeared to cross the threshold.

[29] In the United Kingdom, after much deliberation, developments resulted in the enactment of section 58 of the United Kingdom Courts and Legal Services Act 1990 which permitted speculative actions in accordance with the Scottish practice and rendered enforceable, subject to certain conditions, a conditional fees agreement. The most important condition was the strict regulation of the percentage whereby the fee was to be increased. The Lord Chancellor was to be given the power to regulate the increase.

[30] The importance of this change was emphasised by Steyn LJ in *Giles v Thompson* and Related Appeals [1993] 3 All ER 321 (CA and HL) at 331. He pointed out at 321d-j that the ability to recover fees beyond what was otherwise reasonable or intended to be an incentive to lawyers to undertake speculative action. Such agreements were still unlawful in the absence of Lord Chancellor's order (See *Price Waterhouse* at 77f).

[31] These developments in English law are mirrored in South African law. The judiciary is independent, which independence is guaranteed by the Constitution. The civil justice is regulated by the State and has the necessary mechanisms to withstand the abuses perceived to flow from champertous agreements.

[32] In South Africa the general view regarding unenforceability of pure champertous agreements in pursuing litigation is also based on the Roman-Dutch rule that frowned upon agreements to speculate in litigation (*pactum de quota litis*). A recent demonstration of that principle is to be found in *Tecmed*

(Pty) Ltd v Hunter and Another 2008 (6) SA 210 (W). In that case the first respondent, an attorney, had concluded an agreement with the applicant in terms of which the first respondent would receive a "*merit bonus*" or a "*performance bonus*" on the outcome of certain litigation which a company, M, had launched against the applicant. The first respondent had misled the applicant into believing that the events which would have made the "*bonus*" payable had indeed occurred. The applicant had accordingly paid the bonus to the first respondent. The terms of the agreement had been agreed upon orally. Upon discovering that the events upon which payment of the bonus were conditional had not occurred, the applicant applied in a local division for an order claiming, *inter alia*, repayment of the amount of the bonus paid to the first respondent. It was held, that in essence the agreement to pay a bonus was a *pactum de couta litis*. It was held, further, that to be valid, such an agreement has to comply with the Contingency Fees Agreement Act 66 of 1997. *Pactum de quota litis* was, accordingly, unlawful and void. It was held, further, that given the position of a lay client *vis-à-vis* an attorney, there could be no doubt that public policy dictated an exception to the rule in *pari delicto potior est conditio defendentis.*

[33] After the South African Law Commission had investigated and reported on the question (SA Law Commission Projects 93: Speculative and Contingency Fees, November 1996), the Commission recommended that contingency fees agreements should be legalised in South African law and that common law prohibitions on such fees should be removed, our legislature followed the English example of permitting contingency fees agreements –

"*no win no fees*", and increased fees in case of success – but subject to strict control. As in England this represented a watershed in public policy and was brought about by the view that "*it is in the public interest that litigants be able to take their justiciable disputes to court for adjudication*"; and that a system of contingency fees "*can constitute significantly to promote access to courts and such a system is desirable*".

[34] The Contingency Fees Act 66 of 1997 encourages legal practitioners to undertake speculative actions for their clients. This is in keeping with the right, enshrined in section 34 of the Constitution of the Republic of South Africa Act 108 of 1996, to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Another factor favouring the upholding of champertous agreements is freedom of contract.

Provisions of the Act

[35] The Act, which came into operation on 23 April 1999, provides for two forms of contingency fees 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)). There is however no reason why the two types of agreements may not, in practice, be clauses (or concepts) in the same agreement. This is in fact often the case. The agreement would thus provide that in return for the legal practitioner not charging fees on failure of litigation (no win no fees) the attorney shall be entitled to a higher fee (success fee) if the client is successful.

[36] The Act further regulates the form and content of a contingency fees agreement (s 3(1)). The form is one prescribed by the Minister in a Gazette (s 3(1) (a)) after taking same before Parliament. The prescribed agreement was published in Government Notice No. 574 of 23 Apr 1999 (contained in Government Gazette 20009).

