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

CASE NO: 03482/2015

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes
   (14 September 2020)

DP de Villiers AJ

In the matter between:

BOTES, JOHANNES CHRISTOFFEL **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

Claim for past medical expenses of R420.00 not proven. Impact of contingency fee agreement on taxable costs. Costs order against the attorneys considered and granted.

JUDGMENT

DE VILLIERS, AJ

Introduction

[1] On 14 May 2013 the plaintiff's vehicle was hit from behind when it was stationary at a robot-controlled intersection. He suffered the following injuries:

> "*Injury to the neck;*
> *Injury to the lower back;* (and)
> *Significant bruising of the right arm*".

[2] When the matter served before me seven years later, the remaining issue before me was a claim for past medical expenses of R420.00. The other disputes had been resolved or were abandoned.

[3] A chronology is important in this case.

Chronology

[4] After the collision on 14 May 2013, the plaintiff was taken by ambulance to a state hospital, the Kopanong Hospital, from where he was discharged the next day. The cost of the ambulance service is alleged to have been just more than two thousand rand, R2 265.79. No evidence has been presented that the plaintiff ever paid the bill. The plaintiff pursued payment of this expense until shortly before the trial heard by me, but it seems that this claim was abandoned by the plaintiff at the last moment.

[5] Within weeks after the collision, on 24 May 2020 and on 30 May 2013, the plaintiff twice consulted a general practitioner, Dr Teixeira. Dr Teixeira charged the plaintiff R300.00 for the first consultation, and R120.00 for the second. The total cost of R420.00 was in the end the subject matter of the litigation that played out before me.

[6] Subsequent to the trial. I found a contingency fee agreement in the court file, dated 27 June 2014. I confirmed that it is the applicable agreement. Its conclusion is the next determinable date in the chronology of events. In the contingency fee agreement, attorneys Mills & Groenewald agreed to represent the plaintiff at a normal fee of R3 500.00. if successful, this fee then could be doubled to R7 000.00 per hour. This was a proverbial sitter of a case, as the plaintiff's vehicle was rear-ended when stationery, and he suffered injuries. The only issue would have been the extent of the liability of the defendant ("the

RAF"). Success in the form of some payment, was as near as possible, guaranteed.

[7] On the same date, 27 June 2014, attorneys Mills & Groenewald submitted a claim to the RAF for payment of just below R700 000.00, namely R680 420.00, which included the claim in issue before me of R420.00.

[8] About seven months later, on about 3 February 2015, attorneys Mills & Groenewald issued summons against the RAF. The summons was for payment of an increased amount of damages of almost three million rand, R2 852 685.79. The damages claim was made up of the following heads of damages:

[8.1] General damages of R800 000.00;

[8.2] Future medical expenses of R500 000.00;

[8.3] Past loss of income of R50 000.00;

[8.4] Future loss of income and/or earning capacity of R1 500 000.00; and

[8.5] Past medical expenses as set out above of less than R3 000.00, namely R2 685.79, being the R420.00 and the ambulance expense.

[9] Almost two years and ten months after summons was issued, on 14 December 2017, the plaintiff served on the RAF two documents reflecting the alleged past medical expenses: (a) A letter of demand by the ambulance service of 23 April 2014 for payment of R2 265.79, and (b) a handwritten receipt by the practice of Dr Teixeira dated 30 May 2013 for receipt of R420.00. Still no documents were served that showed what the services were that Dr Teixeira had rendered for this payment.

[10] Almost three years after the summons was issued, on 8 January 2018, at a pre-trial conference, the parties recorded that the claim for general damages of R800 000.00 would be referred to the HPCSA for assessment, and that the plaintiff would serve an "*index*" for past medical and hospital expenses, with annexures. A further judicial pre-trial conference was held on 23 February 2018 and the matter was certified trial ready by the presiding judge.

Accordingly, the plaintiff was proceeding to trial without ever having discovered proof of his past medical expenses of R420.00.

[11] On 12 March 2018 a settlement agreement was made an order of court. The RAF had to pay the plaintiff the R357 162.00 in respect of future loss of income (R1 500 000.00 was claimed), as well as his legal costs in instituting the action to date of the order. The usual undertaking to pay any future medical expenses was given (R500 000.00 was claimed). Two matters were postponed for later adjudication, the claim for general damages (R800 000.00) which had been referred to the HPCSA, and the claim for past medical expenses (R2 685.79). The claim for past loss of income of R50 000.00 failed.

[12] I point out that the success that was achieved, in hard cash, was receipt of R357 162.00. The plaintiff's attorneys did this work at R7 000.00 per hour, subject to the 25% statutory cap. This cap limited the allowable legal fees to R89 290.50 (excluding disbursements). In the normal course this would have been deducted from the payment of R357 162.00. I do not know when the bill of costs was taxed or agreed upon, what the amount was, or when it was paid by the RAF. The proceeds of the taxation belong to the client, save for any set-off in respect of fees and expenses/disbursements incurred. An attorney cannot keep such fees and costs as an additional success bonus in contingency fee matters.[1]

[13] On 10 June 2019 the HPCSA decided that the plaintiff did not qualify for a claim for general damages, and the claim for R800 000.00 fell away. The only claim that remained in issue, was the claim for past medical expenses, then still of R2 685.79.

