REPUBLIC OF SOUTH AFRICA

REPUBLIC OF SOUTH AFRICA
HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION
Case No.: 2012/21359
DATE: 31 AUGUST 2016
In the matter between:

MASANGO MLUNGISI NELSON — Plaintiff

THE ROAD ACCIDENT FUND — Defendant

RENIER VAN RENSBURG INCORPORATED — Intervening Party

JOHANNESBURG SOCIETY OF ADVOCATES — 1st Amicus Curiae

And

LAW SOCIETY OF THE NORTHERN PROVINCES — 2nd Amicus Curiae

JUDGMENT

MOJAPELO DJP:

[1] Is a legal practitioner entitled to charge as his or her fess 25% of the capital amount recovered for his or her client plus 14% Value-Added Tax (VAT) in terms of a contingency fees agreement concluded with the client under the Contingency Fees Act 66 of 1997 (the CFA)? This is the first question that was raised by the court. The plaintiffs attorney in this case, now the intervening party, contends that he is entitled to do so and provided for it in an agreement concluded with the plaintiff. It is trite law that a contingency fee agreement which does not comply with the CFA is invalid.[1] A related and broader question is therefore whether the agreement is valid or should be declared invalid.

[2] The first question has in it two questions rolled into one: firstly whether a legal practitioner may charge 25% of the capital award as fees (the fee question), and secondly, whether 14% VAT may be added to the 25% capital amount (the VAT

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[1] ***Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse*** **v** ***Road Accident Fund, Komme*** **v** ***Road Accident Fund*** **[2012] ZAGPJHC 150** ***(Mofokeng)*** **para [38] and [41]. See also para [54] to [60] of this judgment.**

question), assuming that the answer to the first question is positive. I propose to deal with the sub-questions in that order.

[3] These questions arise in the context of the supervisory power and duty that rest on the court to ensure that contingency fees agreements comply with the provisions of the CFA.[2] Contingency fees agreements were at common law[3] and in terms of the English law[4] unlawful and unenforceable. In terms of both our law and the English law, which the development of our law on the subject mirrored, contingency fees agreements are allowed and recognised as valid, subject to the provisions that they will be supervised strictly by the courts to ensure that the rights of the clients in litigation are protected and not compromised.[5]

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[2] **See *Mofokeng supra* para [28], [29] and [32]**

[3] **In terms of the common law contingency fees agreements were unlawful as *pacta de quota litis.***

[4] **In English law such agreements were champertous and unlawful in terms of the champerty laws.**

[5] ***Price Waterhouse Coopers Inc and Others* v *National Potato Co-operative Ltd* 2004 (6) SA 66 SCA); [2004] 3 All SA 20 (SCA) para [33], [40], [43]. See also *Mofokeng* para [33]**

[4] Accordingly the CFA includes a set of strict controls. They include a provision that an offer for settlement in a matter litigated under an agreement in terms of the CFA may not be accepted until the requisite affidavits have been filed in court if the matter is pending in court[6], or with the relevant regulatory professional body.[7] A client furthermore has to be provided with a copy of the agreement upon signature and has a fourteen (14) days cooling off period within which the client may opt out of the agreement.[8] The agreement is further subject to review by the regulatory body of the legal practitioners.[9] These are but some of the controls prescribed by the CFA.

[5] In the present matter, the Court raised the first question (in its composite form) after examining the contingency fee agreement and the prescribed affidavits when the parties sought to obtain a court order to make the settlement concluded between the plaintiff and the defendant an order of court. The second broad question arises as a matter of law.[10] The questions are considered against the relevant clause in the agreement and the applicable law.

[6] A material part of the agreement contained in clause 8 provides as follows:

"The parties agree that if the client is successful in the aforementioned proceedings a fee shall be payable to the attorney, calculated at 25% (exclusive of VAT) of the total amount awarded and/or obtained by the client in consequence of the proceedings. The total amount charged by Renier van Rensburg Inc will therefore be 25% (fee) on all amounts awarded and/or

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[6] Section 4 (1) of the CFA. The court has to ensure that the affidavits disclose the matters required by the section of CFA to ensure that the rights of the client are not compromised as against those of the legal representative. See also *Mofokeng* para [51] and [52].

[7] Section 4(1) of CFA; The bodies are the Law Societies in respect of attorneys, the Societies of Advocates in respect of advocates and, in future, the Legal Practice Council created under the Legal Practice Act 28 of 2014.

[8] Section 3(3)(h) of the CFA

[9] Section 5 of CFA

[10] In terms of the supervisory powers of the Court.

recovered, add 14% VAT on the fee and add all disbursement [sic] (including interest) and the remaining balance will be paid to the client."

[7] The agreement in this clause provides for 25% of the amount awarded to or obtained by the client to be charged as a fee. This is the first part of the composite question, which will be examined first. The fee question is considered in the context of the provisions of the CFA while the VAT question brings in the provisions of the Value-Added Tax Act 89 of 1991 (the VAT Act).

