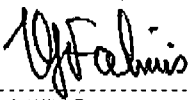


**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case Number: 22645/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE ☒ YES ☐ NO	
(2) OF INTEREST TO OTHER JUDGES ☒ YES ☐ NO	
(3) REVISED.	
13 / 2 / 13 DATE	 SIGNATURE

In the matter between:

DE LA GUERRE, JUANNE ELIZE

APPLICANT

and

RONALD BOBROFF & PARTNERS INC.

1ST RESPONDENT

LAW SOCIETY OF THE NORTHERN PROVINCES

2ND RESPONDENT

ROAD ACCIDENT FUND

3RD RESPONDENT

JUDGMENT

Fabricius J,

1.

In this application the Applicant sought the following relief:

1. "That the "Percentage Contingency Fee Agreement ("Common Law Contingency Fee Agreement") entered into between the Applicant and the First Respondent, in respect of fees payable by the Applicant to the

Respondent in pursuance of the Applicant's claim against the Road Accident Fund in respect of the accident in which the Applicant was involved on 27 November 2005, a copy of which is attached to the Founding Affidavit marked "J2", be declared invalid, void and of no force or effect;

2. That the First Respondent deliver to the Applicant, within a time to be fixed by the above Honourable Court, a fully itemized and detailed account in the form of a "Bill of Costs", supported where necessary by vouchers, reflecting the reasonable fees and disbursements incurred by the First Respondent in case number 2007/013898 in the South Gauteng High Court between the Applicant and the Third Respondent and that the Applicant is entitled to demand taxation thereof;
3. That the First Respondent pay to the Applicant the difference between the sum of R1 063 707,69 and the total of the taxed bill of costs within 7 days of the taxation.
4. That the First Respondent pay the costs of this Application on the scale as between attorney and own-client which costs are to include the costs consequent upon the employment of two Counsel."

2.

The notice motion was dated 6 October 2011.

It is convenient to briefly set out the facts that the Applicant relied on:

The motor vehicle collision which caused Applicant substantial injuries occurred on 27 November 2005. She thereafter consulted the First Respondent and was advised that it would accept instructions from her on a contingency basis that she pay a fixed 30% plus VAT of the damages recovered, for it instituting, prosecuting and finalising her case against the Third Respondent. She was then handed a written agreement headed "Percentage contingency fee agreement", and she filled in her name and signed it. She was thereafter advised by her present attorney that this agreement was illegal, invalid and unenforceable as it did not comply with the Contingency Fees Act 66 of 1997 ("the Act"). He also stated that the provisions of section 3(3) of the Act had not been complied with, inasmuch as none of those requirements had been explained to her at all, and in any event she was not even advised of the existence of the Act or any of its provisions, let alone any detail contained therein.

First Respondent did institute the relevant claim, and on 30 April 2009 judgment was granted in her favour in the total amount of R 2,538,811, 02.

Thereafter she received payment from First Respondent as follows:

- 2.1 On 22nd June 2009 the sum of R1360000,00;
- 2.2 On 13 October 2009 the sum of R166000,00;
- 2.3 On 15 February 2011 the sum of R19126,00 ; and
- 2.4 On 22 March 2011 the sum of R184325, 11.

3.

On the same day she was also given a statement of account from which it appeared that:

3.1 the total moneys paid by the RAF in respect of capital and costs was R2793158, 80;

3.2 the total amount received by her was R1729451.11;

3.3 the total fees and disbursements deducted by First Respondent amounted to R1063707, 69 of which:

3.3.1 the sum of R868 273, 37 was in respect of the firms fees including VAT;

3.3.2 the sum of R195 434, 32 was in respect of so called disbursements.

4.