[14] Five years after instituting the action, on 27 February 2020 attorneys Mills & Groenewald served so-called clinical notes by Dr Teixeira on the RAF. In reality, these were two sick notes. The first one is dated 24 May 2013 and it reflected that Dr Teixeira booked the plaintiff off work until 31 May 2013. The medical certificate noted the nature of the illness as "*motor vehicle accident, soft tissue injury and whiplash*". The second sick note, dated 30 May 2013,

[1] I revert to *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ).

reflected that Dr Teixeira booked the plaintiff off work until 3 June 2013. The illness described therein is illegible. These documents still did not address what services were rendered by Dr Teixeira for the fee of R420.00.

[15] A practice note delivered on 27 February 2020, reflected that the full amount of past medical expenses of R2 685.79 remained in issue and was being pursued in the High Court. On 10 March 2020 the plaintiff caused a further pre-trial conference to be held, and on 18, 19 and 24 March 2020 the plaintiff caused judicial case management conferences to be held in the pursuit of the claim for past medical expenses. The matter was certified trial ready. At some stage during the judicial case management conferences, the claim for ambulance costs, was abandoned and the remaining claim became R420.00.

[16] The national lockdown due to the Covid-19 pandemic commenced on 27 March 2020. I am advised that the RAF offices closed on that day (and remained closed), including importantly the department that had to evaluate proof of the composition of the remaining claim for R420.00. This department, the Bills Review Department, would have needed proof of the alleged past medical expenses incurred in order to approve payment. Although these facts were conveyed from the bar, they were not in dispute.

[17] At some stage on or after 27 March 2020, attorneys Mills & Groenewald served by e-mail a document dated 27 March 2020. This document included two computer generated statements by Dr Teixeira. According to the date stamp thereon, they were faxed to the recipient at some time in March 2020, either on 14 or on 24 March 2020. They, by reference to several lines of unexplained computer code on them, reflect the composition of the two amounts of R300.00 and R120.00, and also the payment on 24 May 2013 and on 30 May 2013 respectively. No lay person could determine what the medical services were as reflected by the computer codes. Evidence would have been required for a court to interpret the statements, but for the first time, documentary evidence explaining in part the claim for R420.00 was produced.

[18] The matter was referred to me on Wednesday 6 May 2020, with a suggestion by the Acting Deputy Judge President that I hear the matter on Friday 8 May 2020 after completion of my divorce roll. I contacted the counsel, expressed

astonishment at the matter, suggested a discussion between them, called for heads of argument, and made the arrangements for a hearing of the matter by video-conferencing on Friday 8 May 2020 (should the matter not be resolved).

[19] The matter did not resolve. I gave the plaintiff as much warning that he was proceeding at his peril as I could have done, without descending into the arena. On Friday 8 May 2020 I raised during the opening address the fact that I note that the plaintiff does not intend to call evidence to prove that the expense of R420.00 was fair and reasonable. The plaintiff elected to proceed.

The evidence and assessment

[20] It is beyond doubt that the plaintiff consulted Dr Teixeira on 24 May 2013 and on 30 May 2013, and paid him R420.00. The plaintiff testified that he consulted the doctor, received tablets and received an injection on each occasion. It is beyond doubt the plaintiff incurred the expense of R420.00. However, these facts are not enough for the plaintiff to succeed. The plaintiff had to provide "… *adequate proof of the need for the item on which the money was spent and of the fairness of the amount claimed for the item*" to succeed. See *Revelas and Another v Tobias*[2] at 444H. The plaintiff knew that he was unable to prove exactly what services he had received from Dr Teixeira, and at what cost. His affidavit evidence dated 6 May 2020 included this astonishing statement (underlining added):

> "*My legal representatives have been able to obtain two invoices but have not been able to get a precise breakdown to show which payment had been allocated*."

[21] Such evidence must have been available. Someone would have been able to interpret the computer codes, someone would have been able to testify about the fees and charges that bulk purchasers of such services (in the form of medical aid schemes) accept as fair and reasonable, or that the fees and charges included in the R420.00, were within the median of fees charged by private doctors in the area. No such evidence was tendered.

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[2] *Revelas and Another v Tobias* 1999 (2) SA 440 (W) at 444H.

[22] This is not a case where the best evidence has been produced and I am bound to make an estimate, as contemplated in *Enslin v Meyer*[3] at 523G-524A. Put differently, this is not a case where I was compelled to make bricks out of straw. If the result of this case is unsatisfactory to the plaintiff, it is the consequence of his failure to put proper evidence before the Court in proof of his claim. See too *Esso Standard SA (Pty) Ltd v Katz*[4] at 968H-969H.

