IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 4000/2017

REPORTABLE

In the matter between:

NOWETU MKUYANA **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

FULL BENCH JUDGMENT

Van Zyl DJP:

[1] The judgment deals with the legislative framework for a fee arrangement in a contingency fee agreement between a legal practitioner and his client that entitles the practitioner to receive an increased fee that is higher than his normal fee if the client's claim is successfully prosecuted.

[2] The background is that the plaintiff was injured in a motor vehicle accident in

December 2012. In September 2017 she instituted an action against the Road Accident Fund for the payment of damages that she suffered as a result of the injuries she had sustained in the accident. The matter was set down for trial on 27 November 2018. On the day of the trial the parties informed the trial Judge (Bloem J) that the matter had become settled and he was furnished with a draft order. In compliance with the provisions of section 4 of the Contingency Fees Act[1] (the Act) the plaintiff's attorney also provided the Judge with a contingency fee agreement entered into by the plaintiff and Antonio de Sousa of A C de Sousa Attorneys, an affidavit by the plaintiff accepting the settlement of her claim, and an affidavit by Diane Jepp, an attorney in the Grahamstown office of A C de Sousa Attorneys who dealt with the matter.[2]

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[1] Act 66 of 1997

[2] Section 4 reads:

"Settlement

(1) Any offer of settlement made to any party who has entered into a contingency fee agreement, may be accepted after the legal practitioner 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 her 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;

[3] Bloem J was satisfied with the terms of the draft order which made provision for payment by the defendant to the plaintiff of the sum of R1 051 880.30, with interest thereon, costs of suit on a party and party scale, and the furnishing of an undertaking to the plaintiff in terms of section 17(4)(a) of the Road Accident Fund Act.[3]

[4] Bloem J proceeded to make an order in accordance with the terms of the settlement. He however raised a question with regard to whether the settlement agreement was compliant with the Act, and ordered the plaintiff and her attorney to make submissions with regard to the following issues:

"8.1 The explanation for the fee agreement having been concluded between them on 30th August 2018 when the action was instituted on 6th September 2017;

8.2 The reasonableness of the legal practitioner's fees as set out in clause 6(b)(i) and (ii)of the fee agreement;

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

(c) his or her attitude to the settlement.

(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 a court.

[3] Road Accident Fund Act, 1996 (Act No. 56 of 1996).

8.3 Whether this court is entitled to enquire into the reasonableness of the fees referred to in paragraph 8.2 above."

[5] The issues raised were subsequently referred to the full court for determination as envisaged in section 14(1)(b) of the Superior Courts Act 10 of 2013. At the hearing of the matter senior counsel representing the plaintiff's attorneys informed the court that the plaintiff decided not to make submissions and to abide by the decision of the court. At the request of the court, the Eastern Cape Society of Advocates appointed senior and junior counsel as *amici curiae* to make submissions with regard to the validity of the contingency fee agreement. Both sets of counsel presented extensive heads of argument, and we are indebted to them for their thorough argument, which has been of assistance to us.

[6] The plaintiff's attorneys filed affidavits wherein it was sought to justify the fees in the contingency agreement. According to Mr de Sousa, he has been practising as an attorney since 1997. He has been practising for his own account in Durban since 2004 as A C de Sousa Attorneys. He explained that during June 2017 his firm took over the plaintiff's claim from another firm, and he concluded a contingency fee agreement with the plaintiff on 31 July 2017. Therein it was agreed that the attorney **"shall be entitled to fees and disbursements in respect of work done calculated on an attorney own client basis",** and that the attorney **"shall be entitled to charge a fee based on an hourly rate of R5 000,00 per hour for**

all work performed in regard to attendances, consultations, e-mails, telephone calls."

[7] Mr de Sousa further stated that during February 2018 Ms Jepp informed him that a Judge of this Court, Pickering J, had voiced his concerns about the hourly rate of R5000.00 of the plaintiff's attorney in a contingency fee agreement in another matter. After a discussion with colleagues, specifically Mr Friedman, he decided that attorneys in his firm with 10 years' plus experience would charge a normal fee of R4 500.00 per hour. The plaintiff was contacted, and on 30 August 2018 another contingency fee agreement was concluded.