As I have said, she was advised later that the agreement did not comply with the requirements of the Act, and further that she had probably been overcharged. On consideration of the mentioned account it appeared that the sum of money received by her expressed as a percentage of the total moneys received (capital and costs) was 61.9% of the total. The sum of money charged by First Respondent expressed as a percentage of the total moneys received was 31.08%, and the total disbursements of the case expressed as a percentage of total moneys received was 7.02%. If the Third Respondent's contribution towards costs was excluded, then having regard to the amount paid and actually received by her, the actual amount received expressed as a percentage of the total capital was 68.12% of the total, and the sum charged by First Respondent in respect of fees and disbursements and expressed as a percentage of the total capital received was 31.88%. In summary therefore it appeared that having regard to all of the mentioned figures, the First

Respondent in fact charged her 30% of the capital and costs received together with 14% VAT thereon. She stated that she had been advised that in terms of the Act the maximum contingency fee to which an attorney was entitled to was 25% of the capital, or double their normal fee, whichever was the lesser. She further stated that in order to arrive at a reasonable attorney and client fee, and if she were to multiply the party and party fees by 3, it would appear that a reasonable attorney and client charge would be R58913.46 (that was the amount recovered from the RAF in respect of costs) multiplied by 3 would be R176740, 38. Even if this were doubled, as provided for in the Act, this would mean that First Respondent was notionally only entitled to charge her R353480,76, whereas in fact she had been charged R868273,37 equalling R514772.61 more than the notional fee. She accordingly submitted that having regard to the legality of the contingency agreement she was entitled to have this agreement declared null and void, and that First Respondent be ordered to submit a formal attorney and client bill of costs for taxation. Whatever difference there may be between what she was charged in terms of the illegal agreement, and what First Respondent was entitled to charge her, should be refunded to her together with interest.

5.

In respect of costs, she said the following in the founding affidavit: First Respondent claims specialist expertise in major personal injury claims. She was never informed by the firm that the fee agreement did not comply with the provisions of the law. She was also not advised that there were alternative lawful agreements, such as an agreement in terms of the Act, or a time based

charge for work actually done. She felt compelled to have launched these proceedings because First Respondent had failed to act in her best interest, but chose rather to act in its own interest, in circumstances where it knew or alternatively ought to have known better, in that its directors were senior attorneys of many decades standing, and because the senior partner was a past president of the Law Society of the Northern Province, and was currently a member of its council. Accordingly we were asked to show our displeasure at the conduct of First Respondent due to its fragrant violation of the Act, and its failure to properly apply the law, despite its professed expertise, by making a punitive cost order against it on the scale as between attorney and own client.

6.

To put the further events into proper context it is necessary to refer to a letter which the Second Respondent wrote to Applicant's attorney on 27 September 2011, and I quote part of this letter: "council noted your comments and fully agrees with the view expressed by you that attorneys, who enter into invalid or illegal attorney and client agreements, should be sanctioned by the law society and also attorneys who charge excessive fixed percentage fees in terms of attorney and client fee agreements.

I also wish to confirm that council is prepared to participate in the referral of a test case, on the basis as was suggested by the Honourable Deputy Judge President, as it would be in the public interest and also the interest of the attorneys profession to obtain certainty and clarification on the question of

whether fixed percentage fee agreements entered into, will constitute a valid and regular fee agreement." This letter was annexed to the founding affidavit.

7.

The Second Respondent filed an affidavit and after setting out so-called problematic situations arising from the Act concluded as follows: "in the light of the impracticality arising from the Contingency Fees Act and the need for a workable alternative, common law contingency fee agreements may validly be concluded within the stated recognised perimeters." It referred to a ruling that it had made on 21 June 2002 which permitted members to enter into certain common law contingency fee agreements as they call it, if such agreements met the following criteria:

- 7.1 it should relate to a genuine case of assisting an impecunious client to assert his or her rights;
- 7.2 the attorney's remuneration had to be fair;
- 7.3 the agreement should not amount to gambling, speculation or trafficking in litigation.

This was the only topic of interest to the Second Respondent in the present context, and it did not express any view to other statements made by the Applicant herein against the First Respondent.

8.