[37] Section 3(2) deals first with the signatories. The one signatory is the client and the other is the client's attorney. Where and when an advocate is involved such advocate shall also countersign the agreement. Once the advocate has countersigned the agreement, the advocate becomes party to such agreement.

[38] The Act specifies what must be contained in the agreement (s 3(3)). The Act is very specific as to the contents and all matters prescribed are inclusive, that is, all the matters or provisions stated in paragraphs (a) up to (i)) of the subsection have to be included in the agreement. Similarly the provisions in sub-paragraphs (i) to (iv) of paragraph (a) are all to be included. It is not some provisions or the others. It is all prescribed provisions which

have to be in the agreement. The attorneys are not at liberty to draw a contingency fees agreement in any form as they like. The agreement has to be in accordance with the provisions of the Act and in the form prescribed by the Minister (s 3 (1)).

[39] It is obligatory for the agreement to be delivered to a client. This has to be done on the date on which the agreement is signed (s 3(4)). This is a stringent provision which could possibly affect the efficacy or enforceability of the agreement.

[40] The Act further lays down 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).

Intention of the Legislature

[41] The clear intention of the legislature is that the contingency fees be carefully controlled. The Act was enacted to legitimise contingency fees agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fees agreement between such parties which is not covered by the Act is therefore illegal and unenforceable. 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 recover or receive part of the proceeds of the action.

[42] As in England, this Act is designed to encourage legal practitioners to undertake speculative actions for their clients. The legislature was obviously of the view that the conflict between the duty and the interest of legal practitioners would not lead to an abuse of legal procedure. This is where monitoring by the courts is important. It is clearly considered that it is better that people be able to take their disputes to court in this way rather than not at all. The learned judge (Southwood AJA) in *Price Waterhouse* states thus:

> "*In my view this approach is consistent with the right enshrined in section 34 of the Constitution: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. On a number of occasions the Constitutional Court has emphasised the importance of the right: <u>It is of cardinal importance and requires active protection and courts have a duty to protect bona fide litigants</u>.* (my emphasis) (*Beinash and Another v Ernest & Young and Others* 1999 (2) SA 116 (CC) para [17]).

[43] The need for active protection of needy litigants, such as one finds in *RAF* cases, once more came out strongly from even our highest court.

[44] A demonstration of the kind of abuse that may occur if courts do not exercise their monitoring role vigorously is to be found in *Mnewaba v Maharaj* [2001] 1 All SA 265 (C). In that case the plaintiff sued his erstwhile attorney for payment of sums which the latter appropriated to himself as fees from monies he received on the plaintiff's behalf from the Multilateral Motor Vehicle

Accidents Fund ("*the MMF*") in respect of claims for damages and costs. The defendant had submitted the plaintiff's claim to the MMF which made an offer of settlement of R283 443,00 and tendered to pay the plaintiff's party and party costs as settled or taxed. The plaintiff accepted the offer of settlement. Thereafter the plaintiff and the defendant concluded a fees agreement in terms of which the plaintiff agreed to pay the defendant fees of R135 000,00 which would be deducted from the capital sum paid by the MMF. The MMF also paid an amount of R13 078,30 to the defendant in respect of the plaintiff's party and party legal costs.

[45] The plaintiff issued summons against the defendant, alleging that the agreed fee bore no relation to a reasonable fee and that the fees agreement was therefore illegal, null and void. The court considered whether the defendant's defence that the plaintiff had agreed to the fee was an absolute defence to the claim. The court considered the decided cases on this point and concluded that the court is not bound by fees agreements between attorneys and their clients.

[46] The approach is driven by considerations of public policy. The most important and obvious policy objective is to ensure that the administration of justice does not fall in disrepute, which objective is achieved, *inter alia*, by protecting lay litigants against statutory fee arrangements and *pacta de quota litis* in whatever form they occur. This is subject to the Act which did not apply in the *Mnewaba v Maharaj* case.