[8] According to Mr de Sousa he specialises in personal injury claims, including medical negligence claims and claims against the Road Accident Fund. One of the persons whom he consulted after Pickering J had raised his concerns about the hourly rate of R5 000.00 was Mr Friedman whom he holds in high regard as an attorney practising in Durban for more than 30 years. Mr Friedman informed him that attorneys in his firm charged different hourly rates depending on their years of experience. He noted that attorneys with less than 10 years' experience charged R3 000.00 per hour while attorneys with more than 10 years' experience charged R5 000.00 per hour.

[9] He decided that in his firm, attorneys with 10 years' plus experience, those with less than 10 years' experience, and candidate attorneys, could charge hourly

fees of R4 500.00, R3 500.00 and R 1 500.00 respectively. He believed that those rates were reasonable regard being had to the expertise that the lawyers in his firm provided to their clients, his firm dealing almost exclusively with personal injury matters and the complexity of those matters. He stated that although the rates charged by the attorneys in his firm appear to be higher than those charged by many firms in the Eastern Cape, he believed that those rates are justified in view of the skills and experience that they offer.

[10] Ms Jepp confirmed that she was admitted as an attorney in 2000, practised as a solicitor in London from 2001 to 2008, and had been practising at the Grahamstown office of A C de Sousa Attorneys since 2014. She specialises in personal injury litigation. She had been prosecuting the plaintiff's claim. She confirmed having informed Mr de Sousa about the concerns raised by Pickering J. She furthermore confirmed that her hourly at the time of deposing to her affidavit, was R4 500.00, which she considered to be fair and reasonable.

[11] Mr Friedman has been practising as an attorney since 1986, specialising in personal injury claims. Mr de Sousa was employed by him as a professional assistant from about 1998 to 2001. He subsequently utilised Mr de Sousa's services as a consultant. He confirmed that as at 23 January 2019, when he deposed to his affidavit, he charged a rate of R5 000.00 per hour, which he allows for an attorney of more than 10 years' experience and which he stated was "***not uncommon in the industry"*** *and [he believed]* ***"that it is fair and reasonable, taking into account the skill and risk involved in these types of***

***cases*"**. He accordingly considered the fee at a rate of R4 500.00 per hour to be reasonable and fair.

[12] Both agreements purported to be contingency fee agreements that would entitle Mr de Sousa to an increased fee if the plaintiff was successful with her action against the Fund, as contemplated in section 2 (1) (b) of the Act. The reason for entering into a second contingency fee agreement was quite clearly Mr de Sousa's concern about the reasonableness of the hourly fee in the first agreement after it was raised by Pickering, J. In terms of clause 7 of the first agreement, Mr De Sousa's success fee was to be calculated on the basis of 100 % of his normal fee. His normal fee was recorded as being **"a fee charged on an hourly rate of R5 000-00 per hour for all the work performed in regard to attendances, consultation, e-mails, telephone calls."**

[13] In the second agreement the hourly rate was reduced. Clause 6(5) of that agreement provided as follows:

> **"The legal practitioner shall be entitled to charge a fee based on an hourly rate if:**
>
> **(i) Attorney (10 years plus experience)**
> **R4 500-00 per hour**
>
> **(ii) Attorney (1 – 10 years plus experience)**
> **R3 500-00 per hour**

(iii) **Candidate attorney**

R1 500-00 per hour

for all work performed in regard to attendances, consultations, emails, telephone calls."

[14] The contingency fee agreement that was placed before Bloem J was the second agreement. His concern was the validity of that agreement, and, particularly, what was stated therein to be Mr de Sousa's normal fee which was to be calculated on an hourly basis. The concern was motivated by the fact that the Act does not authorise a legal practitioner to recover a contingency fee that is exploitative. Whilst the Act provides an incentive for the legal practitioner concerned by allowing him to charge an increased fee, it is not, in the words of Plasket J in Erasmus v Williams[4], **"… intended to be a licence to plunder up to 25 percent of any award paid to a client who had entered into a contingency fee agreement, and who is usually indigent".** The Act is therefore not intended to be a mechanism for a legal practitioner to charge fees that are unreasonable, and to unjustifiably increase his fees simply to place him in a position to recover the maximum of the success fee which the Act allows. To hold otherwise would be inconsistent with the purpose of the Act, namely to enhance access to justice by enabling litigants who would otherwise not have been able to afford it, to engage the services of a legal practitioner.

