REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2013/27388
REPORTABLE

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

18/7/2014 ....
DATE SIGNATURE

In the matter between:

RONALD BOBROFF AND PARTNERS INC	**First Applicant**
BOBROFF: RONALD	**Second Applicant**
BEZUIDENHOUT STEPHEN	**Third applicant**
BOBROFF DARREN	**Fourth Applicant**
and	
VIVIAN GLEN DEREK	**Respondent**

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

(1) This is an application in terms of ***Rule 47(1) of the Uniform Rules of Court*** for an order to furnish the applicants' attorneys with security for costs in the amount of R500 000.00 (five Hundred Thousand Rand) in a form and manner acceptable to the Registrar of the Court.

THE FACTUAL MATRIX

(2) On 19 February 2005 the respondent was involved in a motor vehicle accident. On 1 July 2005 the respondent signed a ***Common Law Contingency Fee Agreement*** with the first applicant in terms whereof the latter was entitled irrespective of the work done in prosecuting his personal injury case to 25% plus VAT of any monies recovered on the respondent's behalf as remuneration in respect of it's legal fees.

(3) Pursuant to the respondent's instructions the first applicant instituted a personal injury action against the Road Accident Fund. On 18 August 2008 the Road Accident Fund unequivocally admitted liability for the respondent's personal injury damages. On the same day the respondent signed a document titled "*Settlement Instructions and/or Confirmation.* The respondent's trial against the Road Accident Fund was set down for the determination of quantum commencing on 30 July 2012.

(4) According to the first applicant by virtue of the legal uncertainty regarding the validity of the "***Common Law Contingency Fee Agreement***" it became necessary to conclude a ***Contingency Fee Agreement*** in terms of the ***Contingency Fee Act 66 of 1997 ("the***

Act") with the respondent. The said agreement was concluded on 27 July 2012.

(5) In terms of ***Clause 6.3 of The Contingency Fee Agreement*** it was agreed that the first applicant's fees would be the amount as calculated in ***Clauses 6.1 and 6.2*** thereof or an amount equal to 25% (exclusive of VAT) of the monetary award recovered on the respondent's behalf whichever was the lesser.
In terms thereof it was further agreed that the first applicant's fees would not exceed 25% of the award.
The respondent's action against the Road Accident Fund was successfully concluded on 31 July 2012 when he was awarded the amount of R4 400 000.00 plus party and party costs pursuant to a court order.

(6) In the main application the respondent who is a *peregrinus* domiciled in New Zealand has launched an application against the applicants seeking an order to set aside the ***Common Law Contingency Fee Agreement*** concluded between himself and the applicant on 1 July 2005.
Further in the main action the respondent seeks an order that:

(a) the applicants be ordered jointly and severally to pay to his attorney an amount of R1 254 000.00 which the applicant has deducted from the settlement amount of R4 400 000.00 as legal fees and same to be held by them in trust;

(b) the first applicant be ordered to submit a detailed bill of costs supported by vouchers reflecting reasonable fees and disbursements in respect of the services it rendered on

behalf of the respondent who, on receipt thereof, would be entitled to demand taxation thereof; and

(c) in the event the first applicant fails to comply with the submission of the bill of costs within 30 (thirty) days, the respondent's attorney be authorized to pay the amount referred to in *paragraph (a)* above to the respondent.

(7) The applicants contends that they are entitled to demand security for costs from the respondent because he is a *peregrinus*. The respondent's contends that the request to furnish security for costs is ill-conceived in that the applicants have no prospects of success in resisting the main application, consequently, no court would order the respondent to furnish security for costs.