[23] Under these circumstances the consequence and only order I could fairly make, is absolution from the instance. The normal costs order should follow, the plaintiff should bear the costs of the failed attempt to claim R420.00. The fruitless attempt will cost him a large sum.

The court's duty to make further enquiries

[24] I make an order below in terms of which I call upon the attorneys to provide reasons why they should not be held liable for costs in this matter. I did not do so easily.

[25] As would appear from the chronology and my findings, it was an irresponsible undertaking to conduct high court litigation for the recovery of only R420.00, and to do so without proper evidence. In this regard I have made factual findings. What I do not know, is if this outcome is to be put before the door of the attorneys, or before the door of the plaintiff. I have no knowledge of what advice the plaintiff was given, or what his views were. He at least would have been advised that litigation is uncertain and that he ran the risk of an adverse costs order in pursuing this small claim in the High Court. He also would have been advised that he would need proof to substantiate his claims for past medical expenses, and that such proof was not at hand. I do not know if the plaintiff insisted, contrary to any such advice, to continue with expensive litigation in recovering only the R2 685.79 and later only the R420.00, or not.

[26] I accept that attorneys are free to carry out instructions even where they are of the view that the probabilities of success are small (and even when they advise against the litigation). They may make mistakes too, as they may think that there are good prospects of success, or that they have sufficient evidence

[3] *Enslin v Meyer* 1960 (4) SA 520 (T) at 523G-524A.
[4] *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 968H-969H.

to prove a claim, and a court may disagree. See the judgment by MT Steyn J[5] *Waar v Louw*[6] at 304G-H, translated in the headnote as:

> "… *But too strict action should not be taken against an erring attorney. The administration of justice is sometimes an irritating discipline, and even the most skilful practitioners can make mistakes which cause unnecessary costs. The attorneys' profession should not be moved by too lenient an attitude to loosen the reins, but should also not be demoralised by too much cracking of the whip. As usual, in the affairs of man, the middle course is the best. The circumstances under which a court can make an order of costs de bonis propriis against an attorney should be reasonably serious, as, e.g., dishonesty, wilfulness or negligence of a serious degree*."

[27] I believe that Fabricius J in *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others*[7] at Para 34-35 reflects the measured approach I should follow:

> "*[34] … Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket . . . [T]he obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner ...*
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> *[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a*

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[5] LC Steyn J concurring.
[6] *Waar v Louw* 1977 (3) SA 297 (O) at 304G-H.
[7] *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others* 2014 (3) SA 265 (GP) at Para 34-35.

reckless manner, misleading the court, and gross incompetent and a lack of care.'"

[28] It is possible that the plaintiff is to blame for his fate, but I would be surprised if that is the case. Why would the plaintiff belligerently pursue R420.00 at great risk? The plaintiff already had received all his legal costs until the date of the first court order, 12 March 2018. As such there was no real potential benefit in further litigation for him.

[29] I looked through the court file for more background information. The plaintiff matriculated in 1984 with a practical standard ten certificate, not the academic Senior Certificate. He completed some occupational related short courses, and from about 2002 was employed as a security official. His tax returns for 2012 and 2013 show that he received a very modest income. Other facts that point to a man of limited means, are that he did not have a medical aid at the time of the collision, and that he was driving a small, well-used Nissan 1400 model bakkie. His circumstances do not strike one as a litigant prepared to incur huge risk for little potential reward. He also in the witness stand seemed to me to be just the average person who has suffered misfortune, not a confrontation seeking individual, schooled in litigation. He probably would have relied on his attorneys for their advice before entering into an unfamiliar and confusing arena;

[30] With regard to the attorneys, my concerns in this matter were at two levels:

[30.1] I was struck by the alleged normal fee in the contingency fee agreement of R3 500.00 per hour, concluded in 2014 and applicable to every attorney in the firm working on the matter. It seemed high. The claim was modest, the matter not complex. Added thereto was an advocate's (in reality an attorney's) fee of R2 000.00 per hour. I should not on the facts of this matter, say more about the normal fee. It is, in this matter, a red light and no more; and

[30.2] The costs sought before me by the plaintiff's legal representatives may reflect that the real motivation for the litigation was to generate taxable fees, as it included fees for which the plaintiff was not liable to his attorneys and for which he could seek no indemnity from the

RAF. They are impermissible costs, both because they plaintiff was not liable for such costs, and because they are precluded by legislation.

