

## MOFOKENG AND OTHERS vs RAF

### Summary

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.

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 the 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.”*

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

The plaintiffs appear to have been taken by surprise by the defendant's attitude and requirement.

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 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 the court. The court would not make the settlement an order of the court before such affidavits are filed. The concurrence of views appears to be correct, as will appear below.

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.

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. The court does not accept the submissions that it 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.

It is the court's view that it 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.

Further 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.

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. The practice directive incorporated in this judgment page 34, shall apply in matters before the South Gauteng High Court.

The following orders were made:

1. The matter of Mofokeng, M F v RAF, 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 initialed 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.