[8] The CFA regulates contingency fee arrangements between legal practitioners and their clients. It caps the fees that legal practitioners are allowed to charge their clients in terms of contingency fee agreements, and sets out requirements and a prescribed form for such agreements. The Act also stipulates requirements for any settlement entered into by a party to a contingency fee agreement.

[9] Section 2 of the CFA provides as follows:

"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 -

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

[10] The section provides for two kinds of contingency fee agreements. The first is a "no win, no fee" agreement,[11] and the second is an agreement whereby the legal practitioner may charge fees higher than the normal fee if the client is successful.[12] The higher fee is also referred to as the success fee. Only the second type of agreement is subject to the statutory caps.[13]

25% of Capital award as a fee

[11] The agreement concluded between the plaintiff and his attorney falls in the second category. It is subject to the statutory caps. The agreement gives the legal practitioner the right to charge 25% of the award (the cap) as fees and then imposes VAT on top of the 25% cap. The validity of the clause in paragraph [6] above therefore depends, in the first place, on whether the attorney is entitled to charge 25% of capital as a fee. If he is not then the contingency fees agreement is invalid since it contains a material provision

[11] **Section 2(l)(a) of the CFA**

[12] **Section 2(l)(b) of the CFA**

[13] **See *Mofokeng* at para [35]**

which does not comply with the CFA. The VAT question is a secondary one which will be dealt with later.

[12] The attorney (legal practitioner) is authorised in terms of section 2(1)(b) read with 2(2) of the CFA, as an incentive, to charge a success fee which is higher than his or her normal fee subject to the two caps. The normal fees of the attorney are taken as a base and the attorney is authorised to increase the normal or base fee by up to 100%. The attorney may thus increase the normal fee by say 10%, 20%, 30%, 45% etc., but the percentage increase may not exceed 100%. This is the first cap on success fees. 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. The success fee is a fee which has been increased from the normal fee. It is thus necessary that we understand the meaning of "fees", "normal fees" and then "success fees" as contemplated in the section.

[13] [13] In a sense, the validity of the clause depends on the meaning of "fees", "normal fees, and "success fees" as used in the CFA. The term "fees" and its derivatives "normal fees" and "success fees" are not defined in the CFA. One should therefore consider the ordinary meaning of these concepts.

[14] Webster's Third New International Dictionary,[14] defines "fee" as "compensation often in the form of a fixed charge for professional service or for special and requested exercise of talent or of skill (as by an artist or by a lawyer)". Black's Law Dictionary[15] defines "attorney's fees" as "the charge to a client for services performed for the client, such as an hourly fee, a Hat fee, or a contingent fee." Wex

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[14] **Unabridged, 1993 by A. Merriam Webster**

[15] **Seventh Edition, 1999, Bryan A. Gardner**

Legal Dictionary[16] defines "attorney's fees" as "the amount billed to a client for legal services performed on his or her behalf." It recognises that within the US system an "attorney's fees may be an hourly, flat (for a particular service, e.g. $10,000 to handle all aspects of a DUI case) or contingent fee." Also that an attorney's fees may be set by an attorney-client compensation agreement or, in certain types of cases, by statute or a court. The definition with which we are concerned here is an ordinary attorney's fees where neither an agreement nor statue has fixed same. The Concise Oxford Dictionary[17] defines "fee" as "*n. 1 a payment made to a professional person or to a professional or public body in exchange for advice or services > a charge made for a privilege such as admission. 2 Law, historical an estate of land, especially one held on condition of feudal service. mv. (fees, fee'd or feed, feeing) rare pay a fee to." Only the first meaning from the Concise Oxford Dictionary is applicable to our context. We are also not concerned with a public body and shall restrict the meaning to a professional person or professional body. The Verklarende Handwoordeboek van die Afrikaanse 7aa/,[18] defines "Fooi" as "sekere professionele geld deur bv. 'n argitek, ingenieur gevra; ook, enige bedrag vir dienste gelewer"

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[16] **www.law.comeU.edu/wex/attomevs fees or attorneys fees. Cornell University Law School (www. lawschool. cornel 1. eduV**

[17] **Tenth Edition**

[18] **Vierde Uitgawe, 2000, F. F. Odendaal, R. H. Gouws.**

[15] From the above dictionary meanings, a fee, in our context, may be defined as a payment due to a professional person or body for services rendered, or advice given. The key and operative words here are “payment" for “professional services" “rendered", which may include the giving of advice. A fee is only payable for professional services which have been rendered. In our context, we are concerned with the professional services of a legal practitioner (an attorney in this case) for litigious work.