[31] Having said that I do not enter into this part of my judgment easily, I still have to regulate the conduct of officers of the court. In holding the attorneys personally liable, it is relevant that they impermissibly sought to profit from the RAF (as addressed below). The court in *Maswanganyi v Road Accident Fund*[8] held at para 32 that:

> "*Our courts have a duty to ensure that they do not grant orders that are contra bonos mores, or that amount to an abuse of process. Section 173 of the Constitution specifically empowers the court to prevent any such abuses*. …"

[32] Later at para 35 it held that:

> "*In cases involving the disbursement of public funds, judicial scrutiny may be essential.* …"

[33] The real reason why the litigation was persisted with, may appear from the relief claimed before me in prayer 6:

> "*6. The Defendant shall pay the Plaintiffs taxed or agreed party and party costs on the High Court Scale up to and including the 8th of May 2020, as follows:*
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> *6.1 Cost of Counsel for preparation of trial and attendance on the 6th of May 2020, and 8th of May 2020;*
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> *6.2 Drafting and preparation of Heads of Argument for counsel of the Plaintiff;*[9]
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> *6.*(3) *Preparation for Case Management Conference and Plaintiff's written submissions on the dates of the 18th,19th and 24th of March 2020*."

[34] It is difficult to ascertain the real reason why the matter was proceeded with during a trial, as it brings into conflict the duty of an attorney to his/her client, self-interest, and attorney-client privilege. The attorneys' have rights to procedural and substantive fairness. See *Stopforth Swanepoel and Brewis*

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[8] *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) para 32.
[9] I assume these were the heads that I called for in an effort to force the plaintiff to reconsider his position.

Incorporated v Royal Anthem Investments 129 (Pty) Ltd[10] Para 19-26. I give opportunity to respond in this judgment as no one should be condemned without a hearing (in some form). See *Member of the Executive Council for Health, Gauteng v Lushaba*[11] Para 15 and Para 18-21. I therefore call upon the attorneys in the order that I make to provide me with such affidavits and written representations under oath that they may want to make to address any misconceptions in my reasoning (in as far as their personal liability is concerned). I will add an addendum to this judgment to address further submissions on their personal liability.

Indemnification principle

[35] It is trite that the purpose of a costs order is to indemnify a party who has incurred expenses in instituting (in this case) or defending legal proceedings. See *Texas Co (SA) Ltd v Cape Town Municipality*[12] at 488-489. Innes CJ[13] held:

> "*Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based. Speaking generally, only amounts which the suitor has paid, or becomes liable to pay, in connection with the due presentment of his case are recoverable as costs. But there are exceptions. It has been held by the English Courts that a solicitor who personally and successfully conducts his own case is entitled to be paid the same costs as if he had employed another solicitor, save costs which under the circumstances are unnecessary (see London Scottish Benefit Society v Chorley (13, Q.B.D. p. 872). And that view has been approved by South African Courts (see du Plessis v Wilsnach (1915, C.P.D. p. 539); Webb v Union Government (1917, T.P.D. p. 195); Lewin v Muller (1914, E.D.L. p. 467 1926 AD at Page 489 etc.). …*"

[36] The recovery of legal costs on taxation is exactly that, the recovery of legal costs. It is an exercise to indemnify the successful party. It is not a shakedown in terms of a court order of the party ordered to pay the legal costs. It is then a

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[10] *Stopforth Swanepoel and Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd* 2015 (2) SA 539 (CC) Para 19-26.
[11] *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) Para 15 and Para 18-21.
[12] *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488-489.
[13] Wessels JA and de Villliers JA agreeing on this point at 504.

matter of logic that an attorney cannot be limited to a fee of R105.00 by the Contingency Fees Act 66 of 1997 ("*the Contingency Fees Act*" or "*the Act*") and still seek to recover thousands of Rands more from the RAF on taxation, as the indemnification of purported fees they are not allowed to charge their client.

[37] I do not address in this judgment the validity of the agreement, as it has not been argued that it was invalid.

[38] The attorneys probably were limited to a fee of R105.00 in that the attorneys would have received the full allowable R89 290.50 in fees that they became entitled to on 12 March 2018 when the settlement agreement was made an order of court, and paid by the RAF. Thereafter due to the contingency fee agreement and the 25% statutory cap, the most fees that the plaintiff could be liable for, was 25% of R420.00, R105.00. The fees sought in prayer 6 were impermissible in my view.

[39] There are exceptions to the indemnification principle. This is not such a case. Wallis J in *Thusi v Minister of Home Affairs and Another and 71 Other Cases*[14] dealt with a case where attorneys brought cases on behalf of applicants, and the fee arrangement was that they would keep what they could tax and recover from the State. At para 99 the court after referring to *Texas* held:

> "*[99] The indemnity principle is of general application in the field of costs.*[15] *It has not become outdated. In Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa*[16] *Howie JA said:*
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> > *'A costs order - it is trite to say - is intended to indemnify the winner (subject to the limitation of the party and party costs scale) to the extent that it is out of pocket as a result of pursuing the litigation to a successful conclusion. It follows that what the winner has to show — and the Taxing Master has to be satisfied about - is that the items in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket.'*
>
> *…"*

[14] *Thusi v Minister of Home Affairs and Another and 71 Other Cases* 2011 (2) SA 561 (KZP).
[15] "*78. Taylor v Mackay Bros and McMahon Ltd 1947 (4) SA 423 (N) at 431.*"
[16] "*79. 2003 (3) SA 54 (SCA) ([2002] 4 All SA 723) para 18*."

