REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

17-10-2012
DATE

SIGNATURE

In the matters between –

K E TJATJI v ROAD ACCIDENT FUND	(Case No 2010/22475)
T L KHOZA v ROAD ACCIDENT FUND	(Case No 2006/4412)
M T MXOLISI v ROAD ACCIDENT FUND	(Case No 2009/11632)

JUDGMENT

BORUCHOWITZ J

[1] This judgment relates to three separate actions instituted against the Road Accident Fund. For convenience each action will hereafter be identified by reference to its case number. The actions have been set down for trial. Acceptable offers of settlement have been made in each matter and the parties wish to have the terms of settlement made an order of court.

[2] It is common cause or not in dispute that in each instance the plaintiff's legal representative has acted on a contingency basis. A contingency fee arrangement is one whereby a legal practitioner undertakes to charge no fee if he or she is unsuccessful in recovering his or her client's claim.

[3] Section 4 of the Contingency Fees Act, No 66 of 1997 (the Act), provides that any offer of settlement made to any party who has entered into a contingency fee agreement may be accepted after the legal practitioner has filed an affidavit in which disclosure is made of the matters set out in ss 4(1)(a) to 4(1)(g). This affidavit must be accompanied by an affidavit by the client deposing to the matters set out in s 4(2). An offer of settlement may not be accepted before the legal practitioner has filed the affidavit. Section 4 provides as follows:

> "**4. Settlement.**—(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—
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> *(a)* the full terms of settlement;
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> *(b)* an estimate of the amount or other relief that may be obtained by taking the matter to trial;
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> *(c)* an estimate of the chances of success or failure at trial;
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> *(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."

[4] Affidavits as envisaged in s 4 of the Act have been filed in each of the cases. A consideration of these affidavits reveals that the contingency fee agreements entered into between the respective legal practitioners and their clients are invalid as they do not comply with the requirements of the Act. In consequence of such invalidity the parties have purported to enter into new contingency fee agreements.

[5] A new contingency fee agreement was entered into in Case No: 2009/11632 on 27 August 2012, some four days before the trial and three days before an acceptable offer was put by the defendant. The plaintiff's attorney explains that when he was instructed to proceed with the claim the plaintiff signed a "*cost agreement*" and was at no stage required to carry any risk for fees or disbursements; and nor has the plaintiff paid any fees or disbursements to him.

[6] The new contingency fee agreement in Case No: 2010/22475 was entered into on 29 August 2012, one day before the date set down for the trial. The plaintiff's attorney admits that in terms of the fee agreements in question he was to provide the plaintiff with funds to prosecute the action. He concedes that the agreement did not comply with the Act and that the new contingency fee agreement was entered into with the object of ensuring compliance.

[7] In Case No: 2006/4412 the new contingency fee agreement was executed on the date of the trial, 30 August 2012, after an acceptable offer was put to the plaintiff. The plaintiff deposes that at the outset of the action her attorney agreed to act on a contingency basis but the agreement recording their arrangement is lost. Counsel for the plaintiff has conceded that the missing agreement did not comply with the Act, and hence, the conclusion of the new contingency fee agreement.

[8] The question in issue is whether the new contingency fee agreements comply with the prescriptions laid down in the Act, and are legally enforceable.

[9] The Act came into operation on 23 April 1999. Its history, statutory context and purpose is well documented. See the report of the South African Law Commission *(South African Law Commission,* Project 93 '*Speculative and Contingency Fees*' November 1996); *Price Waterhouse Coopers Inc & Others v National Potato Co-operative Limited* 2004 (6) SA 66 (SCA) paras [26]-[46]; *Bridget Katlego Mokatse v Road Accident Fund* (Case No: 2010/24932), an unreported decision delivered in this Division on 22 August 2012 and KG Druker, "*The Law of Contingency Fees in South Africa*".

[10] A contingency fees agreement is defined in s 1 as meaning "*any agreement referred to in s 2(1)*". Section 2(1) of the Act reads:

> "**2. Contingency fees agreements.**—(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 -
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> (*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."

(My emphasis)

[11] The long title of the Act, which summarises the subjects with which the Act deals, reads:

"To provide for contingency fees agreements between legal practitioners and their clients; and to provide for matters connected therewith."