[47] In regard to the agreement itself, the court in the *Mnewaba* case noted that the amount the defendant retained was a multiple of nearly 15 times the fee claimed in the party and party bill and more than 20 times that allowed on taxation. The degree of difference between the fees claimed in the bill and the fees agreement was startling and conclusive evidence of an abuse. The terms of the fees agreement and the fact that it was concluded after the MMF had made its offer were further matters for serious concern. The fact that the plaintiff agreed to the fee was not an absolute defence to the claim. The court accordingly declared the fee agreement null and void.

Interpretation of section 2 of the Act

[48] A correct interpretation of section 2 of the Act, particularly with reference to higher than normal fees of the practitioner, is set out by Morison AJ in *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) at 450G-451B. The interpretation reads:

> *"[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. "*

I am in total agreement with the interpretation above as being correct and in accordance with the wording of the section.

[49] The learned judge in the *Thulo* case however went on to state:

> *"It is to be noted that this excludes costs awards so it may be possible for a legal practitioner to conclude an agreement with his or her client to the effect that on success in the matter the client will pay an attorney client fee that is equivalent to the sum of:*
>
> - *Double the attorney's normal fee or 25% of the amount awarded, whichever is the lower; and*
> - *the taxed costs to be paid by the other side."*

This is the part that I have some difficulties with. I do not share the view that an attorney may legally enter into an agreement with his client to charge the maximum permissible under the Contingency Fees Act plus taxed costs to be paid by the other side. A maximum of the attorney's fees is what it says. It is the maximum and no fees above that maximum may lawfully be recovered. What is recovered as party and party costs are the costs recovered by the successful party from the unsuccessful party. It is what the client recovers and is therefore due to the client. The attorney may recover from party and party costs, once he or she has recovered the full attorney and client fees, only the reimbursement of his out-of-pocket expenses and not fees. The attorney does not recover additional fees (over and above the maximum) from party and

party costs. To do so would deprive the successful litigant of his/her recovered costs and thus overreach the client. An increase of "*normal fee*" chargeable by a legal practitioner up to 100% is more than adequate compensation for the legal practitioner. To add party and party fees to the already doubled fees of the legal practitioner would be extortionate and unconscionable.

[50] Subsection 2(2) of the Act, which is the subject of interpretation reads:

> "(2) Any fees referred to in subsection (1)*(b)* which are higher than the normal fees of the legal practitioner concerned (hereinafter referred F to as the success fee), shall not exceed 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"*

As I read Morison AJ, the portion of his interpretation of section 2(2) with which I disagree arises from the different ways in which we interpret the last portion of the proviso which reads:

> "..., w*hich amount shall not, for the purposes of calculating such excess, include any costs.*"

As I read this portion of the proviso the phrase "*which amount*" refers to and qualifies the phrase "*the total amount awarded or any amount obtained by client*". The effect is that when one calculates the 25% limit of the attorney's fees, one is not to include any costs in the total amount (i.e. the 100% capital). The 25% limit is calculated on the capital amount only and not on the capital plus costs. To illustrate this, if the total amount of capital awarded by the attorney was R100 000,00 and the costs awarded was R15 000,00, the 25% limit would be calculated on R100 000,00 and will thus be R25 000,00. What

the last portion of the proviso mean is that one shall not calculate the 25% limit on R115 000,00, which is the "*total amount*" (R100 000,00) plus costs (R15 000,00). The effect of the way the *Thulo* case interprets the last proviso would be that the attorney could, in the example given above, recover the maximum of 25% of capital, i.e. R25 000,00 (if this is less than double normal fee) plus R15 000,00, thus a total of R40 000,00. I am in respectful disagreement with that part of the interpretation in *Thulo* and see it as a misreading of section 2(2) of the Act. I agree in everything else in the *Thulo* judgment which is a laudable and welcome judgment on the Act and the conduct of the defendant's attorneys in RAF claims.