(8) The applicants contend that the respondent being fully aware of the fact that he had signed the ***Contingency Fee Agreement*** in terms of ***The Act*** as well as the "*Settlement Instructions and/or confirmation Agreement*" has failed to make any reference thereto in the main application, and only makes reference to the initial ***Common Law Contingency Fee Agreement*** signed on 1 July 2005 which to his knowledge was superseded by the ***Contingency Fee Agreement***. The applicants further contend that notwithstanding the aforegoing, the respondent seeks an order that the said ***Common Law Contingency Fee Agreement*** be declared invalid in circumstances where he has signed the subsequent ***Contingency Fee Agreement***. In the light of the aforegoing, the relief claimed by the respondent in the main application is incompetent because fees charged by first applicant are not based upon the ***Common Law Contingency Fee Agreement*** but are based on the ***Contingency Fee Agreement.***

(9) The applicants argue that although the respondent's founding affidavit to the main application refers to the cases of ***Jaunne De la Guerre v Ronald Bobroff & Partners Inc in the North Gauteng High Court under Case Number: 57523/2011 and South African Association Personal Injury Lawyers v Minister of Justice 2013 (2) 585 GNJ*** as authority for the proposition that the ***Common Law Contingency Fee Agreement*** is invalid and *void ab initio*,
the issue of the legal validity of the ***Common Law Contingency Fee Agreement*** has not been finally decided because it is still the subject of an appeal to the Supreme Court of Appeal and a possible petition and further appeal to the Constitutional Court.

(10) Furthermore, the applicant's contend that the respondent's attorney in the main and present application are the same attorneys who acted in the matter of ***Justin John Bitter N.O. obo Anthony Pontes v Ronald Bobroff & Partners Inc and Road Accident Fund under Case Number 11069/13*** and are aware that in that the first applicant unsuccessfully sought a similar order confirming the constitutional validity of the ***Common Law Contingency Fee Agreement*** that the court on 29 July 2013 postponed the application *sine die* pending the outcome of the application for leave to appeal to the Supreme Court of Appeal in the cases referred to hereinabove.

(11) Irrespective of the outcome of the applications for leave to appeal to the Supreme Court of Appeal in those judgments referred to above, the applicants argue that the main application will have to be considered by the Court after the parties thereto have presented their submissions in arguments further when the main application is heard, the applicants

intend briefing senior and junior counsel to argue the matter on their behalf as the legal issues to be determined are complex.

(12) The respondent on 11 September 2013 the Supreme Court of Appeal dismissed the first applicant's application for leave to appeal the decision in the matter of ***Juanne De La Guerre v Ronald Bobroff & Partners Inc (supra)***. On 13 September 2013 the Supreme Court of Appeal dismissed the application for leave to appeal in the matter of ***South African Association of Personal Injury Lawyers v Minister of Justice & Others (supra).*** Both decisions upheld the contention that ***Common Law Contingency Fee Agreements*** which do not comply with the provisions of the ***Contingency Fees Act 66 of 1997*** are unlawful, invalid and of no force or effect.

(13) The respondent argues that by the time he concluded the ***Contingency Fee Agreement*** on 27 July 2012 the issue of liability had long been settled on 18 August 2008, and the issue of quantum was postponed *sine die*. The fact that the applicant now wishes to rely on a subsequent ***Contingency Fee Agreement*** which purports to comply with the ***Contingency Fees Act*** illustrates that the fourth applicant:

(a) unlawfully induced him as the respondent to conclude a ***Contingency Fee Agreement*** after the risk involved in prosecuting the personal injury claim had passed;

(b) was aware of the fact that the ***Common Law Contingency Fee Agreement*** originally concluded with the first applicant on 1 July 2005 was unlawful, invalid and unforceable; and

(c) induced the respondent to sign the "*Settlement Instructions and/or Confirmation Agreement*" on 8 August 2008 well knowing that it was unlawful, invalid and of no force or effect.

(14) The respondent argues that the statement that the issue of the validity of the ***Common Law Contingency Agreement*** has not been finally decided in our courts is false and misleading, because the Supreme Court of Appeal in ***Price Waterhouse Coopers Case Number 2004 (6) SA 66 (SCA),*** and a full bench of the North Gauteng High Court in ***South African Association of Personal Injury Lawyers v Minister of Justice and Others (supra)*** have held that ***Common Law Contingency Fee Agreements*** are unlawful, invalid and unenforceable, and an application for leave to appeal the decision was dismissed by the Supreme Court of Appeal.

(15) The respondent contends that the unlawfulness of ***Common Law Contingency Fee Agreement*** has been finally determined and until such time as the Constitutional Court rules otherwise, any ***Contingency Fee Agreement*** concluded between an attorney and his or her client that fails to comply with the provisions of the ***Contingency Fees Act*** is unlawful, invalid and unenforceable.