[16] “Normal fees” of an attorney for litigious work are fees or charges that would ordinarily be allowed on taxation.[19] The High Court rule on taxation[20] provides a useful guide as to what fees are normally allowed on taxation. The Rule[21] provides that a taxing master shall be competent to tax a bill of costs “for <u>services actually rendered</u> by an attorney in his capacity as such in connection with litigious work” (emphasis added). When one focusses on the concept “for services actually rendered”, it is an established principle that charges for work not actually done cannot be allowed on taxation. The practitioner’s statement for fees must be specific in respect of the particular business done and for which a fee is charged.[22] In City Deep (Pty) v Newcastle Town Council and Another[23] Galgut J restated the well-established principle that in a bill of costs the business or action of the practitioner for which a fee is raised should be specified item by item with each item dated and its subject matter stated

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[19] Outside the area of litigation normal fees for attorneys are assessed by the governing professional body, i.e., the Law Society.

[20] As contained in the Uniform Rules of Court

[21] Rule 70(1) (a)

[22] *Spira* v *Weber* 1912 TPD 353 at 355-356. See also *Duvos (Pty) Ltd* v *Newcastle Town Council and Another* 1965 (4) SA 553 (WLD) at 558F; *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W) at 119F-120G; *EichhoffvEichhoff* 1980 (4) SA 389 (SWA) at 392F

[23] See footnote 22 above.

precisely and not in general terms.[24] In litigious work the normal fees for attorneys are thus fees for services actually rendered or for advice actually given.

[17] In a sense normal fees that an attorney charges his client are the fees which are included in what is referred to as attorney and client costs. Leaving aside the disbursement part of such costs, attorney and client fees are the fees that an attorney is entitled to recover from his client for professional services rendered. Such fees are payable by the client regardless of the outcome of the matter for which the attorney's services were engaged. They are not dependent on an award for costs by the court. In a wide sense, such fees include all fees that an attorney is entitled to recover against own client on taxation.[25] Normal fees exclude any fees that an attorney may be entitled to recover from his client by virtue of any special arrangements made with the client or in terms of some specific statutory provision applicable to a particular case or cases. Normal fees in litigation are fees which are recoverable by an attorney from his or her own client and which would be allowable on taxation of an attorney and client bill by the taxing master outside any special arrangements. The legal practitioner (the attorney in this case) and the client are required by sec 2(2) of the CFA to set out the normal fees in the contingency agreement concluded.

[18] "Success fees"[26] are contemplated and explained, but are not defined, in section 2(2) of the CFA. They are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in the litigation

to the extent set out in the agreement concluded in term of the CFA. The subsection requires the legal practitioner and the client to specify in the agreement what they will regard as success in the particular litigation.[27] A success fee is normal fee which has

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[24] ***City Deep*** **at 119G - H**

[25] ***Hawkins v Gelb and Another*** **1959 (1) SA 703 (WLD) at 705C-E; See also Hebstein & Van Winsen: *The Civil Practice of the High Court of South Africa,* 5* Edition (Juta 2009) by Cilliers, Loots and Nel at 953**

[16] **As noted in para [12] above**

[27] **Section 2(1)(b) of the CFA**

been increased by a pre-agreed percentage. There is no other way of increasing the normal fee to the increased or success fee other than through a percentage. The normal fee may be increased by up to 100% to reach the success fee. Success fee may thus be and is often double the normal fee. Ordinarily a 100% increase on the normal fee in effect entitles the attorney to charge a fee for one matter as if the attorney had done two matters. A double fee is more than sufficient incentive to the legal practitioner to pursue litigation on a contingency basis. One can therefore not understand the ever increasing rampant and persistent attempt by legal practitioners (especially attorneys) to provide for and recover more than the legitimate and legalised success fee.[28]

[19] The second cap on the increase that the attorney may charge is introduced as a proviso to section 2(2) and applies only in claims sounding in money. It does not apply to other claims litigated through a contingency agreement. In claims sounding in money the total of the success fee shall not exceed 25% of the total amount awarded or obtained by client (excluding costs). It is important to emphasise that there is no basis for the practitioner to charge 25% of client's capital as his or her fees. The 25% of the client's capital is introduced only as a cap: the attorney charges a success fee which shall not exceed 25% of the client's capital award. Twenty five per cent of the capital claim is therefore not a fee.

[20] The agreement in this case simply provides for the attorney to charge 25% of the capital award as fees. There is no basis in the CFA that authorises or sanctions such a provision in fee agreements or such practice by legal practitioners. There is reason to believe that the practice of attorneys simply charging 25% of their client's capital award is widespread, especially in personal injury claims. This court has seen many such agreements that were handed to it by counsel when seeking to

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[28] **If the problem lies in the fact that normal fees for attorneys are inadequate (a point which has so far not been asserted in any of the cases that one is aware of) then the problem lies elsewhere and not in the CFA, because normal fees are neither defined nor regulated by the CFA. The Act regulates, through the two caps in section 2(2) and its proviso, only success fees.**

obtain court orders to sanction settlements in such claims. The practice is not legal and needs to be weeded out.