Settlement and the Affidavits (s 4)

[51] With regard to the settlement, the Act provides that an 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 (s 4(1)). The purpose appears to me to lay down conditions under which an offer may be accepted. An offer may thus not be accepted before the legal practitioner has filed the affidavit. If the matter is before court, the affidavit in question must be filed with the court. If not, the affidavit must then be filed with the professional controlling body (that is the Law Society in respect of attorneys and the Society of Advocates in respect of advocates). The subsection further specifies what the affidavit must contain (s 4(1) (a) (ii) (g)).

[52] The attorney's affidavit is the main or primary one. It has to be accompanied by an affidavit by the client (s 4(2)); and the Act specifies or prescribes the contents of the affidavit of the client. On this point, I agree with and accept the submission by Mr Den Hartog that the provisions are peremptory and the court may not make an order until the provisions of the two subsections have been complied with. In other words the filing of the affidavits is a prerequisite before the court can make the settlement an order of court inasmuch as the acceptance of the offer has to be preceded by the filing of the affidavits. At the very least the affidavits must be filed when the settlement is sought to be made an order of court. Absent such filing of the affidavits, the court may not endorse the acceptance by making the settlement an order of court.

[53] The critical provision is in section 4(3). The section makes it obligatory for the settlement to be made an order of court once the matter, in respect of which a contingency fees agreement has been signed, is before court. It seems to me therefore that there cannot be an out-of-court settlement in a pending litigation where one of the parties is a party to a contingency fees agreement in respect of the proceedings before court.

[54] The purpose must be to ensure that the supervisory or monitoring process of the court is present whenever matters litigated under the Contingency Act are settled or finalised.

Monitoring or Supervisory Function of the Court

[55] The question arises as to what the supervisory functions of the court must entail. Firstly, it appears that the court must ensure that the prescribed affidavits are signed and filed. The court must thus have sight of the affidavits. I do not accept the submissions that the court must only be advised that the affidavits have been filed. The court must further ensure that the affidavits contain the matters which the Act stipulates to be contained in such affidavits.

[56] The supervisory functions of the court in relation to the contents of the affidavits must be determined, in relation to each affidavit, with reference to the prescribed contents. The affidavit of the attorney must, in terms of section 4 (1), state:

(a) *the full terms of the settlement* - Nothing must be withheld from the court.

(b) *an estimate of the amount or other relief that may be obtained by taking the matter to trial* - The court must be placed in a position to see what is it that the client abandons or compromises by settling in the specific terms and at the particular stage instead of proceeding to full trial.

(c) *an estimate of the chances of success or failure at trial* - The court should satisfy itself that it is prudent to settle having regard to the chances of success as seen by the professional who is

aware of the evidence and the relevant considerations. Here, the practitioner may not simply state that the chances are good or bad. It seems to me that the practitioner must give his or her reasons for holding the view that the chances are good or bad with reference to the available evidence and other relevant considerations.

(d) *the outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial* - The Act here seems to require the practitioner to state what his fees are at the stage of settlement – albeit an estimate and what his fees would be if the matter was to proceed to trial. The court should be able to determine whether the legal practitioner is financially better or worse off with the settlement than he or she would be with the trial option. Against this, one would have to consider whether the client is financially worse or better off than would be the case at the end of the trial.

(e) *reasons for settlement* - This must no doubt be given having regard to the chances of success and the financial implications that would appear from paragraphs (a) to (d). It appears that the court has to be satisfied that the client is better off with the settlement and that the attorney's financial or pecuniary interest in the capital is not allowed to outweigh those of his or her client.

(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* - It will not be enough for the attorney simply to say that he explained the steps or the matters contemplated in the subparagraphs in question to the client. The attorney must convey to the court and satisfy it that the client understood. It appears as if the attorney would amongst others have to satisfy the court that the client understood the language used, and where the client, for instance, does not speak the same language as the attorney, the court would require that some steps were taken to bridge the gap of understanding for instance by providing the interpretation services.