THE APPLICANT'S SUBMISSIONS

(16) Mr Zidel on behalf of the applicant argued that the ***Common Law Contingency Fee Agreement*** signed on 1 July 2005 which the respondent seeks to set aside in the main application has been superseded by the ***Contingency Fee Agreement*** pursuant to the ***Contingency Act 66 of 1997*** concluded by the parties on 27 July 2012.

(17) Further Mr Zidel submitted that because the respondent did not disclose the existence of the ***Contingency Fee Agreement*** in the main application and has not challenged it's existence, consequently, the relief sought in the main application is incompetent.

(18) Mr Zidel further argued that the applicants have challenged the contention that ***Common Law Contingency Fee Agreements*** are invalid, by having petitioned the Constitutional Court to adjudicate the constitutional validity and legality of ***Sections 2 and 4 of the Contingency Act of 66 of 1997.***

THE RESPONDENT'S SUBMISSIONS

(19) Mr Berkowitz on behalf of the respondent argued that it is trite that the ***Common Law Contingency Fee Agreement*** signed on 1 July 2005 is unlawful and *void ab initio*. He further argued that the ***Contingency Fee Agreement*** concluded between the parties on 27 July 2012 does not comply with ***Section 3 of the Contingency Fees Act,*** that such failure rendered same unlawful, invalid and *void ab initio*.

THE EVALUATION OF EVIDENCE

(20) It is not disputed by or on behalf of the respondent that he signed the ***Contingency Fee Agreement*** on 27 July 2012 or that he signed the ***Common Law Contingency Fee Agreement*** on 1 July 2005, which is the subject matter of the main application. Further it is not disputed by the respondent that he signed the *"Settlement Instructions and/or Confirmation Agreement"* on 8 August 2008 or that the existence and content of the ***Contingency Fee Agreement*** is not referred to nor disclosed in the main application.

(21) The applicants contend that ***Common Law Fee Agreement*** the respondent seeks to declare invalid, is void and of no force or effect because it was in fact superseded by the ***Contingency Fee Agreement*** concluded on 27 July 2012, which complies with the ***Contingency Fees***

Act, consequently, the entire relief sought by the respondent in the main application is incompetent and doomed to fail because the respondent has shown any ground on which a court in the exercise of its discretion would come to the conclusion that the respondent as a *peregrinus* should be absolved from furnishing security for costs.

(22) It is trite that under the common law legal practitioners were not allowed to charge clients a fee calculated as a percentage of the proceeds awarded in successful litigation. The ***Contingency Fees Act 66 of 1997*** changed this status quo and allowed legal practitioners to charge set percentage fees from the proceeds awarded in litigation. See in ***Re William Emil Hollard v Paul H Zietsman (1885) 6 NLR 93 at 96-7, See also Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another [2004] ZASCA 64; 2004 (6) SA 66 (SCA) (National Potato Co-operative) at para 41; Lekeur v Santam Insurance Co Ltd 1969 (3) SA (CPD) at 9; and Incorporated Law Society v Reid (1908) 25 SC 615 and 618-9.***

(23) ***Section 1 of The Contingency Fees Act*** defines a contingency fee agreement of the *Act* referred to in ***Section 2(1)*** which provides:

> *"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."*

(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 consequences of the proceedings concerned, which amounts shall not, for purposes of, calculating such excess, include any costs.*

(24) The respondent contends that when he concluded the ***Common Law Contingency Fee Agreement*** he was never informed by the applicants that there were alternative lawful fee agreements such as the a ***Contingency Fee Agreement*** in terms of the ***Contingency Fees Act*** or time based charges agreement for work actually performed.

(25) The respondent admits that a ***Common Law Contingency Fee Agreement*** pursuant his personal injury claim against the Road

Accident Fund was settled 31 July 2012 in the amount of R4 400.000.00 plus an undertaking for future medical and hospital expenses and party and party costs. Further the respondent alleges that pursuant to the said settlement, the first applicant charged as it's legal fees a total of R1 100 000.00 plus VAT in the amount of R154 000.00, that is R1 254 000.00 which the applicant justified as it's entitlement in terms of the ***Common Law Contingency Fee Agreement.***

(26) The costs contribution was settled by the Road Accident Fund in the amount of R412 428.90 and of that amount R84 062.95 inclusive of VAT represents what was recovered towards the first applicant's fees. The difference between R412 428.90 and R84 062.95 namely R328 365.95 represents the disbursements recovered.