[21] An attorney renders professional services and therefore charges professional fees for such services rendered. An attorney cannot charge for anything other than the services he or she has actually rendered. The services that an attorney charges for must thus, of necessity, be specified in his or her account, unless the client, properly informed, waives details of the services for which he or she is charged. The fees charged must, however, always relate to actual professional services rendered, of which the attorney has records and which must be specified when required. One cannot think of any basis for charging fees in litigation other than for specified services and which are capable of being taxed, when required.

[22] There is no basis for an attorney in our law to charge as his/her fees a percentage (25% or even smaller percentage) of the amount awarded to his client. The CFA certainly does not provide such a basis. An attorney can for instance not simply agree with his client to charge 25% or 20% of capital. His charge is neither a percentage commission nor a share in the injuries or damages suffered by his client. An agreement or practice that makes an attorney a partner in the injuries suffered by his client is contra bones mores and is therefore unlawful and illegal at common law and under the CFA. Outside the strict confines of the CFA there is no basis for a legal practitioner to share in the capital of his or her client's claim.

[23] The illegality of the practice is demonstrated by the following:

If an attorney in a claim worth R1 million takes a few steps to enforce the claim after receiving instructions (e.g. a letter of demand or telephone call to the defendant) and the defendant immediately agrees to settle the capital, the actual and normal attorneys' fees in such a case will be restricted to the professional services actually rendered, and may, e.g., not be more than a few thousand rand, say R10 000, at most. An increase of

100% would give the attorney a total fee of R20 000.00. This would have been the case even if the capital claim was R100 million. In such a case the success fee could never have been more than R20 000.00 which is way less than 25% of the capital. The size of the claim does not even come into consideration in such a case. It would be unconscionable and totally illegal in such a case for the attorney to charge R250 000.00 (25% of the R1 million) or R25 million (25% of R100 million) for services worth only R10 000.00. An agreement which stipulates 25% as the attorneys fee would in such a case lead to a situation where the attorney, for very little professional services actually rendered (without even issuing a summons) charges fees of R250 000.00 (on a claim of R1 million) or R25 million (on a claim of R100 million). This is totally unreasonable and unlawful. It is an illegal practice which should not be allowed to survive. The professional controlling bodies (the Law Societies, Societies of Advocates or Legal Practice Council, as the case may be) must in the interest of the good image of their respective professions take steps to weed out such practices, and if necessary punish the offending conduct, whenever they are found to exist. They could perhaps start by introducing rules for their members as contemplated in section 6 of the CFA.

[24] There is another perspective from which the point made in this judgment may be explained. It is about the two different caps placed on success fees. The CFA places two caps on success fees that a legal practitioner may charge in terms of an agreement with the client. Both caps are expressed as percentages. The first cap is the percentage by which the legal practitioner is entitled to increase his fee, which is from 0% up to 100%. The second cap is a percentage of client’s capital award, which the success fee may not exceed, namely, 25%. The first percentage (by which the success fee is capped) is a fee percentage. It is therefore a fee. However the second percentage is neither a fee nor a fee percentage. It is a percentage of client’s capital award which a success fee may not exceed. It is not a fee but part of

client's capital award. It is accordingly not proper to talk of VAT on what is neither a fee nor a price. Twenty five percent of client's capital is not a fee. It is a percentage of the client's award, and therefore a part of quantum, which an increased fee may not exceed.

[25] The agreement between the plaintiff's attorney {the intervening party) and the plaintiff, as quoted in paragraph [6] above, provides for such a basis for charging fees. It is for this reason unlawful and stands to be declared invalid.

[26] It is necessary to consider the second part of the first question, which becomes important, in the event that the conclusion reached above, is incorrect.

<u>VAT on Fees (the 25% cap)</u>

[27] For purposes of the VAT question and the VAT Act the word "fees" appears to have the same meaning as "price". Normal fees and success fees will have meanings that correspond to normal price and success price respectively.

[28] The agreement concluded between the plaintiff and his attorney gives the legal practitioner the right to charge 25% of the award (the cap) as fees and then impose VAT on top of the 25% cap. The validity of the clause in paragraph [6] above therefore depends, from this perspective, on whether the 25% cap, placed on "success fee" as contemplated by section 2(2) of the CFA, includes VAT. If it does, the contingency fee agreement will be invalid since it contains a material provision which does not comply with the Act. On the other hand, if the cap excludes VAT, then the legal practitioner was entitled to indicate that fact in the agreement and the agreement cannot be invalid for that reason.

[29] Section 7(1)(a) of the VAT Act provides for the levying of VAT in the following terms:

"(1) Subject to the exemptions, exceptions, deduction and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added

tax-

(a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;" (own emphasis).

The tax is levied on the supply by the vendor and not on the acquisition of goods or services by the consumer. The vendor is the supplier.