(g) *that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement* - This provision is self-explanatory.

[57] The affidavit of the client essentially confirms that the attorney has complied with his or her obligations *vis-à-vis* the client as appears or is prescribed in relation to the affidavit of the attorney. The client must thus state in the affidavit that he or she was notified in writing of the terms of settlement (s 4(2)(a)), and that the terms of the settlement were explained to him or her and that he or she understands and agrees to them (s 4(2)(b)). The client must not only have agreed to the terms when explained to him by

the attorney but he or she must also still agree to those terms in the affidavit before court. The final provision is that the client must disclose to the court what his or her attitude is to the settlement (s 4(2)(c)). The client should thus not only tell the court that he or she has accepted the terms of the agreement after understanding them but also whether he or she is happy or unhappy about (attitude towards) the settlement.

[58] An equally important provision of the Act is the right created in section 5(1) of the Act for the client who feels aggrieved by any provision of the fees agreement or the fees charged. Such client may refer the provision or fees to the controlling professional body of the practitioner (Law Society in the case of attorneys and Society of Advocates or the Bar Council in the case of advocates). The professional body has the powers to review and set aside the impugned provision or fees if it is of the opinion that such provision or fees are unreasonable or unjust. This is an important power which introduces reasonableness and justice between practitioner and client as grounds of review. It appears to me that in order to give full effect to this safeguard the attorney must inform his or her client of this important right. In addition to all matters covered in section 4, the attorney must accordingly state specifically in the affidavit that he or she has informed the client of the right to take the fees or the agreement on review if the client is unhappy therewith. Similarly, the client must confirm this in the client's affidavit. It should further be clear from the affidavit that the attorney has furnished the client with the name of the controlling body, the address, the telephone number, fax number, e-mail address and such other contact details of the controlling body as the client

might reasonably require in the event of the client deciding to exercise the rights conferred by section 5(1). The disclosure of the name and contact details of the controlling body is necessary to make the right of review meaningful to the client. It would accordingly be a good practice to specify these in the contingency fees agreement itself as client will be given a copy to retain.

Must the Contingency Fees Agreement be handed in?

[59] The Act does not expressly provide for the agreement to be handed in to court. The court however has a strong monitoring function to perform and to balance the interests of the legal practitioner against that of his or her client. If the examination of the agreement is necessary for the court to perform its function, I cannot see any reason why the court should not call for and examine such agreement as Southwood J did in *Mnisi v RAF (supra)*. I do not consider the law in regard to privilege to be operating to take away the powers of the court in this case. One deals here with the regulation of the very relationship between the attorney and his or her client. Of necessity the monitoring function of the court takes place in that area. The other party to the lawsuit (RAF) is not a party to this relationship or its monitoring.

[60] The law of privilege ordinarily operates to protect the rights of the client in his or her relationship with a legal practitioner. It operates against third parties to that relationship. It cannot operate when the purpose of the exercise is to examine that relationship. In any event, the legal practitioner is already

obliged by section 4(2)(d) to disclose or give an outline of his or her fees. This in my view is a demonstration of the fact that attorney and client privilege does not operate against disclosure. Even if it did, I would venture to state that the dictates of public policy makes such disclosure necessary. If I were to be wrong in this view, the answer would be to disclose the agreement to the court and not to any other party. In this way the protection would still be available to the client and no right would be violated.

[61] I hold accordingly that the court is entitled, if it deems it necessary, to call for and examine the contingency fees agreement in the monitoring of the application of the Act between the legal practitioner and the client.