[4] 2016 JDR 2007 (ECG 3364/2016; 8 December 2016) at para [13]. See also Mathimba v Nonxuba 2019 (1) SA 550 (ECG) at para [101].

[15] Contingency fee agreements facilitate access to justice as they enable litigants to obtain legal representation to prosecute their claims where the litigant may otherwise have been unable to do by reason of the prohibitive cost of litigation. However, such agreements carry with them the inherent risk of abuse and the incentive to profit. The undesirable features of contingency fee agreements were highlighted as follows in South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development, (Road Accident Fund, Intervening Party):[5]

"The first is that they compromise the lawyer's relationship with his client by introducing conflicts of interest, and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with a financial interest in the outcome of the case, which may adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding desire to secure a successful outcome may tempt him or her into practices which may compromise his or her duties to the court, such as coaching witnesses, misleading the court, falsifying evidence, etc."[6]

[16] Unregulated, contingency fees agreements have the potential for earnings by

[5] 2013 (2) SA 583 (GNP).

[6] Idem at (587 H-I) fn 5.

legal practitioners which are excessive and disproportionate to the labour and risk invested. This will negatively impact on public confidence in the legal system. The legislature was clearly conscious of the risk of exploitation when it legitimised contingency fee agreements. What the Act therefore sets out to do is to carefully regulate the extent to which a legal practitioner may agree with his client for the payment of an increased fee. It does that in section 2 of the Act. It reads as follows:

""**2 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] What section 2 does is to place a limitation on the contingency fee that an attorney may recover from his client. In the scheme of the Act this is achieved in three ways: The agreed increased fee, or as it is referred to in section 2, the success fee or uplift fee as it is also known, is firstly limited by confining it to an amount that represents an increase in the attorney's normal fees. The principle is that the legal practitioner charges his normal fee, and as an added incentive, to compensate him for the risk of undertaking the litigation, he be rewarded by being permitted to agree with his client to charge an extra fee over and above his normal fee, either equal to or a percentage increase on the normal fee. The normal fee of the practitioner is therefore taken as the base fee from which a percentage increase is by agreement with the client permissible to arrive at the amount of the success fee. **"What is important is that there is a base (the normal fee) from which a percentage increase is permissible. This is the ordinary and only basis on which the practitioner may increase fees. The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fee, and then increases it in terms of the contingency fees agreement. The success fee is a fee which has been increased from the normal**

fee."[7] This statement is correct. Otherwise than the success fee, the amount of the practitioner's normal fee is therefore not determined by way of mutual consent in the contingency fee agreement, but rather by the provisions of the Act itself. This feature is dealt with more fully later in this judgment.[8]

[18] The second limitation placed on the success fee is that it may not exceed the legal practitioner's normal fee by more than 100 %. The practitioner concerned may therefore negotiate and agree with his client an increase in his normal fee by say 10 %, 20 %, 30 % etc, but the percentage increase may never exceed 100 %.[9]

[19] To prevent the proceeds of the claim from being absorbed by the fees, the third and last limitation is expressed as a percentage of the client's capital award, which the success fee may not exceed, namely 25 %. The amount recoverable as fees by the practitioner concerned may therefore not exceed 25 % of the award, no matter how much work the practitioner has done, and not, as contended in some cases in the past, that the Act allows an attorney to without more charge a success fee equal to 25 % of the capital amount awarded by the

[7] Masango v Road Accident Fund 2016 (6) SA 508 (GJ) at para [12]. See also Cilliers Law of Costs at page 15 – 25.

[8] See paragraph [30] and further.

[9] Masango v Road Accident Fund 2016 (6) SA 508(GJ) at para [12].

court to the client.[10]

[20] Prior to the passing of the Act contingency fee agreements were deemed to be *contra bonos mores* and were prohibited at common law.[11] They can only be entered into in accordance with the provisions of the Act. Due to the risk of abuse attendant on contingency fee agreements, it is trite that the intention of the legislature is that contingency fee agreements must be carefully and strictly controlled.[12] In Price Waterhouse Coopers Incorporated and Others v National Potato Co-Operative Ltd[13] Southwood AJA explained it as follows:

"The Act has detailed requirements for the agreement (s 3), the procedure to be followed when a matter is settled (s 4) and gives the client a right of review (s 5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s 6) and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise

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[10] Erasmus v Williams at para[13]; Thulo v Road Accident Fund 2011 (5) SA 446 GSJ at paras [51] to [52]; Mfengwana v Road Accident Fund 2017 (5) SA 445 (ECG) and Masango v Road Accident Fund 2016 (6) SA 508 (GJ).