First Respondent did not file an answering affidavit, but on 11 November 2011 filed an application to stay proceedings in the following terms: (that) "these

proceedings are stayed pending the final determination of a test case to be convened to a Full Bench of this division, by arrangement with the Deputy Judge President and the Law Society of the Northern Provinces.” In the meantime there had been certain correspondence between the Law Society and the Honourable Deputy Judge President regarding so called “test case”, but it is not necessary to deal in any great detail therewith. What transpired was that on 28 May 2012 the South African Association of Personal Injury Lawyers launched an application against the Minister of Justice and Constitutional Development being the Respondent, in terms of which it sought an order declaring amongst others that nothing in the Contingency Fees Act restricts the rights of a legal practitioner to conclude an agreement with a client that makes payment of legal fees depend, in whole or in part, on the outcome of the client’s proposed or pending litigation, and that subject to the rules governing their ethical conduct, legal practitioners have the same right to conclude contingency fee agreements as any other person. The alternative claim was that an order was sought declaring that the Act, by restricting the rights of practitioners and the client to conclude contingency fee agreements, was an infringement of section 1 of the Constitution of South Africa and/ or section 10 (the right to human dignity), 14 (the right to privacy), 34 (the right to a fair public hearing), and parts of section 35 of the Constitution. That application was opposed by the Minister of Justice and Constitutional Development, and ultimately a Full Bench was constituted by the Honourable Judge President of this Court, and both the application of De La Guerre and the South African Association of Personal Injury Lawyers were heard on 29 November 2012 by the same panel of judges. A judgment in the South African

Association of Personal Injury Lawyers application will be delivered in due course, and for present purposes I will not comment any further thereon.

9.

I accordingly return to the De La Guerre application. As I have said, the First Respondent filed no answering affidavit and preferred the route of applying for a stay of the proceedings. Mr. Brassey SC very properly conceded, when I put the point to him, that it was the practice in the courts that a litigant could not follow this route, unless it is in very exceptional circumstances, without pleading over i.e. without filing an answering affidavit. He admitted that the decision not to file such an affidavit had been a considered one, and he was also aware of the relevant authorities in this context. Because the two matters were heard on the same day there was obviously no point in pursuing the application for a stay, but he did ask for leave to file an answering affidavit. For present purposes it is necessary to refer briefly to the relevant authorities in this context. In ***Bader and Another v Weston and Another 1967 (1) SA 134 (C) at par 136***, Corbett J (as he then was) said the following: "it seems to me that, generally speaking, our application procedure requires a Respondent, who wishes to oppose an application on the merits, to place his case on the merits before the court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action...on the other hand, I do not think that normally it is proper for such a Respondent not to file opposing affidavits but merely to take the preliminary point."

In ***Randfontein Extension Limited v South Randfontein Mines Limited and Others*** 1936 WLD 1 at 5, Greenburg J emphasised that one could not ask a Respondent to assume that his preliminary point would be successful; he had to be prepared for the possibility of his point failing. A similar approach was adopted by Coetzee J in ***Lipschitz and Schwartz NNO v Markowitz*** 1976 (3) SA 772 (W) at 776. As a result of these dicta the court in ***Standard Bank of SA Limited v RTS Techniques and Planning (Pty) Ltd*** 1992 (1) SA 432 (T) at 442, held that it was established practice that a Respondent should file affidavits on the merits, irrespective of whether a preliminary point was to be argued. It should not rely upon his preliminary point only. As I have said, this rule is not inflexible, and the court may in appropriate circumstances allow of the late filing of affidavits. I am of the view that no such appropriate circumstances or exceptional circumstances exists herein. In Applicant's answering affidavit to First Respondent's application for a stay of the proceedings, Applicant's attorney said that the present matter was in fact the intended "test case". Apart from that, the Applicant was entitled to pursue her case to conclusion. Stay of proceedings is normally only granted in exceptional cases and the power is exercised sparingly.

See: ***Cilliers A.C et al. 2009. The Civil Practice of the High Courts of South Africa (1), 5th ed. at 306, Herbstein and Van Winsen***. Apart from that he referred to certain correspondence, and suggested that the First Respondent herein was attempting to delay the outcome of this case as long as possible, and was moreover on a "forum-shopping" exercise. The fact of the matter however is that First Respondent, knowing the requirements of

practice that I have referred to, and the relevant authorities quite well, intentionally chose not to file an answering affidavit. It cannot do so now.

10.

On behalf of the Applicant it was submitted that it was clear from the relevant contingency fee agreement that it did not comply with the Act and that - accordingly it was invalid. The Second Respondent was of the view that a so called "common law fee agreement" could lawfully co-exist with an agreement in terms of the Act. Third Respondent supported the Applicant's view that a contingency fees agreement between a lawyer and his client was unlawful at common law.