(27) Consequently the total sum of money received as capital, interest and legal costs is R4817 332.85 and of this amount the respondent received R3201 644.06 which is 66.5% of the total, and the amount of R1254 000.00 deducted by the first applicant as its disbursements in the amount of R361 688.90 amount to 7.5% of the capital and costs.

(28) The respondent contends that the ***Common Law Contingency Fee Agreement*** he signed is invalid and unenforceable, consequently in order to arrive at a reasonable attorney and own client fee the first applicant is obliged to present a bill of costs for work performed which the respondent estimates to be in the amount of R252 188.85. Further the respondent believes that the applicant has over reached him by as much as R1 001 811 151.

(29) It is common cause that the respondent was paid out the sum of R36 365.95 by the first applicant and is accordingly not impecunious and is able to provide security for costs if ordered to. It is trite that an *incola* may not as of a right flowing from substantive law claim security for costs against a non-domiciled *peregrinus.* In other words, the applicants do not have a right that entitles them as a matter of course to the furnishment of security for their costs by the respondent. See ***Magida v Minister of Police 1987 (1) SA 1 (A) at p 12 A-C.***

(30) A Judge has a discretion to grant or refuse the furnishing of security for costs by having due regard to the particular circumstances of each case as well as considerations of equity and fairness to both the *incola and the peregrinus* to decide whether the latter should be compelled or be absolved from furnishing security for costs. Although there is authority to the effect that a court will not enquire into the merits of the main dispute in the exercise of its discretion regarding the furnishing of security for costs, like all rules of practice this rule should not be seen to be wholly inflexible. See ***Exploitatie – En Beleggingsmaatschappij Argonauten 11 BV and Another v Honig 2012 (1) SA 247 (SCA) at para 20 p 255***

(31) In considering an appeal against an order of security, a Commissioner of Patents under ***Section 17(2)(b) of the Patents Act 57 of 1978 i***s entitled to have regard to the prospects of success of a party in considering whether security should be furnished. In ***Zietsman v Electronic Media Network Ltd and Others 2008 (4) SA 1 (SCA)*** the court was influenced largely by the fact that the respondents had not disclosed their defence. In this regard Streitcher JA stated at *paragraph 21:*

"I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case."

(32) Although this is a ***Rule 47(1)*** application, in my view the peculiar exceptional legal circumstances present in the respondent's opposition to this application, namely, that the applicants have no legally sustainable defence to his contention that both the ***Common Law Contingency Fee Agreement*** and the ***Contingency Fee Agreement*** are unlawful, invalid and unenforceable obliges the court to enquire into the merits of the primary dispute in the main action.

(33) The litigation instituted by the respondent against the applicant has its genesis from the ***Common Law Contingency Fee Agreement***. Although as a general rule a *peregrinus* must furnish security for costs in an action against an *incola, an incola* does not have an unfettered right which entitles it as a matter of course to the furnishing of security for costs by a *peregrinus.* See ***Estate Fawcus v Wood 1934 CPD at 249.*** The requirement of security of costs pursuant to ***Rule 47(1) of the Uniform Rules of Court*** is a rule of procedure and not a rule of substantive law. See ***Saker & Co Ltd v Grainger 1937 AD at 2236-7. Arkell & Douglass v Berold 1922 CPD 198; Alexander v Jokl and Others 1948 (3) SA 269 (W) at 281.***

(34) Further although the bona fides or soundness of the claim of a *peregrinus* is not a factor which should normally play a part in the

exercise of the court's discretion, this court is enjoined to "*inquire into the merits of the matter fully in terms of the cautio fideiussoria by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the non-domiciled foreigner.*" See ***Magid v Minister of Police 1987 (1)(1) at p12A-C.***

(35) A further reason which entitles this court to deal with the merits of the dispute in the main application is the Constitutional Court decision in the matter of ***Ronald Bobroff and Partners Inc and Juanne Elize De La Guerre,*** and the matter between ***South African Association of Personal Injury Lawyers Applicant and Minister of Justice and Constitutional Development First Respondent and Road Accident Fund Second Respondent under Case Numbers CCT 122/13 and CCT 123/13*** the judgments which were respectively delivered on 20 February 2014.

