

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21947/2022

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 29 July 2024

E van der Schyff

In the matter between:

MARTIN EDDIE VAN DER WESTHUIZEN

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

- [1] The matter was set down for trial on 27 May 2024. The trial proceeded in the absence of the defendant as it was properly set down. After having heard the

plaintiff's *viva voce* evidence, and considered the expert witnesses' reports that were confirmed under oath,¹ the merits and quantum were resolved.

- [2] The question arose of whether or not the plaintiff's attorney may charge Value Added Tax (VAT) on the contingency fee as provided for in the contingency fee agreement. This issue was reserved for the filing of Heads of Argument. The defendant's representative declined an invitation to the online platform. An affidavit was filed wherein the plaintiff stated that he is aware that charging VAT 'on a contingency fee agreement' is a contentious issue and that the issue will be argued for clarity. He confirmed that the possible outcomes have been explained to him, that he abides the court's decision, and that the matter may be determined without further input from his side. The matter was subsequently argued.

Legal question

- [3] Counsel essentially seeks a declarator and phrased the question to be considered as whether a plaintiff's attorney is entitled to charge VAT over and above the contingency fee charged to the plaintiff.
- [4] I am of the view that the question is more nuanced. No issue arises if the payment, including the VAT charged on fees, remains within the 25% cap provided for in section 2(2) of the Contingency Fee Act 66 of 1997 (the CFA). The actual question is whether the levying of VAT that renders payment by a client in terms of a contingency fee agreement to exceed the statutorily decreed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned is in line with the provisions of the CFA.

Stare decisis

¹ A Rule 38 application was granted.

- [5] The question under consideration was considered in *Masango v Road Accident Fund and Others*.² Counsel argued that Mojapelo DJP *obiter* stated that VAT could not be charged over and above the contingency fee. Counsel submitted that the court's view in *Masango* that:

'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.'

is wrong.

- [6] It is trite that *obiter dictum* refers to a judge's comments or observations made in passing on a matter arising in a case before the court, which does not require a decision. *Obiter* remarks are not essential to a decision and do not create binding precedent. Courts are not bound to follow comments made *obiter* in earlier rulings, but these comments are very useful when judges are considering cases.
- [7] The question before Mojapelo DJP in *Masango*, as phrased in the first paragraph of the judgment was –

'Is a legal practitioner entitled to charge as his or her fees 25% of the capital amount recovered for his 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)?'

- [8] The question was considered to have 'two questions rolled into one', the first whether a legal practitioner may charge 25% of the capital award as fees and secondly, whether 14% VAT may be added to the 25% capital amount, 'assuming that the first question is positive.

² 2016 (6) SA 508 (GJ).

- [9] Although Mojapelo DJP found that the contingency fee agreement was invalid on other basis as well, he explicitly held that VAT is not recoverable above the 25% cap imposed by the Act:³

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

- [10] The issue regarding the ability to recover VAT above the 25% cap imposed by section 2(2) of the CFA was extensively argued before Mojapelo DJP and is one of the reasons underpinning the order. Mojapelo DJP did not only deal with this issue in passing. The principle set out in *Masango* is not merely *obiter dictum*.
- [11] Counsel submitted that the judgment in *Masango* does not bind this court because the judgment was handed down in the local division while this court sits as the provincial division. This view, however, does not account for the fact that the *Constitution Seventeenth Amendment Act*, 2012, amended the Constitution of the Republic of South Africa, 1996, to provide for a single High Court in South Africa. The Superior Courts Act 10 of 2013, subsequently abolished the local divisions and constituted the High Court in its nine Divisions. Each Division has a main seat, and the Minister was authorised to establish one or more local seats for a Division. There are two seats of the High Court in the Gauteng province. The main seat is in Pretoria and the local seat is in Johannesburg. The local seat has concurrent jurisdiction with the main seat. In accordance with the *stare decisis* principle, I am bound to follow the principle set out in *Masango* unless I am of the view that it is wrong, since the judgment was handed down by a court of the Gauteng Division.

Counsel's submissions

³ At paragraph [52].

- [12] Counsel submitted that Mojapelo DJP correctly held in *Masango* that (i) the relationship between the legal practitioner (the vendor) and SARS was not one of agency but that of debtor and creditor, and (ii) that the vendor owes the VAT to SARS, not to the client.
- [13] Therefore, counsel challenged the findings that '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', and the conclusion that the output tax is included in the maximum fees that the practitioner is entitled to recover from the client'. Counsel submitted that these findings could not be correct for the following reasons: (i) A vendor has a statutory duty to impose VAT on fees in terms of section 7(1) of the VAT Act; (ii) The value of the supply of goods or services must be established in accordance with section 10 of the VAT Act based on the amount of consideration for such supply less the amount that represents tax. Having regard to section 10(3) of the VAT Act, counsel submitted that VAT must be imposed on the amount of money agreed upon, in *casu*, the success fee that the parties agreed on; (iii) A vendor has a statutory duty to account and pay the VAT liability to SARS. VAT is an indirect tax on the consumption of goods and services in the economy. It is a tax imposed by SARS on the end user of legal services. The client consumes the services and is consequently liable for the VAT; (iv) There is no reference to VAT in the CFA. The parties to the CFA may, therefore negotiate whether the amount of the success fee should include VAT or not – where parties do not agree that the success fee is exclusive of VAT the provisions of section 64(1) of the VAT Act applies whereby the success fee will be inclusive of VAT; (v) If the 25% maximum fee that may be charged is the amount exclusive of VAT a practitioner who is not a VAT vendor would be in a better position than a practitioner who is a VAT vendor 'a result which would disturb the tranquility of even the most phlegmatic interpreter of legislation'; (vi) The limitation imposed by section 2(2) of the CFA refers to 'fees'. VAT is a tax that does not constitute a 'fee', and thus, on a normal interpretation of the section, the limitation can never be interpreted as including VAT.