11.

The Act was introduced after a report in November 1996 by the South African Law Commission on Speculative and Contingency Fees, mainly to provide access to justice for those persons who most likely were unable to prosecute their claims and pay for their own legal fees. It allowed such claims under specified circumstances and subject to certain conditions.

The Supreme Court of Appeal in ***Pricewaterhouse Coopers Inc. v National Potato Co-op Limited 2004 (6) SA 66 (SCA) at par 41***, said the following per Southwood AJA: "The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a "no win, no fees" agreement (s2(1)(a)), and the second is an agreement in terms of which the legal practitioner is entitled to fees higher

than the normal fee if the client is successful (s2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of a claim sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s2(2)). The Act has detailed requirements for the agreement (s3), the procedure to be followed when a matter is settled (s4) and gives the client a right of review (s5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s6), and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s7). 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."

12.

During argument it was contended that the latter dictum was *obiter*. A "real" *obiter* is a judicial observation made in passing: one not necessary for the decision of the case. It is a stated thought that does not advance the reasoning by which the outcome is reached.

See: ***De Kock and Others v Van Rooyen 2005 (1) SA 1 (SCA) at par 17.***

I do not agree that the said dictum is *obiter*, as it is clear from the judgment as a whole that the Supreme Court of Appeal was dealing with a mosaic (if I can call it that) of contingency fee agreement validity in general, be it between

a third party and a litigant, or be it between a litigant and a legal practitioner. Its so-called *obiter dictum* certainly did advance the reasoning by which it reached the particular outcome in that decision. In any event, even if I am wrong in this view, it is of no consequence. The Supreme Court of Appeal itself has said that it will not lightly depart from a previous decision made by it, even if relevant *dicta* were *obiter*.

See: ***Steenkamp v SABC 2002 (1) SA 625 (SCA) at par 12.***

I may also just add that I am of the view that if five Judges of the Supreme Court of Appeal say that an act is illegal under certain circumstances, the High Court will not easily, if at all, come to a different view.

13.

It is clear in my view, that contingency fee agreements between a litigant and his attorney were unlawful at common law. At common law a legal practitioner was only entitled to a reasonable fee for work actually done. See: ***Christie, R.H. 2011. Law of Contracts in South Africa, 4th ed at 408- 409, Lexis Nexis.*** It is also clear that the First Respondent and the Second Respondent were aware of this view as long ago as November 1992, when former Chief Justice Corbett wrote a letter to the Natal Law Society regarding this issue, which was also considered with approval by the South African Law Commission in its report at par 3.9. For present purposes I deem it necessary to quote the relevant paragraph dealing with the common law authorities: " I am *prima facie* of the view that any [contingency fee agreement] between an attorney and his client... would be unlawful at common law. I list some common law authorities which I have consulted in this regard and also some

case law (I do not claim that my somewhat hurried research has been at all exhaustive): Voet 2.14.18; Kersteman Woorden-Boek; sv *Conditie van Triumphe*; Grotius 3.1.41 and Schorer's Note CCIXXV; van der Keesel *Praelectiones*, 3.1.41; van Leeuwen RD Law 5.4.2; Incorporated Law Society v Reid (1908) 25 (SC) 612; Goolam Mohamed v Janion (1908) 29 (NLR) 304; Hollard v Zietsman (1885) 6 (NLR) 93, a judgment of Connor CJ containing a full review of the common law authorities; Campbell v Welverdiend Diamonds Limited 1930 (TPD) 287, where a number of the cases are [reviewed]. See also Christie, *The Law of Contract* 2nd edition, 423. It is true that the decision in *Patz v Salzburg* 1907 (TS) 526 appears to run counter to the general trend, but this did not concern an arrangement between attorney and client". It is abundantly clear from all authorities that the common law prohibited contingency fee agreements between lawyers and their clients. Certain authorities some of which are unreported, are clear on this point as well, being of the view, as was the Supreme Court of Appeal in *Pricewaterhouse Coopers Inc supra*, that any contingency fee agreement which does not comply with the Act, is invalid. I mention a number of these decisions:

13.1 in *Tecmed (Pty) Ltd v Hunter and Another* 2008 (6) SA 210

(W) it was held that a so called "merit bonus" or a "performance bonus" agreement between an attorney and his client could only be valid if it complied with the Act;

13.2 in *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ)

Morrison AJ held that there was no such "thing" as a common law contingency fee agreement which could in any possible

manner somehow co-exist with an agreement required by the Act.