(36) Pursuant to these judgments the applicants challenged the constitutionality of the ***Contingency Fees Act*** as a whole and in the alternative ***Sections 2 and 4*** thereof. The present first applicant in the Constitutional Court matter accepted that a declaration of constitutional invalidity was a prerequisite for it's success in the proceedings brought against it by a former client (Ms De La Guerre). The same rationale applies in the present matter in connection with the respondent's main action because it is predicated on the same cause of action, namely, the validity and lawfulness of the ***Common Law Contingency Fee Agreement*** and or whether the applicants have complied with the prescriptions of the ***Contingency Fees Act*** in concluding the ***Contingency Fee Agreement*** with the respondent on 27 July 2012.

(37) The Constitutional Court in essence upheld the judgments *of the full benches of the North Gauteng High Court in* ***South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party) Case Number 32894/12*** **and De La Guerre v Ronald Bobroff and Partners Inc and Others Case Number 57523/2011** which were confirmed by the Supreme Court of Appeal through its refusal in both matters to grant for leave to appeal the said decisions on the basis that no reasonable prospects of success on appeal existed. The Constitutional Court in its judgment 20 February 2004 with regard to the aforequoted cases also found that there are no reasonable prospects of success on appeal in respect of both matters and accordingly dismissed the applications for leave to appeal.

(38) The upshot of the Constitutional Court decision is that judgments in the cases of ***South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Law (supra), De La Guerre v Ronald Bobroff and Partners Inc and Others (supra), Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA) 2004 (9) BCLR (30) and Tjatji and Others v Road Accident Fund and two similar cases 2013 (2) 632 (GSJ)*** are upheld.

(39) It is common cause that Road Accident Fund's liability on the merits of the respondent's personal injury case was settled on 18 August 2008. From that date it is patent that the risk of liability was extinguished because the Road Accident Fund unequivocally accepted liability for the respondent's personal injury damages, the only issue remaining was the quantum which was settled on 31 July 2012 pursuant to a court order.

(40) It is common cause that the parties concluded ***a Contingency Fee Agreement*** on 27 July 2012 after the Road Accident Fund had admitted 100% liability for the respondent's personal injury damages on 18 August 2008, three years ten (10) months after the Road Accident Fund's risk of liability had been extinguished.

(41) ***Section 2(1) of The Act*** provides that notwithstanding anything to the contrary in law or the common law if in his her opinion there are reasonable prospects that his or her client may be successful a legal practitioner may only enter into a contingency fee agreement. The fact of the matter is the applicant was instructed on 1 July 2005 to prosecute a personal injury claim against the Road Accident Fund, the issue of liability was effectively settled on 8 August 2008, and the order for the issue of quantum in the amount of R4 400 000.00 was settled on 31 July 2012.

(42) ***Section 3 of The Act*** provides:" *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)that the client will have a period of (14) fourteen 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…

(43) To quote Boruchowitz J in ***Tjatji v Road Accident Fund (supra)*** *before a legal practitioner is entitled to act on a contingency basis the matters set out in* ***Section 3(3)(b)(i)(iv)*** *must be complied with. The client must have also (before signature of the Contingency Fee Agreement) agree with the applicant what financial implications* ***will*** *be regarded as constituting success or partial success…*
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."

