CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 122/13 and CCT 123/13

In the matter between:

RONALD BOBROFF & PARTNERS INC Applicant

and

JUANNE ELIZE DE LA GUERRE Respondent

And in the matter between:

SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS Applicant

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

ROAD ACCIDENT FUND Second Respondent

Neutral citation:	*Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Van der Westhuizen J and Zondo J
Decided on:	20 February 2014

Summary: Contingency fees – Contingency Fees Act 66 of 1997 – constitutionality of the Act as a whole – constitutionality of sections 2 and 4 of the Act – not unconstitutional.

ORDER

On appeal from the North Gauteng High Court, Pretoria:

The applications for leave to appeal in both matters CCT 122/13 and CCT 123/13 are dismissed with costs, including, where applicable, the costs of two counsel.

JUDGMENT

THE COURT:

Introduction

[1] These are two applications for leave to appeal that depend on the same issue, namely the constitutionality of the Contingency Fees Act[1] (Act). The South African Association of Personal Injury Lawyers (Personal Injury Lawyers) sought an order in the North Gauteng High Court, Pretoria (High Court) declaring the Act unconstitutional as a whole or, in the alternative, certain sections of it.[2] Before us the applicant in a related matter, Ronald Bobroff & Partners Inc (Bobroff), a law firm, accepted that a declaration of constitutional invalidity was a prerequisite for its success in the proceedings brought against it by a former client (Ms De La Guerre).

[2] At issue are contingency fees.[3] Under the common law, legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds the

[1] 66 of 1997.

[2] Sections 2 and 4.

[3] The Act defines a contingency fee agreement in section 2(1) as—

> "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."

clients might be awarded in litigation.[4] The Act changed this. It makes provision for these fees to be charged in regulated instances and at set percentages.[5] Certain Law Societies made rulings allowing their members to charge in excess of the percentages set in the Act.[6] Uncertainty reigned in the attorneys' profession about the correct legal position in relation to contingency fees. Could these fees be charged only under the Act, or also outside its provisions?

[3] Bobroff was one of the firms which charged more than allowed for in the Act, as the rules of its professional association allowed. Ms De La Guerre was charged 30 per cent as a contingency fee, instead of the maximum of 25 per cent allowed under the Act.[7] After being awarded damages in litigation she challenged the excess charge in legal proceedings in the High Court. The Personal Injury Lawyers also brought proceedings in the High Court, challenging the constitutionality of the Act. Both cases were heard by the same Full Bench of the High Court.[8]

[4] *In Re William Emil Hollard v Paul H Zietsman* (1885) 6 NLR 93 at 96-7. See also *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another* [2004] ZASCA 64; 2004 (6) SA 66 (SCA) (*National Potato Co-operative*) at para 41; *Lekeur v Santam Insurance Co Ltd* 1969 (3) SA (CPD) at 9; and *Incorporated Law Society v Reid* (1908) 25 SC 612 at 615 and 618-9.

[5] The Act stipulates that the fee charged may not exceed the legal practitioners' fees by more than 100 per cent, and for claims sounding in money it may not be more than 25 per cent of the total amount awarded.

[6] Both the Law Society of the Free State and the Law Society of the Northern Provinces made provision for contingency fees under the common law outside of the prescripts of the Act. See *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2013] ZAGPPHC 34; 2013 (2) SA 583 (GSJ) at para 3.

[7] *De La Guerre v Ronald Bobroff & Partners Inc and Others* [2013] ZAGPPHC 33 (High Court judgment) at para 4.

[8] So constituted under section 14(1)(a) of the Superior Courts Act 10 of 2013.

[4] The High Court dismissed the application seeking a declaration of unconstitutionality and found in Ms De La Guerre's favour in her application.[9] Leave to appeal was refused by the High Court. Further leave was also refused by the Supreme Court of Appeal on the basis that no reasonable prospects of success on appeal existed and that there was no other compelling reason why it should be heard.[10] As a final resort, this Court has now been approached by the Personal Injury Lawyers and Bobroff for leave to appeal. Written submissions were sought from the interested parties.[11] Ms De La Guerre, the Minister of Justice and Constitutional Development and the Road Accident Fund all opposed the applications for leave.

Should leave be granted?

[5] We accept that the matter is of great public interest, but leave should nevertheless not be granted because there are no reasonable prospects of success. The judgment of the Full Bench is, in our view, correct. It is not necessary to repeat its reasoning in any great detail in this judgment. We will only deal briefly with the two main arguments put forward in the written argument. For convenience we will refer to them as the rationality review argument and the reasonableness review argument.

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[9] High Court judgment above n 7 at paras 15-7.

[10] Order of the Supreme Court of Appeal dated 9 September 2013.

[11] The Directions of the Constitutional Court dated 8 November 2013 stated that:

> "1. The Chief Justice and other Justices of this Court have considered the application for leave to appeal and decided, in terms of rules 11(4) and 19(6)(b) of the Rules of this Court, to dispose of this matter without hearing oral argument.
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> 2. The parties must file written submissions on behalf of the—
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> (a) applicant by Friday, 22 November 2013; and
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> (b) respondents by Friday, 29 November 2013.
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> 3. Further directions may be issued."