[40] Wallis J held in para 103 that, in principle, a litigant who is not liable to his/her attorney for legal costs, is not entitled to tax legal costs (footnote omitted):

> "*It is perfectly clear that Goodway & Buck undertook this work in the hope (and the reasonable expectation) that costs orders would be obtained in sufficient cases to make the venture worthwhile. In that sense they are acting on a speculative or contingency basis although it is not one sanctioned by the Contingency Fees Act. Applying the general rule in regard to the purpose of a costs order set out in the cases I have cited, the fact that the applicants incur no liability for costs disentitles them to orders for costs. As they have incurred no expenses in relation to the litigation and no liability for costs, there is no need for an indemnity and nothing to which a costs order could apply. The critical issue in these cases is whether nonetheless a costs order can be obtained on the basis of an exception to the general rule. Innes CJ said that there are exceptions to the rule. Is this one of them?"*

[41] The exceptions to the general indemnification principle were discussed by Wallis J in *Thusi* and the learned judge identified in para 108 three instances where deemed "costs" are recoverable: (a) In forma pauperis proceedings that are recoverable in terms of Uniform Rule 40(7), (b) section 8A of the Legal Aid Act 22 of 1969, and (c) section 79A of the Attorneys Act 53 of 1979. The legislation has since changed, but the changes are not material to this judgment, as the principle remains. Wallis J introduced a further exception to the general indemnification principle in para 111:

> "… *I hold that an order for costs may be granted in favour of a successful applicant:*
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> *(a) Where the litigant is indigent and is seeking to enforce constitutional rights against an organ of State; and*
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> *(b) the legal representative acts on their behalf for no fee and accepts liability for all disbursements; and*
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> *(c) the litigant agrees that the legal representative will be entitled to the benefit of any costs order made by the court or tribunal in his or her favour.*"

[42] This is not such a case. In *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)*[17] the full court held in para 16 that *Thusi* was a narrow

[17] *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ).

exception to the indemnity principle (and in para 18 and 19 that a contingency fee agreement outside the prescripts of the Act is not allowed).

[43] The indemnity principle and the wording of the Contingency Fees Act (to which I revert) form the basis why the finding in this court in *Thulo v Road Accident Fund*[18] para 52 that an attorney could recover the contingency fees plus the taxed costs, with respect is wrong. I agree with the criticism thereof by Mojapelo DJP in *Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund*[19] para 49, as supported by the full court[20] in *Mathimba and Others v Nonxuba and Others*[21] para 104-105:

> "… *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*."

[44] Accordingly, the first reason why the costs sought before me was impermissible, was due to the indemnification principle. The deemed costs of counsel sought before me were also impermissible in terms of the Contingency Fees Act.

The Contingency Fees Act

[18] *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) para 52.
[19] *Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* [2012] ZAGPJHC 150.
[20] *Lowe J (Malusi J and Jolwana J concurring).*
[21] *Mathimba and Others v Nonxuba and Others* 2019 (1) SA 550 (ECG) para 104-105.

[45] In order to illustrate the impermissible fees, I need to address the Contingency Fees Act. *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd*[22] held in para 41:

> "… *The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal*. …"

[46] The Contingency Fees Act stipulates that an attorney in the event of success may recover his/her "*normal fees*" (a defined term), plus a "*success fee*" of up to 100% of the "*normal fees*". See section 2 of the Act.[23] Where an attorney seeks to recover an increased fee upon success, section 2(1)(b) applies.

[47] The Contingency Fees Act uses the concept of "*normal fees*" as the starting point to limit the attorney's fees. "*Normal fees*" are limited in the definition in section 1 of the Act first to "*reasonable fees*", the normal public Common Law policy limitation on attorneys' fees, as well as, second, a stipulation that such fees must taxable in the normal course (underlining added):

> "***1 Definitions***
> *In this Act, unless the context otherwise indicates-*
> ***'normal fees'**, in relation to work performed by a legal practitioner in connection with proceedings, <u>means the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or</u>*

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[22] *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) para 41.

[23] "***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 <u>there are reasonable prospects</u> 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 <u>to the extent set out in such agreement</u>;
(b) that the legal practitioner shall be entitled to fees <u>equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement,</u> 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 <u>the 'success fee'), shall not exceed such normal fees by more than 100 per cent</u>: 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, <u>shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned</u>, <u>which amount shall not, for purposes of calculating such excess, include any costs</u>."
(Underlining added)

> *assessed on an attorney and own client basis, in the absence of a contingency fees agreement*".

[48] Accordingly, the control against exploitation of the litigant is aimed at two steps: The first question is if the fees are reasonable, and the second if the fees would have been taxable if there was no contingency fees agreement. The intent of the Act is that "*normal fees*" must be "*usual fees*". On a proper interpretation of the Act, the fees to be inserted in contingency fee agreement as "*normal fees*", must be justifiable as usual, normal fees. This appears from a reading of section 2 of the Act.

