



THE REPUBLIC OF SOUTH AFRICA
**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 14788/2013

In the matter between:

CLIVE AMOS DARRIES

Applicant

Versus

JAMES EDWARD FIELIES

Respondent

JUDGMENT: 9 JUNE 2014

BOZALEK, J

[1] In these proceedings Applicant seeks an order against Respondent, his former attorney, setting aside a contingency fee agreement as being invalid and of no force and effect together with other ancillary relief.

[2] Applicant instructed Respondent to recover damages on his behalf for personal injuries he suffered in a motor-vehicle accident which took place in September 2003.

[3] On 27 December 2004 the parties entered into the disputed written contingency fees agreement (*'the agreement'*) in terms of the Contingency Fees Act, 66 of 1997.

[4] The relief sought herein by Applicant was opposed by Respondent who filed an opposing affidavit. However, when the matter was argued on 27 May 2014 there was no appearance for Respondent. From the bar Mr Van Heerden, counsel for Applicant, advised that Respondent was aware of the hearing date and in unsuccessful settlement negotiations had asked that the matter be removed from the roll but this request had been refused.

[5] Applicant's claim against the Road Accident Fund (*'the Fund'*) was eventually settled on 16 August 2010 upon acceptance of the Fund paying the amount of R1 433 736.00 in respect of general damages and damages for loss of earnings and an amount of R11 912.02 in respect of past medical expenses. The Fund also tendered an undertaking in terms of section 17(4)(a) of the relevant Act relating to the provision of future medical expenses. Prior to settlement an amount of R110 550.85 had been paid by the Fund directly to the hospital which treated Applicant after the Department of Health had instituted a supplier's claim for past medical and hospital expenses.

[6] A few days after the settlement was reached Respondent requested the actuary whose services had been used in the matter to value the section 17(4)(a) undertaking by the Fund. The actuary placed a value of R476 714.00 on the

undertaking but made no provision for contingencies. Instead, under a note headed **'Contingencies'** he recorded *'omitted/to be negotiated'*.

[7] In September 2010 Respondent provided a statement of account to Applicant in which he charged a contingency fee of 25% on an amount of R2 032 913.80 made up as follows:

- i. the capital payment of R1 433 736.00;
- ii. the value of the undertaking in the amount of R476 714.00;
- iii. past hospital expenses in the amount of R110 551.85; and
- iv. past hospital expenses paid in terms of the settlement in the amount of R11 912.02.

[8] Respondent's contingency fee amounted to the handsome sum of R508 222.45. After certain further disbursements were paid, including counsel's fees, hospital, medical and doctor's fees. Applicant received the amount of R581 930.65. Respondent then instructed a consultant to tax a party and party bill of costs and, during April 2011 Applicant received a further, and apparently as far as Respondent was concerned, a final payment R335 546.24 after the party and party costs had been taxed and recovered.

[9] Applicant was unhappy with the fees charged and, in October 2010, a complaint was laid on his behalf with the Cape Law Society against Respondent. In September 2013, evidently so as to interrupt the running of prescription and with a

view to obtaining the repayment of amounts alleged to have been wrongfully deducted by Respondent, these proceedings were instituted. To date the Law Society has still not finalised its hearing of the complaint against Respondent. Earlier this month it advised Applicant's attorney that its council had directed that the matter stand over pending finalisation of these proceedings.

[10] Respondent maintains that he is entitled to the 25% contingency fee which he charged and in his opposing affidavit explains in more detail how he arrived at this figure as follows:

'... Fielies (referring to himself) (was) forced to use what he had in his possession, namely, a fees statement of Adv Moses, which amounted to R278 271.25. Fielies then proceeded to calculate his fees based on that.

The amount of R278 271.25 x 2 = R556 542.50.

Fielies then proceeded to quantify his fees of 25% of R2 032 913.80 – R508 228.55.

And he took the lesser of the two amounts (R508 228.55) as his fees'.