Monitoring of the Contingency Fees Act at the end of the trial

[62] If the contingency fees agreement exists between the client and the legal practitioner, fees in terms of such an agreement would be chargeable not only in the event of settlement. Fees would be chargeable on the same basis at the end of a trial. In the light of the historical power of a court to control and monitor the unusual provisions such as contained in the Contingency Act, there is no reason why the court should not have such powers even at the end of a trial. Public policy considerations and the same reasons which made it necessary for the monitoring at the time of settlement would make it necessary at the conclusion of the trial. Considerations which apply only when the matter is settled and but not when it is finalised by judgment will obviously be excluded. In the interests of protecting the rights of

clients and to prevent abuse of the legal processes all other considerations should become applicable still at the end of the trial. I hold accordingly that although not specifically provided for in the Contingency Fees Act, the courts have the power to monitor compliance with the reasonable limits placed by the Act, not only at the time of settlement but also at the end of the trial.

Practice Directive

[63] Some practical directive appears necessary and desirable in order to place the court in a position to exercise its monitoring function effectively as contemplated in the Contingency Fees Act, 1997 and in this judgment. To that end the following practice directive shall apply in matters before the South Gauteng High Court:

63.1 Whenever a court is required to make a settlement agreement or a draft order an order of court, before the court makes such an order:

63.1.1 the affidavits referred to in section 4 of the Contingency Fees Act, 1997 must be filed, if a contingency fees agreement as defined in the Act, was entered into;

63.1.2 if no such contingency fees agreement was entered into, the attorney and his or her client must file affidavits confirming that fact;

63.1.3 where a contingency fees agreement was entered into, in addition:

63.1.3.1 counsel shall confirm to the court that counsel has read such agreement and advise the court whether same complies with the Act or not;

63.1.3.2 the court may in its discretion call for the submission to it of the contingency fees agreement for examination by the court.

63.1.4 In addition to the matters contemplated in sections 4 (1) and 4 (2) of the Act: (a) the affidavit of the attorney must confirm that the attorney has explained to the client the client's right to take the agreement and the fees charged in terms thereof for review as contemplated in section 5 of the Act; and (b) the affidavit of the client must confirm the explanation and that the client has understood

such explanation and further that the client is in possession of the name, address and contact details of the relevant controlling professional body or bodies.

63.2 The court may require compliance with the directive set out in paragraph 63.1 above at the end of the trial and whenever the court is required to make an order for payment of capital or part thereof in favour of the client.

Particular Matters before Court

Mofokeng v RAF, Case No. 2009/22649

[64] At the hearing of this matter on 23 July 2012 the plaintiff placed before court a draft order. There was no affidavit or agreement placed before court. There has subsequently been placed in the court file, with the leave of the court, an affidavit of the attorney dated 07 August 2012. There is also an unsigned affidavit of the client which this Court shall ignore.

[65] In the affidavit of the attorney it is stated that: "*The amount to be obtained by taking the matter to trial would exceed the offer.*" The amount that would be obtained at the trial is not dated nor estimated. Section 4(1)(b) is not complied with. It is further stated that the prospects of success at the trial are fair but trial costs are a deterrent. No indication whatsoever is given of

the legal practitioner's fees upon settlement. The trial fees are stated to run at R30 000,00 per day (including counsel's fees). There is no indication that such trial fees would not be recoverable at the end of the trial. Sections 4(1) (c) and (d) are not complied with. The instances of non-compliance must be rectified before the court grants the order sought. The observations made with regard to the attorney's affidavit will only be relevant when the client's affidavit has been filed.

[66] As there is no signed affidavit of the client section 4(2) of the Act has not been complied.

[67] The draft order in the *Mofokeng* matter shall not be made an order of court until section 4 has been complied with.

Mokatse v RAF, Case No. 2020/24932

[68] The affidavits of the attorney and that of the client dated 23 July 2012 are on file. On the face of these affidavits they are compliant.

[69] What remains is for counsel to confirm that he has read the contingency fees agreement and that same is compliant. Once that has been done, the draft order in the *Mokatse* matter may be made an order of court.