[49] First, section 2(1)(b), which enables an attorney to charge increased fees, uses the words "*normal fees*" in this context:

> "… *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 ..*"

[50] Please note the reference to the possessive words used: "*his or her*" and the addition of the word "*normal*". The reasoning that any fee could be included in the agreement, provided that it could be taxed (with no reference to the attorneys' actual usual fees), would have required a much simpler wording of the section.

[51] Second, this interpretation that "*normal fees*", must be justifiable as usual, normal fees, is also supported by the wording of section 2(2) of the Act:

> "*Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned …*".

[52] Please note again the link to the normal fees of the attorney to the fees of the attorney concerned. The intent clearly was to limit the normal fees to the attorneys' usual/normal fees. An alleged usual/normal rate as a base rate cannot take into account the risk of a no-win-no-fee. That risk is included in the potential doubling up of the stipulated fee in terms of section 2(2) of the Act.

[53] Our courts have accepted that the normal fees are the attorney's usual fee. The full court in *Mathimba* in para 101 held:

"*In eloquent terms, in Erasmus v Williams,*[24] *Plasket J said the following of the meaning of s 2(2) in circumstances in which an attorney had claimed to be entitled to 25% of the damages awarded to his client:*

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

[54] See too *Masango and Another v Road Accident Fund and Others*[25] para 12 where Mojapelo DJP said:

> "… *What is important is that there is a base (the normal fee) from which a percentage increase is permissible. This is the ordinary and only basis on which the practitioner may increase fees. The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fee agreement, and then increases it in terms of the contingency fee agreement.* …"

[55] I am not suggesting that an attorney must have one fixed usual fee, applicable in all matters, but the normal fee in the agreement must be the normal fee for matters of such size and complexity paid by fee-paying clients.

[56] The statutory cap on the fees applies in respect of all attorneys in the firm, and all counsel employed. An additional fee is impermissible. The full court in *Mathimba* held made this point in para 106 where an opinion by MJD Wallis SC et al is quoted with approval. Relevant to this case is:

> "'*At least three contentious issues have arisen in the interpretation of the above section (Section 2), namely:*
>
> *(a) whether the cap of 25% of the amount awarded in sub-section (2) is a global cap applicable to all the lawyers involved in a case so that jointly their fees cannot amount to more than 25% of the amount awarded or an individual cap applicable to each lawyer involved in the case, so that notionally if there are four lawyers involved their fees could cumulatively consume the entire award;*

[24] *Erasmus v Williams* 2016 JDR 2007 (ECG) para 13
[25] *Masango and Another v Road Accident Fund and Others* 2016 (6) SA 508 (GJ) para

(b) …

…

It also follows that what is contemplated by section 2 is a single contingency fee agreement for a single matter to which all the relevant legal practitioners will be parties, not separate agreements for each legal practitioner. In other words where more than one legal practitioner is engaged in the matter and is party to the contingency fee agreement one reads the expression legal practitioner in section 2(1) as legal practitioners. It is the agreement with all the legal practitioners involved that is subject to the constraints set out in section 2 and particularly the limitation that the amount of the success fee, as defined, in a case where one or more of the practitioners proposes to charge more than his or her normal fees, shall not exceed 25% of the total amount awarded. In our view that is a global limitation applied to the entire body of costs that the client will be liable for in the event of the claim succeeding.

This interpretation is we think supported by the overall purpose of these provisions, which it to protect the client against exploitation by the lawyers who act for him, her or it on a contingency basis. We have already noted that the purpose of this legislation is to enhance access to justice. It is not intended as it has become in the USA as a means of ensuring colossal wealth to lawyers who very often in effect run cases for their own rather than the litigants' benefit. All that this Act aimed at doing was enabling litigants to make use of such agreements where they would not otherwise be able to afford a lawyer to handle a case on their behalf and to provide some incentive to lawyers to take such cases. Section 2(2) aims to prevent this from being abused by excessive claims by the lawyers in respect of contingency fees. That being so we cannot think that in setting a limit on the fees recoverable and saying that it would not in total exceed 25% of the amount awarded the legislature meant that in some cases it could be 50% and in others 75%. That is inconsistent with the language of section 2(2). We lay stress on the reference in sub-section (2) to the reference to total of such success fee. That seems to support the interpretation we favour that one is concerned so far as this cap is concerned with the overall impact of all the fees chargeable to the client.

For those reasons we think that it must be accepted that the intention of the legislature was to provide that higher fees in terms of Section 2 of the Act, be consolidated between counsel and the attorney and then assessed to see whether they comply with the statutory cap. The fees payable by the client, and subject to the statutory limitations would be the total fees payable to both the attorney and the advocate. Accordingly in our view the circular issued by the KwaZulu-Natal Law Society is incorrect and this needs to be discussed and resolved at the liaison committee meeting between Consultant and the Law Society.'"