(44) In any event, ***Section 3(h)*** provides for a fourteen (14) day cooling off period within which the respondent has the right to withdraw from the ***Contingency Fee Agreement***. Since the parties purportedly concluded the ***Contingency Fee Agreement*** on 27 July 2012 after the issue of liability was settled on the 18 August 2008 and three (3) days before the issue of quantum was settled in terms of a court order that the Road Accident Fund should pay the respondent damages in the amount of R4 400 000.00, party and party costs, and furnish an undertaking in terms of ***Section 14 of the Road Accident Fund Act*** in respect of hospital and medical expenses,

(45) The purported ***Contingency Fee Agreement*** concluded on 27 July 2012 cannot and does not comply with ***Section 3(h) of The Act,*** because to use the prescribed form only after the legal practitioner had commenced to act on a contingency basis on 1 July 2005 and after the liability risk had been extinguished on 18 August 2008, or to use same (3) days before the settlement of the parties is made an order of court,

on 31 July 2012 renders the cooling off provision nugatory and ineffectual.

(46) The further indication that non-compliance with ***The Act*** is visited with invalidity is shown by the fact that ***Section 2 and 3*** respectively are couched in peremptory terms. The first applicant's failure to comply with ***Section 3 of the Contingency Fees Act*** rendered the ***Common Law Contingency Fee Agreement*** unlawful, invalid and *void ab initio*. ***Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA);*** dictum in ***para 41*** applied in ***Tjatji v Road Accident Fund and Two Similar Cases 2013 (2) SA 632 (GSJ) SAAPIL v Minister of Justice and Constitutional Development (RAF intervening) 2013 (2) SA 583 (GNP).***

(47) A ***Contingency Fee Agreement*** which was only concluded at an advanced stage, after the legal practitioner has commenced to act on a contingency basis and after disbursements had already been incurred, while formally appearing to be in order, is substantially invalid because it could not possibly comply with the provisions of ***Section 3 of the Contingency Fees Act, consequently,*** the new ***Contingency Fee Agreement*** is invalid, as a result of the failure of the parties to observe the requirements of the ***Contingency Fees Act.*** It is trite that an agreement which is a nullity cannot be rectified so as to become a valid contract. ***Spiller and Others v Lawrence 1976 (1) SA 307 (N) at 312B-D*** as referred to in ***Headermans (Vryburg) (Pty) Ltd v Ping Bai 1997 (3) SA 1004 (SCA).***

(48) As both the initial ***Common Law Contingency Fee Agreement*** and the new subsequent ***Contingency Fee Agreement*** are invalid, the

common law applies. Under the common law the first applicant is 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 first applicant is therefore only entitled to such fees as are taxed or assessed on an attorney and own client basis in relation to the work performed.

(49) The applicants contend that the respondent has not pleaded in the main action that the ***Contingency Fee Agreement*** purportedly concluded on 27 July 2012 should be set aside because it is invalid and unlawful, that such failure renders the respondent's main action nugatory. Further the applicants contend that this court is precluded from enquiring into the merits of the main action or to decide on the validity or lawfulness of the ***Contingency Fee Agreement*** concluded on 27 July 2012, because this issue has to be dealt with separately by another court. For authority for this proposition Mr Zidel cited the case of ***Exploitatie-En Beleggings maatschappi, Argonauten 11 BV and Another v Honig 2012 (1) SA 247 (SCA).***

(50) It is trite that the whole purpose of pleadings is to bring clearly to the notice of Court and the parties to an action the issues upon which reliance is to be placed. In R***obinson v Randfontein Estates GM Co Ltd*** Innes CJ put it thus:

'The object of pleading is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent all enquiry. But within those limits the Court has a wide direction. For pleadings are made for the Court, not the Court for the pleadings. And where party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has

been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.'

(51) *Pleadings should state facts only. Pleadings should not contain statements of either law or the evidence required to establish the facts. Only material facts need be alleged in pleadings.*

The pleading of a legal proposition itself is no pleading at all. But the rule means more than that, it implies that the facts must be set out and it is for the court to say on a consideration of the facts proved in evidence whether they will or will not support a particular conclusion in law.

