IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

"REPORTABLE"

CASE NO: 1555/04 & 9471/06

In the matter between:

SHAMIELA ROGERS **Plaintiff / Applicant**

and

CASSIEM HENDRICKS **Defendant / Respondent**

REVIEW OF TAXATION JUDGMENT DELIVERED 15 SEPTEMBER 2006

<u>Goso AJ</u>

[1] This matter comes to me by way of review. On 19 October 2004 Mr Van Gend of Coulters, Gend and Kotze, Claremont, Western Cape gave instructions to Advocate Whitehead of Huguenot Chambers, Queen Victoria Street, Cape Town to represent his client Mrs S Rogers, in a High Court action set down for March 2005.

[2] Mr Whitehead and Mr Van Gend came to an agreement that Mr Whitehead would represent Mrs Rogers without charging fees on condition that if she becomes successful in her action, only then would he charge his normal rate.

[3] Mr Whitehead represented Mrs Rogers during the trial. On 15 June 2005 Allie J granted judgment in favour of Mrs Rogers and the defendant was ordered to pay costs. Accordingly after the trial Mr Whitehead prepared a fee list which he forwarded to Mr van Gend who later informed him that the defendant's attorney was objecting to the inclusion of his fees to the costs award on the grounds that he was representing plaintiff on a *pro bono* basis. On February 2006 a bill of costs was presented to the Taxing Master and the defendant's attorney objected again on the same grounds.

[5] On 14 February 2006 Mr Nacerodien, defendant's attorney wrote to the Secretary of the Bar Council seeking a ruling on whether Mr Whitehead was entitled to claim fees in view of the fact that he had not signed any contingency agreement and also in view of the fact that he had informed the court during the trial that he was acting on a *pro bono* basis.

[7] After inviting representation from Mr Whitehead the Cape Bar Council on 21 April 2006 condoned Mr Whitehead's failure to sign a contingency agreement and the question whether Mr Whitehead was entitled to claim fees was left for determination by the Taxing Master.

[8] On 31 May 2006 the Taxing Master disallowed Mr Whitehead's fees on the basis that he had declared in court that he was acting *pro bono* and he did not sign a contingency fee agreement with plaintiff.

[9] The Taxing Master's ruling has now been brought on review. It has been submitted by Mr Nacerodien on behalf of the defendant that the Taxing Master misdirected himself in finding that acting *pro bono* excludes the right to claim fees. It has also been submitted that he further misdirected himself by failing to have regard to the fact that although Mr Whitehead failed to countersign the contingency agreement, it had always been his intention and plaintiff's attorney's intention throughout the trial to act on a contingency fee basis.

[10] The issues to be determined are whether it is permissible to

charge fees on a contingency fee basis after rendering service on a *pro bono* basis. It must also be determined whether failure to countersign a contingency fee agreement disqualifies counsel from claiming fees.

[11] The Contingency Fee Act, 66 of 1997 ("the Act") was enacted in order to promote access to the courts by allowing citizens who do not have financial means, to take their disputes to court so that they may be resolved in a peaceful manner without resorting to self help.

[12] In terms of section 2(1) of the Act a legal practitioner may enter into an agreement with a client not to charge any fees for services rendered in respect of legal proceedings unless the client is successful in the action. Section 3 of the same Act prescribes that a contingency fee agreement shall be in writing and shall be published in the Government Gazette after consultation with the relevant attorneys' and advocates' profession.

[13] Section 3(2) of the Act provides as follows:-

> *"A contingency fee agreement shall be signed by the client concerned ………,…………………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"

[14] It is apparent from section 3(2) and (4) of the Act that the meaning and purpose of a contingency fee agreement must be explained to the client before it is entered into and a signed copy must be delivered to the client concerned on the date on which it is signed. In terms of section 5 of the same Act all grievances concerning chargeable fees must be referred for review to the professional bodies which regulate the profession or to a person designated by the Minister of Justice and Constitutioanl Development.

[15] It was the function of plaintiff's attorney to explain to plaintiff the meaning and purpose of the contingency fee agreement including the amount payable. Such an agreement should have been sanctioned by the Cape Bar Council. It should have also been countersigned by Mr Whitehead and delivered to plaintiff as soon as it was signed. The existence of the agreement must be disclosed to the court and other litigants. In his representation Mr Whitehead to the Cape Bar Council admitted his non-compliance with the aforementioned requirements.

[16] Rule 5.12.4.3 of the Uniform Rules of Professional Ethics in respect of *pro bono* work at the Cape Bar permits a member who has spent time rendering services on a *pro bono* basis to ultimately receive payment pursuant to a contingency fee agreement once the action is successful.

[17] I have to determine whether the Taxing Master was correct in exercising his discretion against allowing counsel's fees notwithstanding the fact that the body which regulates Mr Whitehead's profession condoned his failure to comply with its own rules of ethics which are similar to the relevant provisions in the Act.

[18] In view of the fact that the Cape Bar Council is the body which receives complaints arising from the implementation of the Act, its preparedness to grant condonation of a breach of its own rules is a significant yardstick for measuring the seriousness of Mr Whitehead's transgression and potential prejudice to both litigants who have in any event not lodged any complaints.

[19] Courts are reluctant to interfere with the exercise of a discretion by the Taxing Master unless it is shown that he has acted on a wrong principle or if he was clearly wrong. The court will not

interfere on this ground alone, it will only do so if it is convinced that it is in the same position as the Taxing Master to determine the issues or if it is in a better position to do so.

See: **Legal and General Assurance Society Ltd v Lieberam NO 1968 (1) SA 473 (A) at 478 G.**

[20] The Taxing Master was wrong in disregarding the fact that Mr Whitehead was not precluded from receiving payment on the basis of a contingency agreement, even if he initially acted *pro bono* if ultimately the action is successful and there is a costs order awarded in favour of his client.

[21] In view of the fact that the Cape Bar Council condoned Mr Whitehead's failure to countersign the contingency fee agreement, the Taxing Master ought to have adopted a more lenient view unless there was specific reason for not doing so. In the absence of a grievance lodged by client, an objection by defendant's attorney based on a misconception of how the *pro bono* system works alone, does not justify disallowing Mr Whitehead's fees.

[22] Promoting easy access to the courts is consistent with the rights enshrined in section 34 of the constitution of the Republic of

South Africa Act 108 of 1996 ("the constitution"). It is fundamental in a democratic society that those who do not have means should be able to have their disputes resolved before courts. Such an approach ensures peaceful resolution of disputes without resorting to self help.

[23] Rendering the full realization of such a right dependent upon delivery of a signed written agreement upon client when there is clear evidence that there was a verbal agreement between the parties which manifested itself through an understanding between the parties throughout the trial proceedings, trumps in an unjustifiable manner a right which is to be promoted and protected.

[24] In any event the decision of the Taxing Master is based on a misconceived interpretation of the meaning and purport of the context in which the term "*rendering pro bono services"* is used in the Act and in the Cape Bar rules. Such interpretation is clearly wrong.

In the circumstances the ruling of the Taxing Master disallowing Mr Whitehead's fees should be set aside.

Therefore the following order is made:-

1. The application for review of the ruling of the Taxing Master is hereby upheld, and items 214,215,216 and 217 are hereby allowed
2. In terms of Rule 48(7) the defendant is ordered to pay plaintiff a sum of R 230 as costs for the review.

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GOSO, AJ

I agree

FOURIE, J

It is so ordered