[57] The attorneys in this matter sought to recover more than R7 000.00 per hour in fees. The contingency fee agreement in this case further contained a clause that in addition to the agreed fee, the plaintiff would be liable for payment to

the attorney as "*advocates fees*" of a further R2 000.00 per hour, or R20 000.00 per day. These additional payments were not meant as disbursements to an advocate, but as additional attorneys' fees, an impermissible arrangement in terms of sections 2(1) and (2) of the Contingency Fees Act.

In conclusion

[58] Awarding costs *de bonis propriis* against the plaintiff's attorneys should only be done in rare cases. Still, the facts of this matter are so stark, that I must seriously consider doing so in this matter. If there was a failure by the attorneys to carry out their duties, then the persons to be saddled with the costs order that I make against the plaintiff, should be them and not the plaintiff. I fully accept that my instincts about a failure in the carrying out of the duties of the attorneys may be wrong. As addressed earlier, I should not deprive them of an opportunity to defend themselves. Still, the indications before me are that this matter was a commercial enterprise for the attorneys, who sought to profit from an impermissible costs order.

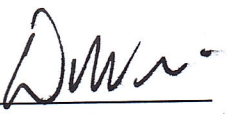
[59] I make the following order:

1. Absolution from the instance is ordered on the issue of past medical expenses in the form of a payment of R420.00 to Dr Teixeira;

2. The plaintiff is ordered to pay the costs pertaining to the hearing, including all costs pertaining to the pre-trial and case management conferences held pertaining thereto;

3. Attorneys Mills & Groenewald are ordered to show cause by no later than 21 August 2020 at 16H00 why they should not be ordered to pay such costs *de bonis propriiis*, jointly and severally with the plaintiff, the one paying the others to be absolved;

4. The documents contemplated in prayer three must be filed with my registrar by e-mail and uploaded on CaseLines.



DP de Villiers AJ

Heard on:	8 May 2020
Delivered on:	24 July 2020 electronically, by e-mail and by uploading on CaseLines
On behalf of the Plaintiff:	Mr. A Bothma, Mills & Groenewald
On behalf of the Respondents:	Adv T Moloi
Instructed by:	Diale Attorneys

ADDENDUM TO JUDGMENT

DE VILLIERS, AJ

[1] After delivering the above judgment and as contemplated in my order, I was provided with an affidavit by Mr Andre van Zyl. The affidavit *inter alia* sets out more background facts on the lodging of the claim, the persistent (and not unusual) lack of reaction by the RAF, and the unsuccessful attempts by the attorneys to obtain a reaction from the RAF. The point is again made in the affidavit that the RAF never took issue with the claim for past medical expenses at any one of several interactions the parties had.

[2] Nothing in my judgment is intended to excuse the RAF's failure to carry out its duties. It is disturbing how uncaringly the RAF approaches its duty to compensate victims in motor collisions. I have presided over many of these matters in one form or another over the last four years. Instead of dealing with obviously valid claims, the RAF causes matters to proceed unnecessarily to court, at great wasted expense to the public. This is also evident from its failure to make secret tenders. Not once have I seen a secret tender made by the RAF to compensate a victim, fairly or not. A fair, secret tender is a sign of a litigant seeking to avoid unnecessary litigation.

[3] The affidavit *inter alia* contained allegations that:

[3.1] The attorney who dealt with the matter, handed (what I referred to in paragraph 17 as) computer generated statements by Dr Teixeira, to Mr Molefe representing the RAF on 10 March 2020, and on 18 March

2020. In other words, that these were given to the RAF before 27 March 2020, the earliest date I have found that it could have been served. I still have difficulty reading the date stamp of the telefax machine. I read it as 14 or 24 March 2020, but perhaps it was 4 March 2020. Although the averment is hearsay and has not been put to Mr Molefe for comment, I will accept the averment for the purposes of this judgment;

[3.2] The judge who certified the matter as trial ready, did not have an issue with the amount of the claim, and certified it trial ready because the RAF failed to instruct its attorneys regarding the claim for R420.00. Again, I will accept the averment for the purposes of this judgment; and

[3.3] On 14 April 2020 the plaintiff wrote to the RAF and offered to settle the matter against payment of R420.00 plus costs on the High Court scale. The letter was attached to the affidavit. I believe that, in as far as costs are concerned, this letter has been placed before me properly. After the matter was placed before me, the plaintiff sought a postponement, costs to be costs in the cause, but the request was declined. I will accept the averment for the purposes of this judgment.

[4] These facts do not materially impact on my findings that the plaintiff only at the last minute produced proper evidence of his treatment. Perhaps someone at the RAF should have taken a pragmatic view that a claim for R420.00 need not be itemised to be settled. The RAF would know what two doctor's visits should have costed. But on these facts, the RAF attorneys had documentary proof of the composition of the claim for a few days before the country came to a standstill. In a normal case, with a substantial quantum, a claim for R420.00 would have been resolved, probably by the parties limiting issues. If still disputed, a judge would have leant on the RAF to state a version, to state why the amount is not due, and not to waste time (and cost). But this clam was for R420.00. It had to be proven once it was the only issue before me.