13.3 I agree with that view, as did Boruchowitz J in *Tjatji v Road Accident Fund* (case no: 2010/22475 of 19 October 2012) at par 12, and Mojapelo DJP in *NK Bridget v Road Accident Fund* (Case no: 2010/24932 of 22 August 2012) at par 32.

14.

It is my view that the above mentioned decisions were correct in finding the following:

14.1 at common law a contingency agreement between an attorney and his client was unlawful;

14.2 the Contingency Fees Act is exhaustive on its stated object, and any contingency fee agreement not in compliance with it is invalid.

15.

There is no doubt that the agreement entered into between the Applicant and the First Respondent does not comply with the Act for the reasons set out in the founding affidavit. The agreement is accordingly invalid. The Third Respondent, in its answering affidavit, was of the same view. In my view therefore the Applicant is entitled to the relief sought.

16.

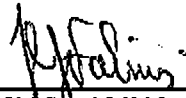
As far as an order for costs is concerned, I have mentioned why the Applicant is of the view that she is entitled to an attorney and own client costs order with

reference to the allegations made in the founding affidavit. Her contentions in this context were not put in issue by the First Respondent due to its intentional decision not to file an answering affidavit. It is blatantly obvious that the relevant agreement does not comply with the Act. There is no explanation before court why payments of the amounts due to her were made over a period of 2 years. First Respondent must have been aware as an experienced practitioner that the overwhelming view of distinguished authorities, including the Supreme Court of Appeal, was that any agreement not complying with the Act would be invalid, and could, in the proper context, amount to unprofessional conduct as well. This becomes clear from the unreported judgment of Southwood J in *Mnisi v RAF [2010] JOL 258 at 257 (GNP)* of 18 Mei 2010. For the stated reasons, I am of the view that applicant is entitled to a punitive cost order which would in turn express the strong disapproval of this court with the First Respondent's conduct in these proceedings. There is also no reason at all why the Applicant should be out of pocket in seeking the relief that she did.

17.

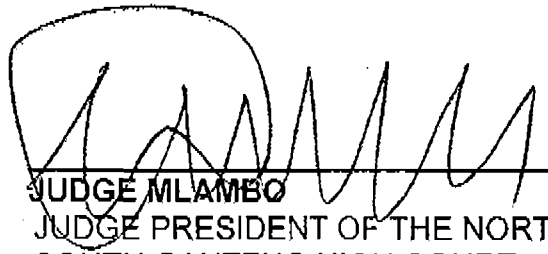
Accordingly prayers 1, 2 and 3 of the notice of motion are granted. In the context of prayer 2 the relevant "bill of costs" is to be delivered to the Applicant within 30 days from date of this judgment. The First Respondent is ordered to pay the costs of the application on the scale as between attorney and own-client which costs are to include the costs consequent upon the employment of two counsel.

ordered to pay the costs of the application on the scale as between attorney and own-client which costs are to include the costs consequent upon the employment of two counsel.



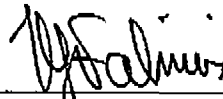
JUDGE FABRICIUS
JUDGE OF THE NORTH & SOUTH
GAUTENG HIGH COURT

I Agree :



JUDGE MLAMBO
JUDGE PRESIDENT OF THE NORTH &
SOUTH GAUTENG HIGH COURT

I Agree :



JUDGE KATHREE - SETILOANE
JUDGE OF THE NORTH & SOUTH
GAUTENG HIGH COURT

Date of hearing: 29 November 2012

Date of Judgment: 13 February 2012

Applicants Counsel: Adv. Ancer SC
Adv. Berkowitz

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Johannesburg

First Respondent's Counsel: Adv. Brassey SC
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