[30] Section 7(2) of the VAT Act provides in the following terms for payment of VAT:

"(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid bv the vendor referred to in that paragraph..." (Own emphasis)

The tax levied is to be paid by the supplier. It "shall be paid by the vendor"

[31] Section 64(1) of the VAT Act stipulates that prices are deemed to include value-added tax, whether the vendor has in fact included the tax in the price or not. It provides as follows:

"Prices deemed to include tax -

(1) Any price charged by any vendor in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of section 7(1)(a) in respect of such supply, whether or not the vendor has included tax in such price."

[32] Section 65 of the VAT Act further provides:

"Prices advertised or quoted to include tax -

Any price advertised or quoted by any vendor in respect of any taxable supply of goods or services shall include tax and the vendor shall in his advertisement or quotation state that the price includes tax, unless the total amount of the tax chargeable under section 7(1) (a), the price excluding tax and the price inclusive of tax for the supply are advertised or quoted by the vendor..."

[33] The section makes it clear that any price (fee) advertised or quoted by a vendor includes VAT. The vendor must state so in the advertisement or quotation. There is only one exception to these statements of principles. The only situation where a price does not include VAT is where the vendor specifies the three components separately, namely, (a) "the price excluding tax", (b) "the amount of tax payable" and (c) "the price inclusive of tax[11]. The vendor, who wishes to indicate that the quoted

or advertised price does not include VAT, has to comply with the section. If the vendor does not comply, the price quoted or advertised includes VAT

[34] As appears from section 7(1)(a) of the VAT Act, VAT is levied on the supply by a vendor (in this case the legal practitioner) and not on the consumer (in this case the client) of services supplied by the vendor. Similarly in terms of section 7(2) VAT is paid by the vendor. VAT is therefore a tax on the legal practitioner and not on the client. Consequently the legal practitioner pays the tax to the South African Revenue Services (SARS). The quoted price (fees) is deemed to include VAT, unless the price is broken down into its components in terms of section 65 of the VAT Act.

[35] What the client pays to the legal practitioner (vendor) is the “price” (fee). The client does not pay VAT, although the price may be structured to account for

the VAT payable by the legal practitioner (vendor) to SARS. Regardless of how the price is structured or quoted, the final price charged by a vendor is inclusive of VAT. This court accordingly agrees with Mr C. Badenhorst SC, for the first amicus curiae, that it is a common misnomer to state that a client or customer pays VAT. In truth the client pays a price (fees) and the vendor (supplier) is the one that pays tax (VAT) on the supply.

[36] The aforegoing becomes even clearer when one has regard to section 10(2) of the VAT Act. The section provides:

"(2) The value to be placed on any supply of goods or services shall, save as is otherwise provided in this section, be the amount of the consideration for such supply, as determined in accordance with the provisions of subsection (3), less so much of such amount as represents tax" [Emphasis added]

[37] The section,[29] read together with the other sections of the VAT Act referred to above, confirms that the 14% by which a vendor increases the price of his or her services "represents" tax, but is not in fact tax. Accordingly the amount paid by a client to the legal practitioner (vendor) in terms of a contingency fees agreement is a fee and is subject to the 25% cap regardless of whether or not it is stated to be inclusive or exclusive of VAT.

Computation of VAT payable by the Vendor

[38] The manner in which the VAT payable by the vendor (supplier) is computed and paid to SARS reinforces the fact that VAT is a tax levied on the supplier and payable by him or her. It is not a tax on the consumer (client). The consumer only pays a price (fee) which is always inclusive of VAT, unless the three components stipulated in section 65 are stated separately.

[39] Section 16(3) of the VAT Act provides for computation of VAT payable by the vendor. It provides that the amount of tax payable in respect of a tax period shall be calculated by deducting input tax from the sum of the amounts of output tax of the

[29] **Section 10(2) of the VAT Act**

vendor which are attributable to that period and the amounts (if any) received by the vendor during that period by way of refunds of tax.

[40] The section authorises the vendor (legal practitioner), when completing his VAT returns, to deduct input tax (the amount of VAT which the practitioner paid to his suppliers) from the total of output tax (the amount of VAT which he charged to his clients on his services) and any tax refunds, and to pay the balance over to SARS. The legal practitioner therefore only pays to SARS the difference between output tax and input tax where output tax is greater than input tax. The fact that the practitioner is entitled to make this deduction confirms the position that the liability for value added tax attaches to the practitioner and not his client. In a sense, the deduction is a benefit that the vendor gets and which he does not pass to his client. If the tax liability were that of the client, the benefit would also have been that of the client. The liability to account for output tax and the right to deduct input tax both vests in the legal practitioner. Value added tax is not a tax which the legal practitioner incurs on behalf of the client and therefore recovers from the client. It is a tax levied on the practitioner (on the supplier) and for which the practitioner is liable. The fact that the practitioner is entitled to include the tax in the price does not change the locus of tax liability, which is on the supply by the practitioner.