Makhuvele v RAF, Case No. 2011/19509

[70] Two affidavits had been filed, one by the attorney and the other by the client. The purported contingency fees agreement which has been filed is short. It comprises of three sentences and reads in its totality as follows:

> "*1. Legal fees: The client hereby instructs the attorney to assist him/her in the RAF matter which occurred on the 5th September 2009.*
>
> 2. *Legal fees: The client hereby undertakes to pay the attorney 25% of the capital received in the said claim in respect of his/her legal fees exclusive of VAT.*
>
> 3. *Manner of payment: The client hereby agrees that the attorney shall deduct the said fee from the capital held in the said sum*."

The agreement is then signed and witnessed. The above agreement neither complies with the express provisions of the Act (ss 2 and 3), nor is it in the form prescribed by the Minister in the Government Gazette. The agreement is accordingly invalid and of no force and effect. The plaintiff's attorney in this matter is therefore not entitled to any fees other than the normal attorney and client fees.

[71] In the premises I propose to an order declaring the particular contingency fees agreement invalid.

Komme v RAF, Case No. 2011/20268

[72] On 23 July 2012 the draft was handed in. No affidavits were handed in. This is a matter in which the Road Accident Fund had not imposed the

condition relative to the Act and did not demand anything of the plaintiff's attorney.

[73] Counsel for the plaintiff however indicated that the plaintiff's attorney had signed a Contingency Fees Agreement with his client.

[74] On 23 July 2012 when the matter was called the defendant apparently did not impose a condition with reference to the Contingency Fees Act in the agreement or its offer.

[75] Counsel however informed the court, as he was obliged to, that a contingency fees agreement had been entered into in the matter and enquired as to whether his attorney should file affidavits and prepare for argument. It was upon my specific directions that Mr Ismail subsequently filed the affidavits dated 25 July 2012, one by the attorney and the other by client which have been filed.

[76] On the face of these affidavits they are compliant.

[77] All that remains is that counsel should confirm to this Court that he has read the contingency fees agreement and that same complies with the Act. Upon this confirmation the draft may be made an order of court.

Orders:

I accordingly make the following orders:

1. The matter of Mofokeng, M F v RA F, Case No. 2009/22649 shall stand down. Counsel in the matter may approach this court, in chambers if needs be, to obtain an order once the defects pointed out in this judgment have been rectified. Counsel would further need to confirm that he has read the contingency fees agreement and that same complies.

2. The matters of Mokatse, K B v RAF, Case No. 2010/24932 and of Komme, M K v RAF, Case No. 2011/20268 shall also stand down. Counsel in both matters may approach this court, if needs be in chambers, to obtain the appropriate orders, once counsel have read the relevant contingency fees agreements and are able to confirm to the court that the agreements comply.

3. In Makhuvele, M L v RAF, Case No. 2011/19509, the following orders are made:

   (a) A draft order, which shall be initialled and dated on delivery of this judgment, is made an order of court.

   (b) The contingency fees agreement between plaintiff and its attorney is declared invalid.

4. Costs orders in all the matters, when granted, shall include costs up to 07 August 2012, for noting this judgment and for complying with any directive issued in this judgment.

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P M MOJAPELO
JUDGE OF HIGH COURT

ALL CASES HEARD ON:	07 August 2012
JUDGMENT DELIVERED ON:	22 August 2012
For Plaintiff in Case No. 2009/22649:	Mr F A Saint
Instructed by:	Wim Krynauw Attorneys
For Plaintiff in Case No.2010/24932:	Mr A P den Hartog
Instructed by:	Renier van Rensburg Inc
For Plaintiff in Case No. 2011/19509:	Mr L P Mathebula
Instructed by:	Risaba Attorneys
For the Plaintiff in Case No. 2011/20268:	Mr M I E Ismail
Instructed by:	R T Tshifura Attorneys

For the Defendant in Cases No. 2009/22649 and 2011/19505:

Mr F F Opperman

Instructed

in Case No. 2009/22649 by: Mayat, Nurick & Associates, and

in Case No. 2011/19505 by: M F Jassat Dhlamini Inc