[12] The phrase: "*Notwithstanding anything to the contrary in any law or the common law ...*" which appears in s 2(1), and the long title of the Act, make it plain that the Act was intended to be exhaustive of the rights of legal practitioners to conclude contingency fee agreements with their clients. There is no room whatever for a legal practitioner to enter into a contingency fee agreement with a client outside the parameters of the Act or under the common law (see *Price Waterhouse* para [41]; KG Druker *op cit*, Chapter 12). Only two forms of contingency fee agreements are recognised in terms of the Act: A "no win, no fees" agreement (s 2(1)(a); and an agreement in terms of which a legal practitioner is entitled to fees equal to or higher than his or her normal fees if the client is successful (s 2(1)(b)). The latter type of agreement is subject to the limitation set out in s 2(2)).[1]

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[1] "(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

[13] A contingency fee agreement which does not comply with the provisions of the Act is illegal. The legal position that obtains in this regard was succinctly summarised by Southwood AJA (writing for the Court) in *Price Waterhouse* (para [41]):

> "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. ...".

[14] It was submitted on behalf of the plaintiffs that the Act is silent as to when, and at what stage of the proceedings, a contingency fee agreement may be entered into, and it is thus permissible to enter into such agreement at any stage of the proceedings – even on the eve of a trial - as long as success or what the parties consider to be success has yet to be achieved.

[15] Although the Act does not stipulate when a contingency fee agreement may be entered into, there are textual indications that such agreement must be entered into at a sufficiently early stage of the proceedings so as to enable the requirements of the Act to be complied with. What is a sufficiently early stage of the proceedings is a question of fact. Much would depend on the nature of the proceedings[2] and whether when the contingency fee agreement

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amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs."

[2] The term 'proceedings' is broadly defined in the Act. It means " ... any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity, and includes any professional services rendered by the legal practitioner concerned and any arbitration proceedings,

is entered into, it is reasonably possible to comply with the prescripts laid down in the Act. The textual indications to which I refer are the following.

[16] Section 2(1) provides that a legal practitioner may only enter into a contingency fee agreement with a client if of the opinion that the client has reasonable prospects of success in any proceedings. It is therefore a requirement that before entering into the agreement a full and proper assessment of the client's prospects of being successful in the proceedings be undertaken.

[17] Legal practitioners may not act on a contingency basis unless they have signed a written agreement to that effect, and have delivered a copy thereof to the client upon the date on which such agreement is signed (ss 3(2) and 3(4)).

[18] The agreement must be in the form contemplated by the Act. In terms of Regulation R547 dated 23 April 1999, the Minister of Justice, acting under s 3(1)(a), has prescribed the form of a contingency fee agreement that must be used. Section 3 sets out the minimum requirements for a valid contingency fee agreement. It provides:

> "**3. Form and content of contingency fees agreement.**—
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> (1) (*a*) A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the *Gazette*,

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but excludes any criminal proceedings or any proceedings in respect of any family law matter;

after consultation with the advocates' and attorneys' professions.

(b) The Minister of Justice shall cause a copy of the form referred to in paragraph (a) to be tabled in Parliament, before such form is put into operation.

(2) A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement.

(3) 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.

(4) A copy of any contingency fees agreement shall be delivered to the client concerned upon the date on which such agreement is signed."

[19] From what is stated above it is evident that before a legal practitioner is entitled to act on a contingency basis the matters set out in s 3(3)(b)(3)(i)-(iv) must be complied with. The client must also have a proper understanding of the financial implications of the agreement. This can only be achieved if before signature of the contingency fee agreement the parties agree on the following matters: What will be regarded as constituting success or partial success; the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable; the amounts payable and method to be used in calculating such amounts; the manner in which disbursements made or incurred by the legal practitioner on behalf of the client are to be dealt with. Agreement also has to be reached in regard to the manner in which any amendment or agreement ancillary to the contingency fee agreement will be dealt with. To agree upon these matters only after a legal practitioner has commenced to act on a contingency basis and when disbursements such as the fees of expert witnesses and advocates have already been incurred would be contrary to the provisions of the Act.