[41] The relationship between the practitioner (vendor) and SARS, in relation to VAT collected by the latter, is not one of agency, but is that of debtor and creditor.[30] This is a further confirmation that the liability for tax is that of the legal practitioner and not of his or her client. It is not a relationship of agency in which the legal practitioner collects VAT on behalf of SARS and pays it over to SARS. The vendor (attorney) only pays over to SARS the difference between output tax and input tax. Where the input tax (VAT paid by the vendor to his suppliers in the production of income) is

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[30] ***Director of Public Prosecutions, Western Cape v Parker*** **77 SATC 224, 2015 Taxpayer 154; [2015] 1 All SA 525 (SCA)**

equal to the output tax, the vendor (legal practitioner) does not pay VAT to SARS; and where the input tax is greater than the output tax, the vendor (legal practitioner) in fact receives or is entitled to a credit or refund from SARS, notwithstanding the fact that he collected VAT output from the client.

[42] It is therefore the legal practitioner (the vendor) who owes the VAT to SARS and not his client. VAT output is therefore not a cost to the practitioner which the legal practitioner is entitled to recover from the client over and above his maximum fees. It is included in the maximum fees that the practitioner is entitled to recover from the client.

Can VAT be excluded from the 25% cap on the basis that it is a "cost" for the purposes of section 2(2) of the CFA?

[43] This court has already indicated above that value-added tax is not a cost which the attorney incurs for the client.

[44] The plaintiffs attorney, who is now the intervening party, argues that VAT is a "cost" for the purpose of section 2(2) of the CFA and that it is therefore excluded from the 25% cap, even if VAT is also held to be a fee.[31]

[45] Section 2(2) of the CFA contains the following proviso:

"...Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs." [Emphasis added]

[46] In Thulo v Road Accident Fund,[32] Morison AJ interpreted this proviso to mean that the taxed costs to be paid by the other side could fall outside the cap and could be recovered as additional thereto. In Mofokeng v Road Accident Fund, however, this court disagreed with the interpretation applied in the Thulo case. As this court stated in Mofokeng:

"As I read this portion of the proviso the phrase 'which amount[1] refers to and qualifies the phrase 'the total amount awarded or any amount obtained by client'. The effect is

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[31] **Intervening Party's Heads of Argument paragraphs 25-31**

[32] **2011 (5) SA 446 (GSJ) at paragraph [52]**

that when one calculates the 25% limit of the attorney's fees, one is not to include any costs in the total amount (i.e. the 100% capital). The 25% limit is calculated on the capital amount only and not on the capital plus costs."[33]

[47] The word "amount' in the phrase "which amount shall not' refers to "the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned. "

[48] In other words, the section[34] distinguishes between two amounts: the amount payable to the legal practitioner and the amount awarded to the client. The amount payable to the legal practitioner is (a maximum of) 25% of the amount awarded to the client, and, for the purposes of calculating this 25%, the amount awarded to the client is taken not to include the costs (or disbursements) portion of the award. The words "for purposes of calculating such excess" make this clear

[49] The proviso above is therefore a part of the calculation of the limit of what is payable to the legal practitioner, and does not serve to exclude costs from what is ultimately recovered. Furthermore, it refers to the costs portion of a court award, granted in favour of the client, and not to be costs to be charged to the client as part of the client's final bill. These costs and disbursements are excluded from the cap by virtue of the fact that they are not a "fee", but for the reasons stated above the extra 14% that is paid by a client on a fee (to account for the vendor's VAT), remains part of the fee.

[50] In Mofokeng, this court[35] said that an attorney could only recover "out-of-pocket" expenses above and beyond the 25% cap:

"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."

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[33] ***Mofokeng* para [50]**

[34] **Section 2(2) of the CFA**

[35] **At para [40]**

[51] It deserves to be made clear that VAT is not an “out-of-pocket expense" for these purposes. The effect of the deduction of input tax on purchases from output tax on taxable supplies is that ultimately the vendor does not bear any VAT, but rather that the consumer ultimately bears the burden of VAT. For this reason it has been said that VAT should not generally be treated as a cost to the vendor.[36] The Supreme Court of Appeal in Price Waterhouse Meyernel v The Thoroughbred Breeders’Association of South Africa[37] put it as follows:

“In terms of s 16(3) it is obliged to pay the Receiver of Revenue only the excess by which, in each tax period, its output tax is greater than its deductible input tax. It follows that if the vendor’s output tax in that period is less than the input tax, or there is no output tax, the vendor is entitled, if not to a refund of input tax, then at least to a credit in respect of the input excess. In short, any payment of input tax will inevitably be matched by a credit or refund. Consequently, if plaintiff is entitled to claim from the Revenue, as an input tax, the VAT which it is required to pay to its attorney, it does not, in respect of such input tax incur an out of pocket expense.”

[52] VAT is therefore not recoverable above the 25% cap imposed by section 2(2) of the CFA. As the contingency fees agreement in casu seeks to authorise the plaintiff’s attorney to recover VAT above the 25% cap imposed by section 2(2) of the CFA, it is for that reason invalid.

[53] For what it is worth, the court wishes to point out that the amici curiae are both in agreement that the contingency fee agreement in issue in this case is invalid to the extent that it seeks to authorise the charging of VAT on top of the 25% fee.

<u>Contingency Fee Agreement invalid on other basis</u>

[54] The intentions of the CFA have repeatedly been stated to be both to encourage speculative litigation and to ensure that it is strictly controlled.[38] The courts have a responsibility to ensure strict control by ensuring that agreements which do not comply with the Act for any reason are not allowed. The responsibility of the court to

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[36] **See Commentary by De Koker & Kruger Value-Added Tax in Sou* Africa [2015 Service 19] at 2 - 2**

[37] **[2002] JOL 10354 (SCA) at para [21]**

[38] ***Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* [2004] 3 All SA 20 (SCA); *Mofokeng {supra)***

ensure compliance goes beyond any specific point which may have been raised. The court should not allow an agreement which is invalid to stand. In this case the intervening party (the plaintiffs former attorney) and the amici curiae were given notice and invited to address any other basis on which the agreement might be invalid. They have done so and the additional bases of potential invalidity are dealt with hereunder.

[55] The courts have repeatedly asserted that common law contingency agreements are invalid and that any contingency agreement must comply with the CFA.[39]

[56] This Court[40] has emphasised the importance of strict compliance with the Act and the form of contingency agreement prescribed by the Act:

"The Act specifies what must be contained in the agreement (s 3(3)). The Act is very specific as to the contents and all matters prescribed are inclusive, that is, all the matters or provisions stated in paragraphs (a) up to (i)) of the subsection have to be included in the agreement. Similarly the provisions in sub-paragraphs (i) to (iv) of paragraph (a) are all to be included. It is not some provisions or the others. It is all prescribed provisions which have to be in the agreement. The attorneys are not at liberty to draw a contingency fees aareement in any form as they like. The agreement has to be in accordance with the provisions of the Act and in the form prescribed bv the Minister (s 3(1 [Emphasis added]

[57] From the above it ought to be clear that this Court was of the view that a contingency fees agreement which does not comply strictly with the terms of the CFA and prescribed form is invalid.

[58] The court in De La Guerre v Ronald Bobroff & Partners Inc. and Others[u] appeared to hold the same view when it said:

"It is my view that the above mentioned decisions were correct in finding the following: at common law a contingency agreement between an attorney and his client was unlawful;
the Contingency Fees Act is exhaustive on its stated object, and any contingency fee agreement not in compliance with it is invalid."

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[39] **See *Thulo supra* paragraph [50]; *Tjatji* v *Road Accident Fund* 2013 (2) SA 632 (GSJ) para [12]; *MKBridget* v *Road Accident Fund* (Case No: 2010/24932 of 22 August 2012) para [32]**
[40] ***Mofokeng* at para [38]**

[59] The court in Tjatji and Others v Road Accident Fund[41] came to the same conclusion, holding that the intentions of the Act and the use of peremptory language pointed towards non-compliance of a contingency fee agreement being visited with invalidity.

[60] Furthermore, compliance must be substantial and not merely formal compliance with the prescribed form.[42]

[61] There are other grounds on which the agreement between the plaintiff and his attorney {the intervening party) does not comply with the CFA. These are

[41][2013] ZAGPPHC 33 para [14]

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[41] **2013 (2) SA 632 (GSJ) para [21] - [22]**
[42] **Ibid para [24]**

pointed out briefly for the guidance of members of the legal profession. The intervening party, who may have concluded similar agreements with its other clients, may also benefit from the indication of this court. They are as follows:

61.1 The agreement does not describe "the proceedings to which the agreement relates" as required by section 3(3) (a). The agreement simply refers to "the relevant proceedings".[43] This clearly lacks the level of detail contemplated by the prescribed form of contingency fees agreements,[44] which is plainly designed to clearly identify the proceedings. The agreement between the intervening party (the plaintiff's attorney) and the plaintiff in no way identifies the proceedings to which it relates. It does not identify the motor vehicle collision which gave rise to the claim, the date of event, the cause of action, the defendant or the court in which proceedings are instituted. Its reference to proceedings is imprecise in the extreme. It can in fact be utilised in any proceedings where the plaintiff is represented by the same attorney. It clearly does not comply with the specific requirements of the CFA. It is furthermore open to abuse.

61.2 The agreement does not define "partial success" as is required by section 3(3) (c) of the CFA and Regulation 4.2 of the prescribed form.

61.3 The agreement does not explain the amount that will be due, and the consequences which will follow in the event of partial success in the proceedings, as required by section 3(3) (e) and Regulation 7 of the prescribed form.

61.4 Finally, the agreement provides for an alternative fees agreement in the event that the main agreement is found to be invalid (annexure "A" to the agreement). Such an agreement is not authorised under the CFA. The alternative agreement in itself is based on an inflated fee because the quoted fee is R2000.00

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[43] **Clause 3 of the agreement**

[44] **Such detail would include, at a minimum, identification of the claim to which it relates and naming the relevant Court. See Regulation 3 of the prescribed form of the agreement [GNR.547 of 23 April 1999: Contingency Fees Agreement in terms of the Contingency Fees Act, 1997 (Act No 66 of 1997).**

per hour, regardless of whether the work is performed by an attorney or any other staff member.[45] The provision is unreasonable and departs from an important principle that applies to the professional fees of attorneys[46] described as "the age old approach of reasonableness assessing chargeable fees"

[62] Furthermore, there are some respects in which the affidavits tendered in compliance with section 4(1) of the CFA do not comply with the Act. It is unnecessary to point all these out.[47] Let it suffice to point out for present purposes that an affidavit tendered in terms of the section must be compliant.

[63] The Law Society of the Northern Provinces, as the second amicus, has urged this court to rule that where counsel is instructed by an attorney, and is presumably a party to the contingency fees agreement, counsel's fees must be included in the 25% cap. The issue does not arise in this case in as much as counsel has not signed the contingency fees agreement and is not a party thereto in the present case. The Law Society could deal with any other issue it may wish to by exercising its rule making authority conferred under section 6 of the CFA.

[64] Prior to the commencement of argument in this matter, counsel for the intervening party advised the court that the intervening party and the plaintiff have settled the question of attorney and client fees on the basis that the intervening party would charge the plaintiff fees as set out in subparagraph (f) of the order given below, that is, "limited to party and party High Court scale as agreed or taxed, which will not exceed 25% of the capital amount settled". The words are taken from the draft order that the intervening party tendered. That settlement provides the sole reason for limiting the intervening party's fees as set out in subparagraph (f) of the order below.

[65] In the result the following order is made:

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[45] **There is no basis in law for services of people who are not legal practitioners to be charged for as if they were qualified legal practitioners.**

[46] ***Van derMerwe* v *The Law Society of the Northern Provinces* 2016 JDR 0082 GP 2016 JDR 0082 page 1**

[47] **The reader is in this regard referred to *Mofokeng* at paragraph [56] and the specific provisions of section 4(1)).**

(a) The defendant shall pay the amount of R664 000.00 (six hundred and sixty four thousand rand) to the plaintiff's attorney of record in settlement of the plaintiff's claim.

(b) The amount referred to in sub-paragraph (a) above is to be paid into the plaintiffs attorney's trust account, the particulars of which are as follows:

Standard Bank, Melville

Renier Van Rensburg Inc Trust Account

Account Number: 4…….

Branch Code: 0…….

(c) The defendant shall furnish the plaintiff with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 for 80% of the costs of future accommodation of the plaintiff in a hospital or medical home or treatment of or rendering of services to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision on 31 January 2011 after such costs have been incurred and upon proof thereof.

(d) The defendant shall pay the plaintiffs costs on the High Court scale up until 27 August 2015, either as taxed or agreed, such costs to include the costs attendant upon the obtaining of payment referred to in subparagraph (a) above, and including the costs of obtaining medico-legal reports and joint minutes, reservation and / or qualifying fees of the following experts:

i. Dr Lurie (maxilla facial surgeon),

ii. Dr Roodt (ophthalmologist),

iii. Dr Volkerez (orthopaedic surgeon),

iv. Maria Georgiou (occupational therapists,

v. Dr Fine (psychiatrists),

vi. Dr Fourie (industrial psychologist),

vii. Dr Edeling (neurosurgeon),

viii. Dr Kolon (dental surgeon),

ix. Margaret Gibson (neuropsychologists) and

x. Algorith (consulting actuaries).

(e) The contingency fees agreement entered into between the plaintiff and its attorneys, Renier Van Rensburg Inc, the intervening party, is hereby declared invalid and of no force and effect.

(f) The plaintiffs attorney's fees in this matter shall be limited to the party and party High Court scale as agreed or taxed, which taxed or agreed cost will not exceed 25% of the capital amount settled as set out in subparagraph (a) above.

P. M. MOJAPELO DEPUTY JUDGE PRESIDENT
HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION
Counsel for the Intervening Party: Adv P. den Hartog
Instructed by: Renier van Rensburg Incorporated
Counsel for the First Amicus Curiae: Adv C. H. J. Badenhorst SC Instructed by: Werksmans Attorneys
Counsel for the Second Amicus Curiae: Adv N. Makopo Instructed by: Maluleke Msimang Attorneys

Attorneys for the Defendant: Duduzile Hlebela Attorneys

Argument heard on: 22 June 2016

Judgment delivered: 31 August 2016