[11] Incorporated Law Society v Reid (1908) 25 SC 612 at 615 and 618 – 619; Hitchcock v Raaff 1920 366 TPD at 369; Lekeur v Santam Insurance 1969 (3) SA 1 (C); Price Watehouse Coopers Inc and Others v National Potato Co-Operative Ltd and Another 2004 (6) 66 (SCA) at para (41); De La Guerre v Ronald Broboff & Partners Inc and Others [2013] ZAGPPHC (33) (February 2013); SA Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party) 2013 (2) SA 583 (GSJ) at para [2] and [7] Ronald Bobroff & Partners Inc v De La Guerre; [2] and Fluxmans Inc v Levenson (523/2015) [2016] ZASCA 183 (29 November 2016).

[12] De La Guerre v Ronald Bobroff & Partners Inc and Others (22645/2011) [2013] ZA GPPHC 33 (13 February 2013) and Masongo v RAF 2016 (6) SA 508 (GJ) at para [54].

[13] 2004 (6) SA 66 (SCA) at para (41).

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."[14]

[21] Contingency fee agreements are accordingly subject to judicial oversight and intervention. This is consistent with the right vested in the courts at common law to determine the propriety of any agreement entered into between an attorney and his client with regard to fees. The authority of the court to set aside a fee agreement is founded upon considerations of public policy and in the context of the supervisory function of the court over the conduct of its own officers, and the protection of the court's dignity and reputation.[15]

[22] A contingency fee agreement that is not covered by the Act, or which does not comply with the requirements of the Act, is invalid.[16]

"Although the Act does not state in express terms that a failure to fulfil the statutory requirements will render the contingency fee agreement null and void,

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[14] Idem at para [41].

[15] Cambridge Plan AG v Cambridge Diet (Pty) Ltd 1990 (2) SA 574 (T) 600 A-E and Muller v The Master and Others 1992 (4) SA 277 (T) at 284 B-C.

[16] Ronald Bobroff & Partners Inc v De La Guerre 2014 (3) SA 134 (CC); Masango v Road Accident Fund 2016 (6) 508 (GJ) at para [1]; Fluxmans Inc v Levenson 2017 (2) SA 520 (SCA); Mostert and Others v Nash and Another 2018 (5) SA 409 (SCA) at para [54]; Mfengwana v Road Accident Fund 2017 (5) SA 445 (ECG) at para [12], and Mathimba and Others v Nonxwba and Others 2019 (1) SA 591 (ECG) at para {118.1].

there are clear indications that this was indeed the legislature's intention. The primary object of the Act was to legitimise contingency fee agreements which were otherwise prohibited by the common law. The purpose was also to encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts but subject to strict control so as to minimise the disadvantages inherent in the contingency fee system and to guard against its abuse . . . The safeguards introduced to prevent such abuses include ss 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would undoubtedly have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions."[17]

[23] In Mostert and Others v Nash and Another[18] Wallis J once again confirmed that the intention of the legislature is that the provisions of the Act must be complied with strictly. **"Any non-compliance with, or departure from, the requirements of the CFA, either as to substance or as to form, renders the contingency fee agreement invalid and unenforceable."**[19] The reason for demanding strict compliance with the provisions of the Act is that a contingency fee agreement is otherwise unlawful as it is prohibited at common law. Another reason, according to Plasket J in Mfengwana v Road Accident Fund, is that it is **"…necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients – a phenomenon that is, in my experience, unfortunately all too common."**[20] With regard to the duty and the functions of the court,

[17] Tjatji v Road Accident Fund 2013 (2) SA 632 (GSJ) at para [21].

[18] 2018 950 SA 409 (SCA).

[19] Idem at para [54].

[20] 2017 (5) SA 445 (ECG) at para [12].

Mojapelo DJP in Masango v Road Accident Fund[21] emphasized that it is the responsibility of the courts to exercise strict control by ensuring that contingency fee agreements that do not comply with the Act, for whatever reason, should be declared invalid.