[20] Subsection (3)(h) provides for a fourteen-day cooling-off period during which the client will have the right to withdraw from the agreement. To effectively exercise this right it is essential that the provisions of the section be brought to the client's attention. This is to be achieved by using the prescribed form of agreement in which express reference is made to the provisions of ss (3)(h). To use the prescribed form only after the legal practitioner has commenced to act on a contingency basis, and shortly before the trial - as has occurred in the present cases - would render the cooling-off provision nugatory and ineffectual.

[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, Chapters 2, 3 and 4; KG Druker *op cit*, Chapters 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 sections 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.

[23] In each of the cases under consideration the new fee agreements were only entered into after the legal practitioners concerned had commenced to act on a contingency basis and when disbursements had already been incurred. This, as indicated, is contrary to the provisions of ss (3)(2) and (3)(4). There is also no indication in the affidavits filed of record that the

matters set out in s 3(3)(b) of the Act had been complied with before the new contingency fee agreements were entered into. The new fee agreements were entered into when the proceedings were at an advanced stage, and it is doubtful whether at that stage all of the requirements of s 3 had been fulfilled, or were capable of being complied with. In Case No 2006/4412, the new fee agreement was entered into on the date of the trial, when it is clear no contingency could have existed.

[24] On the face of it, the new contingency fee agreements appear to be valid as the prescribed form of agreement has been used. In substance, however, they are invalid as a result of the failure by the parties to observe the requirements of the Act. Although the new contingency fee agreements are formally in order, they are substantially invalid (see *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 at 1010D-H, and cases there cited.

[25] There is also an additional and different reason why, in my view, the new contingency fee agreements are invalid. In each of the cases under consideration, the intention in entering into the new contingency fee agreement was to retrospectively validate the contingency fee agreements that were entered into in violation of the Act. This cannot be done. It is trite that an agreement which is a nullity cannot be rectified so as to become a valid contract. In *Headermans'* case the court referred with approval to *Spiller & Others v Lawrence* 1976 (1) SA 307 (N), in which a distinction was drawn, for purposes of rectification, between a contract which is void for want of

compliance with essential formalities, and one which is invalid for some other reason. In *Spiller*, Didcott J stated as follows (at 312B-D):

> " The two situations are fundamentally different. In the one ..., when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. In the other ... the cause of nullity is indeed to be found in the transaction's form. When it is said to consist of a failure to observe the law's requirement that the agreement be reflected by a document with particular characteristics, the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from the document."

Compare, in a different context, *Wilken v Kohler* 1913 AD 135 at 143; *Dowdle's Estate v Dowdle & Others* 1947 (3) SA 340 (T) at 354 *in fin*; *Kourie v Bean* 1949 (2) SA 567 (T) at 572; *Intercontinental Exports (Pty) Limited v Fowles* 1999 (2) SA 1045 (SCA) at 1051C-G).

[26] As both the initial and new contingency fee agreements are invalid the common law will apply. Under the common law the plaintiffs' attorneys are only entitled to a reasonable fee in relation to the work performed. Taxation of a bill of costs is the method whereby the reasonableness of a fee is assessed. The plaintiffs' attorneys are therefore only entitled to such fees as are taxed or assessed on an attorney and own client basis.

[27] Counsel for the plaintiffs pointed out that in the case of smaller claims, the plaintiffs would be prejudiced if fees were charged on such basis as the taxed fees were likely to exceed the amount of the award. In order to obviate

any prejudice, I will order that the fees recoverable by the legal practitioners from their clients not exceed 25% of the amount awarded or recovered by the plaintiffs. As regards disbursements, the plaintiffs' legal representatives shall be entitled to recover from the plaintiffs such portion of the disbursements as are not paid by or recoverable on taxation from the Road Accident Fund.

[28] The following order is granted:

A In Case No 2010/22475:

1. The defendant shall pay to the plaintiff an amount of R5 120 (five thousand one hundred and twenty rand) in respect of delictual damages sustained by the plaintiff arising out of a motor vehicle collision which occurred on 31 October 2009;

2. The amount as mentioned in 1 above is payable on or before 28 September 2012 into the Trust Account for the plaintiff's attorneys of record with the following details:

   Wim Krynauw Attorneys
   ABSA – Trust Account
   Account Number 405 735 0513
   Ref: TT0383/HN

3. The defendant shall furnish the plaintiff with an undertaking as envisaged in s 17(4)(a) of the Road

Accident Fund Act, Act 56 of 1996, for 80% (eighty *per centum*) of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods of the plaintiff arising out the injuries sustained by the plaintiff in the motor vehicle collision which occurred on 31 October 2009, after such costs have been incurred and upon proof thereof.