Discussion

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

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.

[15] It is trite that section 2 limits the contingency fee that an attorney may recover from his client. In the event of success, the attorney will either be able to charge his normal fee or the higher fee, also referred to as the success fee. Whether the attorney will be entitled to charge his normal fees or a higher fee depends on the agreement concluded between the parties. The success fee, in turn, is firstly limited by confining

it to an amount that represents an increase in the attorney's normal fee.⁴ The percentage increase must be negotiated between the practitioner and the client. The second limitation placed on the success fee is that the increase may not exceed the normal fee by more than 100%. The third and last limitation is that the success fee may not exceed the client's capital award by more than 25%.

- [16] A vendor's duty to pay VAT is statutorily entrenched. In determining the question before the court, the VAT Act needs to be considered as a whole. Section 64(1) of the VAT Act provides that:

'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.'

- [17] It is a well-established presumption in statutory interpretation that the Legislature is consistent with itself. The Legislature knows and has in mind existing laws when it passes new legislation, and frames new legislation with reference to the existing law.⁵ The VAT Act was assented to on 5 June 1991, and commenced on 30 September 1991. The CFA was assented to on 13 November 1997, and commenced on 23 April 1999. It can thus be presumed that the Legislature was well aware of the statutory imposition of VAT on the supply of goods and services by a vendor after the commencement of the VAT Act, and based on the presumption, it can be presumed that the Legislature regarded the VAT to be included in the maximum fee, or the Legislature would have indicated that the maximum 25% percentage excludes VAT. The legal practitioner contracts with his or her client regarding the fees, but that agreement must be concluded within the parameters set by the Legislature in the CFA.

⁴ *Mkuyana v RAF* 2020 (6) SA 405 (ECG) par [17].

⁵ *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* [2019] ZACC 47 at para [38].

- [18] Counsel is indeed correct in submitting that if VAT is included in the 25% maximum success fee, practitioners registered as vendors would be disadvantaged compared to practitioners not so registered. The converse is also true regarding clients. If VAT is charged in addition to the maximum 25% success fee, a client who utilises the services of an attorney registered as a vendor will effectively pay more than a client who utilises the services of an attorney who is not so registered.
- [19] The purpose of the CFA is to enhance access to justice. It was principally enacted 'to provide the largely uneducated and poor third-world South African population with an opportunity to litigate in circumstances where they do not have funds to pay for legal services upfront, and to provide litigants of having the fees of legal representatives limited and regulated within reason.'⁶ Revenue and Tax Laws notoriously differentiate between individuals. In this context, there will always be parties who are affected adversely in comparison with their counterparts. An interpretation that would lead to a differentiation between clients, the parties the CFA was promulgated to benefit, would be inconsistent with the purpose of the CFA. Finding that the maximum 25% success fee includes VAT is consistent with the CFA's purpose.
- [20] Counsel submitted that if the statements in the *Masango* case are taken to their logical conclusion, it would mean that in a case:

'where the 100% above the normal fees is applicable, and it is less than the 25% limitation, the attorney would be able to charge VAT, and the client would be liable for same, but where the *normal fee and success fee* reach the 25% limit, the client would not be liable for the VAT and the attorney would be. The aforesaid would make it impossible to determine if a contingency fee is valid, until after the taxation of the fees bill, and would fly in the face of the court determining whether the contingency fee is valid, at the time of the resolution of the trial itself.'

⁶ G W Austin *Contingency fees in the South African Law* (Unpublished LLM thesis ,University of Pretoria, 2017) 5, and the sources referred to.

- [21] This submission necessitates a few remarks. As stated above, section 2 of the CFA determines the remuneration model that may be incorporated in a contingency fee agreement regarding the attorney's fees. The parties can either agree that, in the event that the litigation is successful, the legal practitioner is entitled to fees equal to his or her normal fees, or they can agree that the legal practitioner is entitled to fees higher than his or her normal fees. It is the fees higher than the normal fees that are referred to as success fees. It is thus a fallacy to refer to 'normal fee and success fee' as if both will be paid where the parties opted in the agreement for a success fee to be charged. It is also a fallacy to say that the term 'success fee' is not defined in the CFA. It might not be defined in the definition section of the Act, but section 2(2) clearly defines the term— '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')'.
- [22] Although the normal fee is used as the basis for calculating the higher fee, the success fee, the success fee is not charged over and above the normal fees. Where the parties agree to a higher fee, the higher fee is fenced in from two sides; it might not exceed the normal fee by more than 100%, in other words, it may not be higher than double the normal fee, and it is capped to 25% of the award, excluding costs.
- [23] Counsel is correct in the submission that the limitation to charge VAT only arises where the added VAT would render the total fees payable by the client to exceed 25% of the award. A reading of the contingency fee agreement will determine its validity. If the success fee is capped to a maximum of 25% of the award, the agreement meets the statutory requirement in this regard.
- [24] I agree with the principle laid down by Mojapelo DJP in *Masango v Road Accident Fund and Others*. The levying of VAT that renders payment by a client in terms of a contingency fee agreement to exceed the statutorily decreed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings contravenes the provisions of the CFA.

ORDER

In the result, the following declarator is granted:

1. Value Added Tax is included in the maximum fees that a practitioner is entitled to recover from a client in terms of section 2 of the Contingency Fee Act 66 of 1997.
2. No order as to costs.



E. van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:
Instructed by:

Adv. C. Dredge
Ehlers Attorneys

Date of the hearing:
Date of judgment:

27 May 2024
29 July 2024