[24] In accordance with the scheme of the Act and the court's oversight function, the starting point to the present enquiry is therefore whether, what is stated in the second agreement as being the attorney's normal fee, complies with the provisions of the Act. Before proceeding to examine the relevant provisions more closely, it is useful to first briefly look at the common law position with regard to those fees which an attorney charges his client for professional services rendered.[22] Such fees form part of the scale of costs referred to as attorney and own client costs,[23] which is the scale of costs that is envisaged in the definition of normal fees in section 1 of the Act.[24] The law with regard to attorney and own client costs is relatively well settled.

"Attorney and client costs are the costs that an attorney is entitled to recover from his client for the disbursements made by him on behalf of his client, and for the professional services rendered. These costs are payable by the client whatever the outcome of the matter in which he engaged the attorney services, and are not

[21] 2016 (6) SA 508 (GJ) at para [54].

[22] Aircraft Completions Centre (Pty) Ltd v Rossouw and Others 2004 (1) SA 123 (WLD) at 166 D.

[23] Coetzee v Taxing Master, South Gauteng High Court 2013 (1) SA 74 (GSJ) at para [12].

[24] See para [30] and further of this judgment.

dependent upon any award of costs by the court. In the wide sense it includes all the costs that the attorney is entitled to recover against the client on taxation of his bill of costs, but in the narrow and more technical sense, the term is applied to those costs, charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party."[25]

[25] The relationship between a client and his attorney is that of principal and agent based on a contact of mandate.[26] The attorney is entitled to be remunerated for his services. His charges may be agreed in advance or they are the usual or normal fees due for the work actually performed. Irrespective of whether the attorney's fees are agreed, the fee charged must be reasonable.[27] Reasonableness is the standard against which the attorney's fee must ultimately be measured.[28] Based on considerations of public policy the court retains the right to decide what a fair and reasonable remuneration would be. A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an attorney to charge an unreasonable fee that amounts to overreachment, will be unreasonable and consequently unenforceable.[29] **"An agreement would be**

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[25] Hawkins v Gelb and Another 1959 (1) SA 702 (WLD) at 705. See also Cilliers, Loots and Nel Herbstein & Van Winsen Civil Practice of the High Courts of South Africa vol 2 5th ed (2009) at page 1000.

[26] Mort NO v Henry-Shield Chiat 2001 (1) SA 464 (C). See also Herbstein and van Winsen op cit page 1000. Goodricke and Son v Auto Protection Insurance Co Ltd (in liquidation) 1968 (1) SA 717 (A) at 722 H; Blakes Maphanga Inc v Outsurance Insurance Co Ltd 2010 (4) SA 232 (SCA) at para [16] and Benson and Another v Walters and Others 1984 (1) SA 73 (A) at 83 A.

[27] Ben McDonald Inc and Another v Rudolph and Another 1997 (4) SA 252 (T) at 256 C-D.

[28] President of the Republic of South Africa v Gauteng Lions Rugby Union 2002 (2) SA 64 (CC) at para [51].

[29] Goolam Mohamed v Janion (1908) 29 NLR 304; Law Society of South West Africa v Steyn 1923 SWA 47 at 52; Law Society of the Cape of Good Hope v Tobias and Another 1991 (1) SA 430 (C) at 435 B-C; Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC and Others 1998 (3) SA 608

unreasonable if, for instance, it authorised unprofessional fees or work or expenses which were unreasonable or unnecessary ….”[30] An unprofessional fee is a fee that constitutes overreachment, that is, **“the extraction by an attorney from his client, by the taking by the former of undue advantage in any form of the latter, of a fee which is unconscionable, exercise or extortionate, and in so overreaching his client that attorney would be guilty of unprofessional conduct.”**[31]

[26] The usual method for determining the reasonableness of a disputed attorney and client fee is taxation. That is the task of the Taxing Master. He is a court appointed official and derives his authority to tax an attorney and client bill of costs from the provisions of Court Rule 70 (1) (a).[32] The duty of the Taxing Master is to satisfy himself that the fees charged by the attorney are reasonable and relates to the work specifically authorised by the client.[33] Attorney’s fees which have been agreed to, either expressly or impliedly, would be allowed on taxation, subject to the qualification that in reaching such agreement the client

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(DLCLD) at 612 E-F and Melamed & Hurwitz Inc v Goldberg (686/2007) [2009] ZASCA 15 (19 March 2009).