The distinction between rationality and reasonableness review

[6] The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by the Legislature must pass a legally defined test of 'rationality':

> "The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature."[12]

[7] A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved.[13] It is a less stringent test than reasonableness, a standard that comes

[12] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 63.

[13] In *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51, this Court held:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."

into play when the fundamental rights under the Bill of Rights are limited by legislation.

[8] In those cases the courts have a more active role in safeguarding rights. Once a litigant has shown that legislation limits her fundamental rights, the limitation may only be justified under section 36 of the Constitution.[14] Section 36 expressly allows only limitations that are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[15]

[9] The challenge to the constitutionality of the Act is not clearly demarcated along the lines set out above. However, closer consideration shows that the attack on the

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This was reiterated in *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 32 where this Court held that—

> "rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."

[14] This Court has carried out such a limitations analysis in numerous cases, the most recent of which being *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38 and *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC).

[15] Section 36 states:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

constitutionality of the Act as a whole is founded on rationality review, and the attack on sections 2[16] and 4[17] specifically on reasonableness review.

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[16] Section 2 of the Act provides:

"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."

[17] Section 4 of the Act provides:

"Settlement

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating—

(a) the full terms of the settlement;

(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;

(c) an estimate of the chances of success or failure at trial;

(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;

(e) the reasons why the settlement is recommended;

(f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and

(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating—

(a) that he or she was notified in writing of the terms of the settlement;

(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and

(c) his or her attitude to the settlement.

Rationality

[10] The Full Bench accepted that a rational distinction may be made between the regulation of contingency fees for attorneys and that of champertous agreements[18] amongst lay persons: [19]

> "First, legal practitioners are responsible for conducting the litigation concerned. They run the case and are responsible for advising on and taking the litigation decisions. Lay persons who enter into champerty and maintenance agreements do not engage in any of these activities.
>
> Second, legal practitioners have specialised knowledge and training which equip them to conduct litigation. They are perceived by their clients as being experts on the decisions to be taken. This puts lawyers in a powerful position to influence the actual conduct of litigation. Lay persons who enter into champerty and maintenance agreements do not possess any of these skills or characteristics. Third, legal practitioners are bound by a range of ethical duties to their clients. These duties may well come into conflict with their own pecuniary interest in the litigation when contingency fee agreements are concluded. Lay persons who enter champerty and maintenance agreements have no such ethical or other duties. There is, therefore, no possibility of a conflict of interest in this regard. Lastly, legal practitioners are bound by a range of ethical duties to the court. Again, these duties may well come into conflict with their own pecuniary interest in the litigation when contingency fee agreements are concluded. Lay persons who enter into champerty and maintenance agreements owe no such ethical duties to the court or to litigants. There is, therefore, no possibility of a conflict of interest in this regard."[20]

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(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court."

[18] Champerty is an agreement to finance litigation in exchange for part of proceeds. In this regard, see *National Potato Co-operative* above n 4.

[19] Id at para 46 where the Court held that agreements in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action were not contrary to public policy or void.

[20] High Court judgment above n 7 at paras 43-4. (Footnotes omitted.)

[11] That there is a distinction is now accepted by the Personal Injury Lawyers. But they question the wisdom of this distinction made by the Legislature, regulating only legal practitioners and not lay persons. In doing so they ask us to venture beyond rationality into reasonableness, which courts cannot do under the guise of rationality review. In addition, the fact that regulation for lay persons may also be wise does not mean that regulation of legal practitioners is unwise. Thus, the rationality review bears no merit and should fail.

Limitation and reasonableness

[12] The Personal Injury Lawyers' other attack is against sections 2 and 4 of the Act, based on the limitation of fundamental rights. But whose rights? It appears as if there is an underlying reliance on access to justice under section 34.[21] However, in the matter before us the right of access to justice is that of the legal practitioners' clients, not the rights of the legal practitioners themselves. The application was not brought as a representative one under section 38 of the Constitution,[22] but as one where the

[21] Section 34 of the Constitution reads:

> "Access to courts
>
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[22] Section 38 of the Constitution:

> "Enforcement of rights
>
> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

Personal Injury Lawyers acted on their own behalf. And even if the practitioners sought to bring it on behalf of others there is no evidence that their clients' rights have been limited.

[13] It is for these reasons that there are no reasonable prospects of success on appeal.

Order

[14] The applications for leave to appeal in matters CCT 122/13 and CCT 123/13 are dismissed with costs, including, where applicable, the costs of two counsel.

In CCT 122/13:

For the Applicant:	Advocate M Brassey SC and Advocate K Hopkins instructed by Rontgen & Rontgen Inc.
For the Respondent:	Advocate B Ancer SC and Advocate A Berkowitz instructed by Norman Berger & Partners Inc.

In CCT 123/13:

For the Applicant:	Advocate M Brassey SC and Advocate K Hopkins instructed by Rontgen & Rontgen Inc.
For the First Respondent:	Advocate Q Pelser SC and Advocate L Maite instructed by the State Attorney.
For the Second Respondent:	Advocate G Marcus SC, Advocate S Budlender and Advocate N Mayosi instructed by Lindsay Keller.