[5] The affidavit contains *inter alia* the following further submissions:

[5.1] The one submission is that R420.00 seems reasonable, and the services rendered were in the view of the attorneys, sufficiently described in evidence;

[5.2] A further submission seems to be that I erred in requiring proof that the fees were reasonable, due to an unidentified judgment of the Constitutional Court involving Mr Bobroff. I am not alive to any such judgment, and could not find it after a brief search; and

[5.3] After the order of 12 March 2018, the matter could not be transferred to the Magistrate's Court (to pursue the claim for R420.00). I am not alive to any such prohibition, and was not referred to authority.

[6] As would have been clear from my judgment, I had questions about how it came about that the claim was pursued, and what the benefit to the plaintiff's attorneys could have been. I did not want to draw negative inferences without giving the attorneys the opportunity to explain. It is clear from the affidavit that they feel aggrieved. They state that did not act dishonestly, or negligently to a serious degree.

[7] They could have embarked on the pursuit of the R420.00 believing that they could get a High Court costs order. The affidavit does not address the central finding that I made, that the indications are that this matter was a commercial enterprise for the attorneys, who sought to profit from (what I have found to be) an impermissible costs order. I accept that they did not do so with a dishonest intent, but the affidavit:

[7.1] Does not contain answers to the questions raised in paragraphs 25 and 28 of my judgment about how it came about that the litigation claiming R420.00 was persisted with, including what the advice to the plaintiff was, and what his instructions were (or that he was asked to waive attorney-client privilege, but refused to do so). I could see no benefit to him to seek payment of R420.00 at huge risk and still cannot see why he would have authorised the litigation, if he did;

[7.2] Does not contain answers to my recording of the law and my findings why the costs order sought would be impermissible as the plaintiff was not liable to pay the costs his attorneys sought. See in this regard paragraphs 30.2, 34 to 36, and 38 of my judgment. I quote below from the affidavit, but the attorneys with respect did not understand my reasoning that they could not claim costs from the RAF that were impermissible costs, both because they plaintiff was not liable for such costs (and hence indemnification does not arise), and because they are precluded by legislation (the Contingency Fees Act) from raising the fees they claimed;

[7.3] Does not contain answers to my findings that the purported agreed counsel's fees were precluded by law. See in this regard paragraphs 56 to 58 of my judgment.

[8] It seems to me that that the attorneys still believe that the only limitation on recoverable fees, is the discretion of the taxing master. I reflect a few extracts from the affidavit from which this appears:

> "*14. What is of importance is that Plaintiff's attorneys did not ask a cost order against the RAF on an inappropriate basis. The normal Party and Party high court cost order was sought and should plaintiff be successful the Plaintiff will only be entitled to taxed party and party cost subject to the discretion of the taxing master which is limited by prescribed party and party tariffs";*
>
> and
>
> *18.3 The court's conclusion in paragraph 38 is also incorrect for the reason that whatever the attorney and client fee agreement is between Plaintiff and Plaintiff Attorneys of record, if Plaintiff is successful against Defendant then the Defendant is liable for at least party and party high court cost. The Plaintiff personally is entitled to this cost order. The party and party cost order sought was therefore permissible.*
>
> *18.4 Therefore I deny the court's conclusion that this matter was a commercial enterprise for Mills & Groenewald Attorneys, who sought to profit form an impermissible cost order. My reasons for denial are set out in detail in this affidavit. Taking into account the history of the case Mills & Groenewald Attorneys would not have tried to settle the case on 11 opportunities, thereby decreasing and avoiding legal cost, if we were driven to get a cost order with a trial*."

[9] Having considered the matter again, including again considering the guidance in *Waar v Louw* and in *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others*, I cannot in this matter order the plaintiff to bear the costs of the matter. No evidence has been placed before me that the wasteful litigation was at his insistence. I repeat, I fully accept that the attorneys did not act dishonestly. Still, the facts of this matter are so stark that the attorneys must bear the costs. It is not an order that I make lightly, legal practice is hard as it is, without such orders added thereto.

[60] I make the following order:

1. Attorneys Mills & Groenewald are ordered to pay the costs set out in paragraph 2 of the judgment herein delivered on 24 July 2020 *de bonis propriiis*, jointly and severally with the plaintiff, the one paying the others to be absolved;

DP de Villiers AJ

Heard on:	8 May 2020
Delivered on:	24 July 2020 electronically, by e-mail and by uploading on CaseLines
Revised on:	14 September 2020
On behalf of the Plaintiff:	Mr. A Bothma, Mills & Groenewald
On behalf of the Respondents:	Adv T Moloi
Instructed by:	Diale Attorneys