(52) *The plaintiffs have not raised the point of law in his pleading in the main action (like in the present matter that the* ***Contingency Fee Agreement Fee Agreement*** *is invalid because it did not comply with* ***Section 3 of the Contingency Fees Act)*** *although it is a pure point of law. Nevertheless, it is a point taken by the defendants which," in substance, is a demurrer to the main action…*
"Any party shall be entitled to raise by his pleading any point of law, and, unless the court or a judge otherwise orders, any point so raised shall be disposed of by the judge who tries the cause at or after the trial..." "If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court or judge ay thereupon dismiss the action or make such other order therein as may be just."
It is trite that *"every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading*

relies…" undoubtedly, a party is not bound, and indeed normally ought not, to plead points of law but to plead the facts on which he relies. "If a party intends to apply for determination of a point of law he must raise it on his pleading. But at the trial itself he may raise a point of law open to him even though not pleaded."
In the circumstances is that the defendants here are not precluded from raising this point by the fact that they have not expressly taken it in their pleadings. But where there is a substantial point of law which may dispose of the whole action, it is not a convenient course to be followed normally that no mention should be made of the point of law in the pleading, because, if no mention of it is made in the pleading, the other side may be lulled into a sense of false security in that particular respect, and may very probably appear before the court less ready and able to argue what may be a difficult matter. However, this present point is not one of very great complexity, and the plaintiff (applicants) company will not really be exposed to any great embarrassment by not being told till this morning that this point was going to be taken by the defendants.
See ***Independent Automatic Sales Ltd v Knowles and Foster [1962] 3 ALL ER 27.***

(53) The decision taken in this matter to enquire into the merits of the main action is not absolute authority that a court is absolutely not precluded to enquire into the merits of the main dispute in the exercise of its discretion as to security for costs. The decision to enquire into the merits of the main action is predicated on the patent immutable exceptional legal fact that the applicants do not have a defence to the contentions raised in ***Tjatji v Road Accident Fund (supra) and South African Association of Personal Injury Lawyers v Minister of***

Justice (supra) regarding the invalidity of a ***Contingency Fee Agreement*** concluded after the risk liability has been extinguished.

(54) In any event, because the ***Contingency Fees Agreement*** concluded on 27 July 2012 is invalid and *void ab anitio* as confirmed by the decisions of ***Tjatji v Road Accident Fund (supra) and South African Association of Personal Injury Lawyers v Minister of Justice (supra),*** for the respondent to plead that the ***Contingency Fee Agreement*** concluded on 27 July 2012 is a nullity is not necessary, as a matter of law not necessary because the respondent is legally entitled to raise and argue a point of law arising from the main action at any time.

(55) In any event, because the applicants cannot overcome the hurdle of proving that the ***Common Law Contingency Fee Agreement*** concluded on 1 July 2005, or the ***Contingency Fee Agreement*** concluded on 27 July 2012 are lawful, valid and enforceable, it would be quite unreasonable to order the respondent to provide security for costs in respect of the main action at the behest of the applicants who do not have a defence worthy of consideration to the main action. As a matter of law the applicants have no prospect of successfully opposing the main application and are consequently not entitled to security for costs in the amount of R500 000.00 claimed or at all.

(56) The applicants counsel conceded that there is no reason to fear that the respondent would in any eventuality be unable to meet an adverse costs order issued against him, should this remotely impossible exigency ever occur. In this application is it has not been held as a matter of course that in every application for security for costs an attempt should be made to resolve the main dispute. The enquiry into the merits of the

main action in this application was premised on the exceptional legally immutable specific circumstances prevailing in the main dispute.

(57) Consequently, it follows that because of the invalidity of the ***Common Law Contingency Fee Agreement*** and the ***Contingency Fee Agreement,*** the legal fees payable by the respondent for services rendered by the applicant is governed by the *Rules of Court* which entitle the respondent to a Bill of Costs in order to enable him to determine the legal fees accruing to the first applicant for services rendered as from the 7 February 2005.

THE ORDER

(58) In the premises I made the following order:

(a) The application for security for costs pursuant to ***Rule 47 (1)*** is dismissed;

(b) the applicant is ordered to present the respondent with a taxed Bill of Costs in respect of the legal services it rendered to the respondent in respect of Case Number 07/9289 namely Vivian Glen Derek against The Road Accident Fund within 21 days hereof, and such taxed Bill of Costs must be set off against the amount of R1 254 000.00 held by the first applicant; and

(c) the applicants are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved.

Dated at Johannesburg on this 30 day of June 2014.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCE

DATE OF HEARING: 18 FEBRUARY 2014

DATE OF JUDGMENT: 30 JUNE 2014

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