THE CONTINGENCY FEES ACT AND THE AGREEMENT

[11] In *Price Waterhouse Coopers Incorporated & Others v National Potato Co-Operative Ltd & Others* 2004 (6) SA 66 SCA at 78C, the court, per Southwood AJA, stated as follows:

'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 (section

2(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 (section 2(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 claims 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 (section 2(2)). The Act has detailed requirements for the agreement (section 3), the procedure to be followed when a matter is settled (section 4) and gives the client a right of review (section 5). ... 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] In *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 the Court was required to consider the validity of contingency fee agreements concluded when the proceedings to which they were related were at an advanced stage and after it was found that the pre-existing contingency fee agreements did not comply with the requirements of the Contingency Fees Act. The Court held that although on the face of it the new agreements appeared to be valid, as the prescribed form of agreement had been used, in substance, however, they were invalid as a result of the failure by the parties to observe the requirements of the Act. It held further that, despite not stating so expressly, the Act undoubtedly visited non-compliance with invalidity. In this regard the Court relied on the findings by the Court in *Price Waterhouse* [supra] and went on to state as follows: *'As both the initial and new*

contingency fee agreements are invalid, the common law will apply. Under the common law the plaintiff's attorneys are only entitled to a reasonable fee in relation to the work performed. Taxation of a bill of costs is the method whereby the reasonableness of a fee is assessed. The plaintiff's attorneys are therefore only entitled to such fees as are taxed or assessed on an attorney and own client basis'.

[13] In the present matter although the contingency fee agreement was concluded at an early stage, it is the content of that agreement which arguably renders it invalid and of no force and effect.

[14] The agreement appears to follow in part the prescribed format but falls short of the Act's requirements in many respects. To mention but some of these: in the clause dealing with the issue of the client/applicant being advised of other ways of financing the litigation it is recorded that this is not applicable: provision is made for the appointment of an advocate and the agreement is in fact signed by the counsel who acted in the matter. However, all of the substantive provisions relating to the terms of the agreement between the client and the advocate are left blank. The most important defect, however, is the contradictory provisions relating to the fee which Respondent would earn in the event of a successful result. Clause 6, although obscurely worded, appears to state that if the claim met with success Respondent would be entitled to double his normal fees or 25% of the total amount awarded, whichever is the lower, excluding costs. In the succeeding clause, clause 7, the agreement appears to provide that in the event of Applicant being partially successful the attorney would be

entitled to 25% of the amount settled upon. Neither success nor partial success is defined in the agreement. These two clauses, either taken together or separately, make no sense and do not comply with the requirements of the Act. They are contradictory or obscure and, most importantly, do not provide that upon a successful result Respondent would be entitled to double his normal fees or 25% of the award, whichever was the lower.

[15] As will be seen Respondent's position throughout is that he was entitled to a flat 25% contingency fee without properly measuring this against his normal fee as is required by the Act. To compound matters it is clear that Respondent, despite that elapse of many years, has taken no steps to draw a bill of costs which sets out the fees to which he claims to be entitled. Given the description of the work performed in the matter and the limited extent of the litigation I regard it as highly improbable that Respondent will ever be able to justify a fee approaching R500 000.00 in a matter which was resolved before the trial commenced.

[16] Be that as it may, and in accordance with the findings in *Price Waterhouse* and *Tjatji*, in the light of the obscure and/or contradictory provisions of the agreement and, provisions are on any interpretation non-compliant with the Act, it follows that the agreement is invalid and of no force and effect. It must therefore be set aside with the result that Respondent is only entitled to such fees as are taxed or assessed on an attorney and own client basis.

[17] Since the exercise of taxing such a bill of costs has regrettably not commenced, notwithstanding that Applicant has been disputing the fees and disbursements which he has been charged for more than three years, it follows that Respondent will have to be directed to tax such a bill of costs and must be put to terms in this regard. Given the time that has elapsed since the initial complaint was made I regard a period 45 days as more than adequate within which Respondent must file his bill of costs with the taxing master. I should add in this regard that in his opposing affidavit Respondent repeatedly complains that the original file in this matter was improperly removed from his control by Applicant's present legal representative. I am satisfied, however, that a full copy of such file has long since been delivered to Respondent.

[18] The ancillary relief which Applicant seeks is that Respondent pays to him the difference between the bill of costs as duly taxed (or agreed) and the amount deducted by Respondent in respect of fees and disbursements. There can be no difficulty with such relief which flows naturally from the declaratory order sought in the main prayer. Applicant also seeks interest on such balance with effect from 1 May 2011 until the date of payment. Applicant's counsel motivated for this date on the basis that it was some six months after Respondent initially accounted to Applicant and by which time Respondent had taxed a party and party bill of costs. It was thus reasonable to have expected Respondent to have taxed an attorney and own client bill by this date in order that he could justify claiming his fee be it double his fees or

25% of the award, whichever was the lesser. I accept both the logic and the fairness of this reasoning, namely, that if Respondent is unable to tax a fee in the amount which he has already charged, deducted and enjoyed he has, in effect, enjoyed the fruits of money to which he was not entitled and should therefore be required to pay interest thereon.