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the Magistrates' Court scale, which costs shall include:

The costs attendant upon the obtaining of the medico-legal reports and/or preparation fees and/or joint minutes, if any, and as allowed by the Taxing Master, of the following experts:

- Dr Oelofse;
- Dr Read;
- Adri Roos;
- Munro Actuaries.

5. In the event that costs are not agreed the plaintiff agrees as follows:

5.1 The plaintiff shall serve the notice of taxation on the defendant's attorney of record; and

5.2 the plaintiff shall allow the defendant seven (7) court days to make payment of the taxed costs.

6. It is declared that the contingency fee agreements entered into between the plaintiff's attorney, Wim Krynauw Attorneys, and the plaintiff are invalid.

7. The plaintiff's attorney shall only be entitled to recover from the plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to exceed 25% of the amount awarded or recovered by the plaintiff.

B In Case No 2006/4412:

1. The defendant shall pay the capital amount of R183 600.17 (one hundred and eighty-three thousand and six rand and seventeen cents) on or before 30 September 2012;

2. The defendant shall pay the plaintiff's agreed or taxed High Court costs as between party and party, including counsel's fee on trial and such costs to include the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above, subject to the following conditions:

2.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorneys of record; and

2.2 the plaintiff shall allow the defendant seven (7) court days to make payment of the taxed costs.

3 The defendant shall pay the preparation and qualifying fees, if any, of the actuary, Michelle Barnard, of GRS Quantum.

4 The amount set out in paragraph 1 above and all costs shall be paid by the defendant on behalf of plaintiff into the following Trust Account of the plaintiff's attorney of record:

De Wet Van der Watt & Jordaan Inc
ABSA Bank Limited Account No: 330712341

5. It is declared that the contingency fee agreements entered into between the plaintiff's attorney, De Wet van der Watt & Jordaan Inc, and the plaintiff are invalid.

6. The plaintiff's attorney shall only be entitled to recover from the plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to

exceed 25% of the amount awarded or recovered by the plaintiff.

C In Case No 2009/11632:

1. The defendant shall pay the plaintiff the sum of R200 000.00 (two hundred thousand rand);

2. The amount referred to in paragraph 1 hereinabove is to be paid into the plaintiff's attorney's account, the particulars of which are as follows:

Standard Bank, Melville
Renier van Rensburg Inc Trust Account
Account Number: 401022129
Branch Code: 006105

3. Defendant shall furnish the plaintiff with an undertaking in terms of s 17(4)(a) for 100% of the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor collision of 15 June 2008 after such costs have been incurred and upon proof thereof;

4. The defendant shall pay the plaintiff's costs on the High Court scale, either as taxed or agreed, to date hereof, such costs to include attendant upon the obtaining of payment referred to in paragraph 1 above, and including the cost of counsel and of obtaining medico-legal reports and/or qualifying fees and their attendances at court of the following experts (if any):

4.1 Dr Geoffrey Read

4.2 Dr Geoffrey Read – Joint Minutes

4.3 Dr Fine

4.4 Libolutsha Consultancy

4.5 Libolutsha Consultancy – Joint Minutes

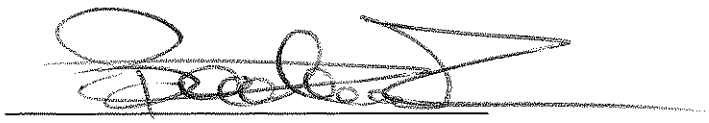
4.6 Dr Rita Kellerman – Joint Minutes

4.7 Algorithm

5. The plaintiff shall allow the defendant seven (7) court days to make payment of the taxed costs.

6. It is declared that the contingency fee agreements entered into between the plaintiff's attorney, Renier Van Rensburg Inc, and the plaintiff are invalid.

7. The plaintiff's attorney shall only be entitled to recover from the plaintiff such fees as are taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to exceed 25% of the amount awarded or recovered by the plaintiff.



P BORUCHOWITZ J

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG