

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)

Case Numbers: 308/2021,
1309/20

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

26 MAY 2022

[SIGNED]

DATE

SIGNATURE

In re the matters between:

TINA MAJOPE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

ABEDNEGO MASHABE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Roelofse AJ:

Introduction

[1] The relationship between an attorney and his or her client is one of mandate.¹ A contract of mandate is a consensual contract between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate for the mandator.

[2] As in any other consensual contract, there must be an offer and an acceptance of the offer in order for a valid and binding contract of mandate to come into being. In the case of a contract of mandate, the mandator makes a request that the mandatary performs some act or duty which obligation the mandatary then accepts and executes.

[3] The object of the mandate may not be illegal, wrongful or immoral.²

[4] In the attorney and client relationship, the client is the mandator and the attorney is the mandatary. Unless agreed otherwise between the client and the attorney, an attorney is not entitled to payment of his or her fees (and disbursements)

¹ Benson and Another v Walters and Others 1984 (1) SA 73 (A) at 83 A. Mort NO v Henry Shields-Chiad 2001 (1) SA 464 C.

² See: The Law of South Africa (LAWSA) Mandate and Negotiorum Gestio (Volume 28(1) - Third Edition) at para. 56.

until he or she has performed his mandate or until the employment of his or her services has been terminated.³

[5] In the interest of the public, the conduct of legal practitioners (attorneys and advocates) are regulated, the Legal Practice Act 28 of 2014 being the principal regulatory instrument. Under the Legal Practice Act, a Code of Conduct was published.⁴ All legal practitioners are subject to the Legal Practice Act and the provisions of the Code of Conduct.

[6] In this case, I have to decide the true mandate that was given by the plaintiffs and accepted by their attorney. More particularly, was the mandate to prosecute the plaintiffs' claims against the RAF on the basis of attorney and own client fee agreements entered into between the plaintiffs and the attorney or did the mandate provide that the attorney would represent the plaintiffs in their actions on a contingency basis. I shall refer to the first mentioned mandate as the "*normal fee mandate*" and the last mentioned mandate as "*the contingency fee mandate*".

[7] In a normal fee mandate, the attorney must be paid whatever the outcome of the mandate is. In a contingency fee mandate, an attorney will render his or her services and incur disbursements on behalf of his or her client on the basis that the attorney's fees and disbursements will only be recovered from his or her client if the client is successful in the proceedings to which the mandate relates. The attorney therefore bears the risk of the outcome of the mandate.

³ Goodricke & Son v Auto Protection Insurance Co Ltd (in Liquidation) 1968 (1) SA 717 (A) at 722 – 3.

⁴ GN 168 of 29 March 2019: Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (Government Gazette No. 42337). The Code of Conduct applies to all legal practitioners (attorneys and advocates) as well as all candidate legal practitioners and juristic entities as defined, and is effective from date of publication in the Gazette.

Background to the matters

[8] The plaintiffs in the above actions instituted actions against the RAF arising from motor vehicle collisions in which they were injured. The plaintiffs were represented by Ngomana and Associates (“Ngomana”). Ms. Fortunate Nwa-Khosa Ngomana (“Ms Ngomana”) of Ngomana dealt with the actions on behalf of the plaintiffs. Adv. Phathutshedzo Tshavhungwe was briefed in the actions by Ngomana.

[9] The RAF did not appear at the hearing on 22 March 2022. Both Ms Ngomana and Mr Tshavhungwe appeared on behalf of the plaintiffs.

[10] I allowed the plaintiffs to proceed to prove their claims in terms of the provisions of Rule 39(1) of the Uniform Rules. The plaintiffs presented evidence where after their cases were closed. I requested the plaintiffs’ attorneys to forward draft orders to me for consideration. They did so.

[11] On 24 March 2022, I gave an *ex tempore* judgment in terms of which I granted judgment in favour of the plaintiffs and awarded amounts in damages to them.

The circumstances giving rise to the need for this judgement

[12] It was recorded in the draft orders that were forwarded to me in both matters that no contingency fees agreement was entered into between the plaintiffs and Ngomane. I doubted the veracity of these statements because: the plaintiff in the first action has been unemployed since the accident. Prior to the accident she was

attending a learnership in building construction earning R 1870 .00 per month. The plaintiff in the second action was employed as a driver earning R 3500 per month since the accident.

[13] It is a well-known fact that litigation in RAF matters are notoriously expensive not only as a result of high legal fees but also the high costs of various experts that are usually consulted in a claim against the RAF. This is the obvious reason why, in the majority of RAF actions, attorneys represent their clients on a contingency basis. So for instance, the plaintiff in the first action relied upon the expert opinions of a neurosurgeon, clinical psychologist, occupational therapist, industrial psychologist and an actuary. The plaintiff in the second action, in addition to those experts relied upon by the first plaintiff, also relied upon the expert opinions of an orthopaedic surgeon and an ear nose and throat surgeon.

[14] What Ngomane represented to court when it furnished the court with the draft orders was that normal fee mandates applied in the actions.

[15] I challenged the allegation with Mr Tshavhungwe that in the draft orders it was represented that no contingency fees agreements were entered into in light of the precarious financial position the plaintiffs most likely found themselves in. It was in my mind highly improbable that the plaintiffs would have been in a position to fund the litigation themselves in terms of a normal fee mandate.

Questions posed

[16] Mindful of the Judgement of the Judge President of this Division in the matter of *Thobile Khethiwe Mucavele obo Mpho Siboniso Mucavele v The Mec of Health*,

Case Number: 3352/2016 that was delivered 17 March 2022 (“Mucavele”), I directed Ms Ngomana to file an affidavit wherein she furnishes the court with answers to the following questions: (i) What fee was agreed upon?; (ii) When was such fee supposed to be paid?; What was the amount of fee agreed upon; (iv) If no fee was paid (or part thereof), when was the fee or remainder thereof to be paid?; (v) If no fee was paid, on what basis was it alleged that no contingency fee was agreed upon?; (vi) What was the agreement between attorney and counsel and when would counsel furnish his account, if any?.

Answers to the questions posed

[17] Ms Ngomana deposed to an affidavit in each matter and filed same. Both affidavits read the same. The heading of the affidavits read as follows: “AFFIDAVIT IN TERMS OF ATTORNEY AND CLIENT AGREEMENT”.

[18] Ms Ngomana’s answers to the aforesaid questions were set out in the affidavits she filed. The answers were as follows: (i) An attorney and own client fee agreement was entered into; (ii) The fees would be payable when the matter was finalized; (iii) Ngomana will prepare a bill for costs that an attorney is entitled to recover from the plaintiffs for the disbursements made on behalf of the plaintiffs and for professional services rendered. The costs are payable by the plaintiffs whatever the outcome of the matter for which the attorneys’ services were engaged and are not dependent upon any award of costs by the court which will be provided to client for comment; (iv) No fees has been paid by the plaintiffs as deposit for service to be rendered as disbursement fees will be paid on the finalization of the matter; and (v) Mr Tshavhungwe and Ngomana agreed on a rate of fees advocates charged per hour or per day and will normally receive payment when the costs matter has been paid

by the RAF; and, Mr Tshavhungwe will furnish his account after when the matter is settled and/or judgement has been granted.

[19] On 24 March 2022, Ms Ngomana and Mr Tshavhungwe appeared before me. I engaged Ms Ngomane on the affidavits she has filed. During my engagement with Ms Ngomane, she confirmed that Ngomane funded the plaintiffs' litigation. Significantly, Ms Ngomane informed the court that in the event the plaintiffs were unsuccessful in the litigation in the sense that judgment and costs were granted against them, the plaintiffs would not have had to pay Ngomane any fees or disbursements. Even more significantly, Ms Ngomana conceded that the litigation was undertaken for the plaintiffs on a contingency basis for Ngomana would only be paid if the plaintiffs had won. Ms Ngomana appeared to suggest that a "directive" issued by the Legal Practice Council allowed the conduct she has followed. The "directive" referred to by Ms Ngomana is in fact Rules made by the Legal Practice Council in terms of section 6 of the Contingency Fees Act 66 of 1997 ("the Act"). These Rules are hereinafter referred as "the contingency rules".

[20] Mr Tshavhungwe informed the court that Clause 29 of the Code of Conduct⁵ allowed an advocate a discretion to charge a fee or reduced fee or no fee at all. In this regard, Mr Tshavhungwe referred the court to clause 29.5 of the Code of Conduct⁶ in order in support of his contention that he was fully entitled to agree to charge no fee for the services rendered to the plaintiffs if they had lost. Mr Tshavhungwe confirmed that he accessed the plaintiffs' claims, found them

⁵ GN 168 of 29 March 2019: Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (Government Gazette No. 42337).

⁶ Clause 29.5 reads as follows:

"Counsel may, in calculating a fee, on the grounds of a client's lack of means to pay fees, charge the client an amount less than would otherwise be reasonable for the services rendered, or charge no fee at all."

merituous and therefore proceeded to render his services. Mr Tshavhungwe confirmed that he would only now render an account because the plaintiffs were successful. The invoice of Mr Tshavhungwe delivered that was attached to Ms Ngomane's supplementary affidavit (to which I shall refer later in this judgment) indeed indicates that the invoice was issued after the *ex tempore* judgments were delivered.

[21] However, the point is this - clause 29.5 of the Code of Conduct contemplates an agreement to charge no fee or a reduced fee irrespective of the outcome of litigation. Clearly what Mr Tshavhungwe did was to agree not to charge a fee if the plaintiffs would have been unsuccessful. Because that the plaintiffs were successful, Mr. Tshavhungwe rendered an account and expects payment thereof by Ngomane.

[22] Mr Tshavhungwe also told the court that mention was made on the draft order that no contingency fee was entered into because the RAF refused to pay costs on either settlement of the matter or when a judgment is granted if the order records that no contingency fee agreement exists.

[23] After my engagement with Ms Ngomane and Mr Tshavhungwe, I referred Ms Ngomane and Mr Tshavhungwe to *Mucavele* and I invited Ms Ngomane to file a supplementary affidavit explaining the issue whether the plaintiffs' matters were taken on contingency or not if she wished to do so. Ms Ngomane undertook to send me the LPC's directive she has referred to during our engagement in court.

[24] My registrar forwarded the judgment in *Mucavele* to Ms Ngomane. I did so because in *Mucavele*, the Court: had to decide over the issue of whether a contingency fee agreement was entered into and if so '*....whether the [contingency fee agreement] is illegal under common law for non-compliance with the*

*Contingency Fee Agreement Act No. 66 of 1997*⁷; examined the nature of the agreement between the attorney and the client and found that the agreement was an illegal contingency fee agreement⁸; expressed itself over Rule 1.7 of the Rules Made by the Legal Practice Council in terms of section 6 of the Act; expressed itself over Clauses 32.1⁹, 32.2¹⁰ and 34¹¹ of the Code of Conduct; made orders with considerable impact upon the litigation and referred the conduct of the practitioners to the Legal Practice Council for consideration. I wanted Ms Ngomana to properly consider *Mucavele* against what was submitted in and to the court.

[25] Ms Ngomane furnished the court with the attorney and own client fee agreements relating to both the matters. In both the matters, the attorney and own client fee agreements were signed prior to the issuing of the summonses. Both agreements were identical in their terms. The agreements provided, amongst other terms, for the payment of a deposit is so demanded by Ngomana; liability for disbursement and fees; interim invoices issued by Ngomana and the payment thereof.

⁷ Paragraph 2 of *Mucavele*.

⁸ Paragraph 42 of *Mucavele*.

⁹ Which provides as follows:

‘Counsel shall not agree to charge on results or agree to reduce or waive fees if a positive result is not achieved, except in a matter taken on contingency in terms of the Contingency Fees Act 66 of 1997 and/or save as contemplated in section 92 of the Act.’

¹⁰ Which provides as follows:

‘Counsel shall not agree to charge a fee as allowed on taxation except in a matter undertaken on contingency, or as permitted in terms of section 92 of the Act.

¹¹ Which provides as follows:

‘Counsel shall mark a fee as soon as practicable after the specific service has been rendered and shall render an account monthly of all fees owing by every debtor.

[26] Ms Ngomane heeded my invitation and filed two supplementary affidavits on 28 March 2022. This is what is set out in both the affidavits:

‘1.

I have read the Judgement by Legodi, and I have a reserved feeling about it and there are grounds that a different court may not be bound by the Judgement. I feel the issues may be distinguishable and not all relevant sections of the Legal Practice Act and the rules made under the act and the code of conduct were considered.

2.

One of the issues in the Judgement is the fact that the instructions in the Judgement referred to us by this court, the agreement was on or around the 1st of September 2016, the Legal Practice Act came into operation on the 1st of November 2018. The rest came after 2019. There is retrospective application of the Act and the rules and codes made under it was not dealt with the Judgment.

3.

As I answered when questions were posed to be during the hearing, I said I advised the client after assessing the matter and been satisfied that there was a good case. That when we agreed on attorney and own client fees. This is after I have incurred disbursement to investigate the prospects of success.

4.

In terms of section 2 and 3 are of the Contingency fees act, if an attorney commences working on a client's matter without signing a contingency fee agreement and even thought the notion is to work on the basis of a contingency fee agreement and they incur disbursements prior to signing the contingency fee agreement. they are barred from entering into the contingency fee agreement.

5.

In these circumstances after first consultation clients are reluctant to sign contingency fees agreement from the onset and as required by the act you advise them of the other means of financing the litigation. And they inform you that they will think about and after you make the initial assessment and having incurred disbursement, they elect to proceed with the

matter.

6.

At that point even if you ask for a deposit, you know well know that you will not receive anything, and you are faced with the provisions of 3. Legal practitioners, candidate legal practitioners and juristic entities shall:

- 6.1 Advise their clients at the earliest possible opportunity on the likely success of such clients' cases and not generate unnecessary work, nor involve their clients in necessary expense;
- 6.2 Use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;
- 6.3 Be entitled to a reasonable fee for their work, provided that no legal practitioner shall fail refuse to carry out work, or continue, a mandate on the ground of non-payment of fees and disbursements (or the provision of advance cover therefor) if demand for such payment or provision is made at an unreasonable time or in an unreasonable manner, having regard to the particular circumstances.

7.

I have no agreement with advocate Tshavhungwe, that if in this matter we are not successful he will not charge a fee. I am security to his fees. If he elects not to charge as he indicated in terms of section 29.5 he does it at his own discretion. Section 29.5 Counsel may, in calculating a fee, on the grounds of a client's lack of means to pay fees, charge the client an amount less than would otherwise be reasonable for the services rendered, or charge no fee at all.

8.

I have attached hereto invoices that Advocate Tshavhungwe furnished me as an example to reflect how this is really done in practice. There is a write off option and discounting of the invoice. This is done to give effect to the provisions of Section 2 of Value-Added Tax Act No. 89 of 1991.'

The affidavit was deposed to on 28 March 2022.

[27] The “directive” of the Legal Practice Council Ms Ngomana referred to was the contingency rules.¹² The contingency rules prescribe the form and content of a contingency fee agreement, the manner in which disbursements must be dealt with in the contingency fee agreement, the effect of a premature termination of the mandate, settlement, provisions regarding fees, the review of the agreement or fees.

[28] Significantly, Rule 8 of the contingency rules provides that the provisions of the Rules do not derogate in any way from the power of the court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner. This power I shall exercise in the order this court intends to make.

[29] Having regard to Ms Ngomana’s affidavit it is immediately apparent that she does nothing else than to evade the real issue, namely why the allegation was made in the draft orders that no contingency fees agreement was entered into while Ms Ngomana conceded in the engagement on 24 March 2022 that the true mandate was one of contingency.

The true mandate

[30] From my engagements with Ms Ngomana and Mr Tshavhungwe it is clear despite the attorney and own client fee agreements that were entered into with the plaintiffs by Ngomana, the real mandate was one of contingency.

¹² Ibid [Para. 19, footnote 5].

[31] The Act provides for contingency fees agreements between legal practitioners (i.e. attorneys and advocates alike¹³) and their clients and provides for matters connected therewith. Section 1 of the Act defines a contingency fees agreement as any agreement referred to in section 2 (1) of the Act. Section 2(1) of the Act provides as follows:

‘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.’

[32] Section 3 of the Act sets out the formal requirements for a contingency agreement. Section of the Act provides as follows:

‘(1) (a) A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the Gazette, after consultation with the advocates’ and attorneys’ professions.

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

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

¹³ Upon a proper interpretation of section 3(1) of the Act which requires attorneys and if applicable advocates also sign the contingency fees agreement.

- (3) A contingency fees agreement shall state—
- (a) the proceedings to which the agreement relates;
 - (b) that, before the agreement was entered into, the client—
 - (i) was advised of any other ways of financing the litigation and of their respective implications;
 - (ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;
 - (iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and
 - (iv) understood the meaning and purport of the agreement;
 - (c) what will be regarded by the parties to the agreement as constituting success or partial success;
 - (d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;
 - (e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
 - (f) either the amounts payable or the method to be used in calculating the amounts payable;
 - (g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;
 - (h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to

protect the interests of the client during such period, calculated on an attorney and client basis; and

- (i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.

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

[33] The Act legalizes services rendered by legal practitioners (i.e. attorneys and counsel) on a contingency basis. Prior to the Act, services rendered by legal practitioners on contingency, the common law forebode. In order for legal services to be rendered on a contingency basis to be legal and enforceable, it must be in terms of a contingency fee agreement that must comply with section 3 of the Act - if not, an agreement to render services on a contingency basis is null and void and unenforceable.

[34] In *Mkuyana v Road Accident Fund*¹⁴, the Full Bench had occasion to deal with the Act. From the court’s judgment, a number of principles relating to the Act were laid down. These principles, insofar as they are applicable to the above actions include: contingency fee agreements facilitate access to justice as they enable litigants to obtain legal representation to prosecute their claims where the litigant may otherwise have been unable to do by reason of the prohibitive cost of litigation; contingency fee agreements carry with them the inherent risk of abuse and the incentive to profit¹⁵; unregulated, contingency fees agreements have the potential for earnings by legal practitioners which are excessive and disproportionate to the labour and risk invested which will negatively impact on public confidence in the legal system; the legislature was clearly conscious of the risk of exploitation when

¹⁴ [2020] 3 All SA 834 (ECG); 2020 (6) SA 405 (ECG).

¹⁵ Paragraph 15 of *Mkuyana*.

it legitimised contingency fee agreements; what the Act therefore sets out to do is to carefully regulate the extent to which a legal practitioner may agree with his client for the payment of an increased fee;¹⁶ contingency fee agreements are accordingly subject to judicial oversight and intervention¹⁷; A contingency fee agreement that is not covered by the Act, or which does not comply with the requirements of the Act, is invalid and unenforceable.¹⁸

[35] The real mandate, that is, the contingency mandate in both actions, was both unlawful for want of compliance with the provisions of section 3 of the Act and are therefore invalid and unenforceable.

Effect of the invalid and unenforceable contingency mandate

[36] Next I consider the effect of the invalid and unenforceable contingency mandate. Does the attorney and client fees agreement survive the invalid and unenforceable contingency mandate for if it does Ngomane would be entitled to payment in terms of the attorney and own client fee agreements - if not, what would Ngomane be entitled to?

[37] From what was disclosed to the court in its engagement it is clear that Ngomane did not intend to rely upon or enforce the attorney and own client fee agreements if the plaintiffs were not suited. Instead they relied on the contingency mandate. The contingency mandate, as I have already said, is invalid and

¹⁶ Paragraph 16 of Mkuyana.

¹⁷ Paragraph 21 of Mkuyana.

¹⁸ Paragraph 22 of Mkuyana.

unenforceable want of compliance with the Act. In *Essop v Abdullah*¹⁹, the following was said over the performance in terms of an unlawful contract:

‘It is a fundamental truism that a contract for the performance of an unlawful act will not be enforced by the Courts. The reason for the principle is self-evident: no Court will compel a person to perform an illegality.’

[38] Therefore, neither the plaintiffs nor Ngomana have any rights or obligations flowing from the contingency mandates. Ngomana is not entitled to any payment whether for services rendered or disbursements that were paid or is still due and the plaintiffs have no obligation to pay Ngomane.

[39] Because no obligation rests upon the plaintiffs to pay Ngomana, the RAF need not pay any costs as costs are awarded against a losing party to a successful litigant in order to compensate the successful litigant to some extent for the expenses he or she had to incur in order to enforce his or her rights or claims. In these matters, neither plaintiffs incurred legal costs and disbursements because they have no obligation to pay Ngomana.

[40] Unfortunately, this is not the end of the matter. Rule 8 of the contingency rules reinforces the court’s power of oversight in contingency mandates. It is with great anguish that I am duty bound to consider Ms Ngomane and Mr Tshavhungwe’s conduct.

Ms Ngomane’s conduct

¹⁹ [1988] 1 All SA 317 (A).

[41] In the draft orders it was alleged that no contingency fee was entered into while. Whilst it is true that no contingency fee was entered into as contemplated in the Act, the real mandate was one of contingency. Therefore, the allegation in the draft orders that no contingency fee was entered into constitutes a misrepresentation to the court.

[42] In Ms Ngomane's first affidavit²⁰, she records that:

‘These costs [fees and disbursements] are payable by the client whatever the outcome of the matter for which the attorney's services were engaged and are not dependent upon any award of costs by the court which will be provided to client for comments.’

[43] In Ms Ngomana's supplementary affidavit, Ms Ngomana confirms that Ngomana agreed with the plaintiffs in attorney and own client fees.²¹

[44] From the engagement on 24 March 2022 where Ms Ngomana conceded that the plaintiffs would only be required to pay Ngomane's fees and disbursements if they succeeded, these statements are misrepresentations of the true facts as was the allegation in the draft order that no contingency fees agreements were entered into.

[45] In both the affidavits, the true mandate was obscured from the court. In fact, the statement in the first affidavit that ‘...[T]hese costs [fees and disbursements] are payable by the client whatever the outcome of the matter...’ amounts to a misrepresentation to court.

²⁰ Paragraph 3.3 thereof.

²¹ Paragraph 3 thereof.

[46] Clauses 3.3.1 and 3.3.3 of the Code of Conduct provides that legal practitioners must:

‘3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to—

3.3.1 their duty to the court;

.....

3.3.3 observance of the law;’

[47] The conveyance in the draft orders and Ms Ngomana’s affidavits constitute misrepresentations to the court and therefore may constitute a contravention of clause 3.3.1 of the Code of Conduct.

[48] As I have already found, the real mandates that were accepted by Ngomana were illegal. By entering into illegal contingency fees agreements, Ngomana failed to observe the law. That may constitute a contravention of clause 3.3.3 of the Code of Conduct.

Mr Tshavhungwe’s conduct

[49] During the court’s engagements with Mr Tshavhungwe, he did not concede that he has accepted the brief from Ngomana on a contingency basis. However, what Ms Ngomana sets out in her affidavits shows otherwise. In the first affidavit, Ms Ngomana sets out:

‘[T]hat counsel and attorney agreed on a rate of fees the advocates charge per hour and on a day fee and will normally receive payment when the costs matter has been paid by the

Road Accident fund and counsel will furnish his account when the matter is settled and/or judgment has been granted.’²²

[50] In Ms Ngomane’s supplementary affidavit, Ms Ngomana says:

‘I have no agreement with advocate Tshavhungwe, that if in this matter we are not successful he will not charge a fee. I am security to his fees. If he elects not to charge as he indicated in terms of section 29.5 he does it at his own discretion. Section 29.5 Counsel may, in calculating a fee, on the grounds of a client’s lack of means to pay fees, charge the client an amount less than would otherwise be reasonable for the services rendered, or charge no fee at all.’²³

and

‘I have attached hereto invoices that advocate Tshavhungwe furnished me as an example to reflect how this is really done in practice. There is a write off option and discounting of the invoice. This is done to give effect to the provisions of Section 2 of Value-Added Tax Act No. 89 of 1991.’²⁴

Two observations are apparent from what Ms Ngomana says. Firstly, in my view, these statements can have no other interpretation than that Mr Tshavhungwe’s invoice would only be paid if the plaintiffs were successful. Secondly, the invoice does not provide for a write off option and even if it did, on what basis would Mr Tshavhungwe write off his fees? If it was in the event that the plaintiffs lost, well then Tshavhungwe rendered his services on contingency. Payment for the work he has done was therefore on the contingency that the plaintiffs would be successful in their claims. The true nature of Mr Tshavhungwe’s brief was one of contingency. Mr Tshavhungwe may have offended the provisions of clause 34.6²⁵ of the Code of Conduct.

²² Paragraph 3.6 thereof.

²³ Paragraph 7 thereof.

²⁴ Paragraph 8 thereof.

²⁵ Which provides:

[51] Mr Tshavhungwe may have contravened clauses 32.1 of the Code of Conduct by agreeing to render legal services on a contingency basis without complying with the Act.

[52] I do not say that the Code of Conduct was indeed contravened by Ms Ngomana and/or Mr Tshavhungwe – that is an issue for the Legal Practice Council to consider and decide.

Conclusion

[53] I hope that this judgment will stand as a stern warning to legal practitioners who accept contingency mandates to comply with the prescripts of the law for not doing so, as is demonstrated in this judgment, may have dire consequences. Not only may offending legal practitioners be left out of pocket despite executing their mandate properly to finality, but also their conduct may offend the strict ethical standards that are expected of them and may subject them to scrutiny and censure.

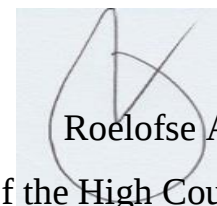
[54] In the premises, I made the following order:

- (a) Judgment is granted in favour of the plaintiff in case number: 308/2022;
- (b) The defendant is ordered to pay the plaintiff in case number: 308/2022 an amount of R 661 795.00 together with interest at the prescribed rate calculated from the date of this judgment to the date of payment, both days included;

‘Counsel shall not mark a brief, or in any form record a description of fees in any record of account, which is false or misleading as to the true nature of the brief or of the services rendered.....’

- (c) Judgment is granted in favour of the plaintiff in case number 1309/20;
- (d) The defendant is ordered to pay the plaintiff in case number: 1309/20 an amount of R 200 000.00 together with interest at the prescribed rate calculated from the date of this judgment to the date of payment, both days included;
- (e) Ngomana and Associates shall not recover any disbursements or fees from the plaintiffs;
- (f) Ngomana and Associates are directed to furnish a copy of this judgment to the plaintiffs within 5 (FIVE) days of this order and to file an affidavit with this court that it has done so;
- (g) The Registrar of this court is directed to forward a copy of this judgment to:
 - (i) The National Office of the Legal Practice Council;
 - (ii) The Mpumalanga Office of the Legal Practice Council; and
 - (iii) The Chief Executive Officer of the Road Accident Fund;
- (h) The Director of the Mpumalanga Office of the Legal Practice Council is directed to:
 - (i) Nominate a firm of attorneys to be appointed by this court for purposes of receiving the moneys due and payable by the defendant to the plaintiffs (“the nominated attorneys”);

- (ii) Within 10 (TEN) days of the date of this order inform the Registrar of this court of its nomination in paragraph (i) above;
- (i) The Registrar shall enrol case numbers 308/2021 and 1309/20 upon the unopposed motion roll for the court to consider the appointment of the nominated attorneys;
- (j) Upon appointment of the nominated attorneys (if the court is satisfied with the nomination), the defendant is directed to pay the amounts awarded to the plaintiffs into the trust account of the nominated attorneys within 30 (THIRTY) days of this order;
- (k) The nominated attorneys are directed to pay to the plaintiffs the amounts received on the plaintiffs' behalf after the deduction of their taxed fees for the execution of their appointment;
- (l) The Legal Practice Council is hereby directed to investigate and consider whether the conduct of Ms Ngomane and Advocate P Tshavhungwe offended the provisions the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (Government Gazette No. 42337).



Acting Judge of the High Court

DATE OF HEARING: 22 AND 24 MARCH 2022

DATE OF JUDGMENT: 26 MAY 2022

APPEARANCES

FOR THE PLAINTIFFS:	ADV TSHAVHUNGWE
INSTRUCTED BY:	NGOMANA AND ASSOCIATES
FOR THE DEFENDANT:	NO APPEARANCE