[19] Finally, Applicant seeks an order that Respondent pay the costs of the present application on the scale as between attorney and own client. In support of this prayer counsel submitted that Respondent had improperly attempted to exploit the contingency fee agreement by not limiting it as section 2(2) of the Act required and, furthermore, by purporting to take a percentage fee on '*amounts*' or '*awards*' that did not fall under the provisions of the Act. This was a reference to Respondent claiming a 25% success fee on the value of the Fund's undertaking in terms of section 17(4)(a) of the Act (without even applying a contingency factor), past hospital expenses paid directly to the Department of Health and past hospital expenses paid in terms of the settlement.

[20] Without expressing an opinion on two of these components, I am certainly of the opinion that charging a 25% success fee on the purported actuarial value of the section 17(4) undertaking, without applying a contingency factor and without seeking any input from Applicant, was completely inappropriate conduct on the part of Respondent. To these complaints can be added several more but I will mention only two. It is clear that Respondent has dragged his heels in responding to Applicant's

long-standing complaint concerning his fee and has stubbornly asserted a right to a 25% success fee where the agreement upon which that is based was clearly non-compliant with the Act. Secondly, and without touching upon the reasonableness of counsel's fee in this matter, I note that to that fee counsel added a 15% '*contingency*' in the amount of R36 295.25. I can see no basis for counsel charging such a '*contingency fee*' as a surcharge and certainly it finds no basis in agreement into which he entered. Respondent, however, paid this fee without demur.

[21] In these circumstances I consider that there is ample justification for a costs order against Respondent on the attorney and own client basis. In the result the follow order is made:

1. The "**CONTINGENCY FEE AGREEMENT**" entered into between Applicant and Respondent in respect of fees payable by Applicant to Respondent in pursuance of Applicant's claim against the Road Accident Fund in respect of an accident in which Applicant was involved on 23 September 2003, a copy whereof is attached to the Founding Affidavit marked "**CD1**" is declared invalid, void and of no force or effect;
2. Respondent is directed to deliver to Applicant within 45 (FORTY-FIVE) days of this Court Order a fully itemised and detailed accounting in the form of an attorney and own client Bill of Costs drawn on the High Court scale as promulgated from time to time in terms of the Rules Board for Courts of Law Act 107 of 1985, supported where necessary by vouchers, as well as disbursements incurred in case number 2773/2007 in the matter between Applicant and the Road Accident Fund; and

3. *Respondent shall tax such Bill of Costs, if Applicant so requires, and on 30 (THIRTY) day notice to Respondent failing which Applicant may set the Bill down for taxation on notice to Respondent;*
4. *Respondent shall pay to Applicant any difference between the Bill of Costs as duly taxed and the amount deducted by Respondent in respect of fees and disbursements within 7 (SEVEN) days of such taxation;*
5. *Respondent shall pay interest on any balance to be repaid at the rate of 15,5% per annum from 1 May 2011 to date of payment;*
6. *Respondent shall pay the costs of this application on the scale as between attorney and own client.*

[22] Finally, I must record some observations concerning the complaints which were lodged on behalf of Applicant relating to the fees which he was charged with two professional bodies, namely, the Cape Law Society in relation to Respondent's fee and the Cape Bar Council in relation to the fees charged by the counsel who was engaged to represent Applicant. As previously mentioned, even though a complaint was lodged with the Law Society on behalf of Applicant in October 2010, after the elapse of more than three years no substantial progress appears to have been achieved. Had any disciplinary proceedings which the Law Society initiated been pursued by it with more vigour then the present litigation may have proved

unnecessary. As it was Applicant was forced to institute these proceedings in order to avoid prescription.

[23] As regards the Bar Council it would appear that a complaint was laid in December 2010 but on the papers before me again there is no indication that the complaint was followed up or any action was taken by the Bar Council in the matter. In the result I will be forwarding a copy of this judgment to both professional bodies for their consideration and, if they deem it necessary, for further action.

L J BOZALEK
JUDGE OF THE HIGH COURT