[30] Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T) at 601 G-H.

[31] Law Society of the Cape of Good Hope v Tobias and Another 1991 (1) SA 430 (C) at 435 A-C. See also Muller v The Master and Others 1992 (4) SA 277 (T) at 284 F-G.

[32] It reads:

“The taxing master shall be competent to tax any bill of coats for services actually rendered by an attorney in his capacity as such in connection with litigious work and such bill shall be taxed subject to the provisions of subrule (5), in accordance with the provisions of the appended tariff: Provided that the taxing master shall not tax costs instances where some other officer is empowered so to do.”

[33] Malcolm Lyons & Munro v ABRO and Another 1991 (3) SA 464 (w) at 469E.

had not been overreached.[34] In the absence of an agreement to charge a specified fee, it is accepted that the taxation of an attorney and own client bill is done in accordance with certain principles. In *Gross v Svirsky*[35] it was stated as follows:

"The court recognizes, especially in a bill of costs between attorney and client, that the experience of the taxing master and his diligence in seeing that the client is not unduly saddled with costs of his attorney, is practically the only protection that the client has. It is very seldom that a client must bring in review the question of taxation of attorney and client costs, though we have had such cases. Another reason why I personally think that the court should be very reluctant to interfere with the taxing master's discretion is that, unless there is a special agreement between attorney and client that special fees should be granted, the taxing master has to be guided in every case by certain principles. The court has held that the scale of fees laid down as between party and party in the tariff of attorney's fees applies mainly as between party and party, and it does not necessarily apply as between attorney and client. I cannot agree with counsel's contention that because a bill of costs is one between attorney and client, the fees allowed should be more liberal; that they should be on a higher scale, merely because it happens to be a bill between attorney

[34] Benson and Another v Walters and Others 1981 (4) SA 42 (C) at 49C; Deeb v Pinter 1984 (2) SA 507 (WLD) at 509 A-B; Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T) at 600 E-F; Law Society of the Cape of Good Hope v Tobias and Another 1991 (1) SA 430 (C) at 435 A-C; Muller v The Master and Others 1992 (4) SA 277 (T) at 284 B-G and Melamed & Hurwitz Inc v Goldberg (686/2007) [2009] ZASCA 15 (19 March 2009).

[35] 1923 TPD 422.

and client and not between party and party."[36]

[27] In the absence of an agreement to pay a special fee, an attorney is not necessarily entitled to a higher fee on taxation for the work that he had performed as between attorney and client, than what the client could recover in a party and party bill of costs.[37] It is an accepted principle on taxation of a bill of costs on an attorney and own client scale, where there is no agreement on costs between the litigant and that litigant's attorney, that the court tariff for party and party costs in Court Rule 70 is used as a guide.[38] **"While it is quite true that the tariff which exists in the case of party and party taxation is not binding upon attorneys who claim fees under an attorney and client bill, there is no reason why the tariff as between party and party should not be taken as a guide and applied in so far as no express or implied agreement is proved to authorise larger charges."**[39]

[28] There are different approaches with regard to the extent to which the Taxing Master is obliged to adhere to the tariffs in Uniform Rule 70. One approach is that the Taxing Master is bound to apply the tariff, or at least be guided fairly

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[36] Idem at 424 – 425.

[37] Gross v Svirsky 1923 TPD 422 at 425; Loots v Loots 1974 (1) SA 431 (E) at 434 A-B and Oshry and Lazar v Taxing Master and Another 1947 (1) SA 657 (T) at 660.

[38] Oshry & Lazar v Taxing Master and Another 1947 (1) SA 657 (T) at 660; See also Malan v Meyer 1974 (1) SA 476 (T) at 477 H; Coetzee v Taxing Master, South Gauteng High Court 2013 (1) SA 74 (GSJ) at para [25.3.2]; Society of Advocates of KZN v Levin [2015] 4 All SA 213 (KZP) at para [11]; Herbstein and von Winsen opcit at page 1000 to 1001; Francis-Subbiah Taxation of Legal Costs in South Africa at page 95; Jacobs and Ehlers Law of Attorney's Cost and Taxation. Thereof at page 50 to 51 and Cilliers Law of Costs at page 13-14 (1).

[39] Oshry and Lazar v Taxing Master and Another 1947 (1) SA 657 (T) at 660.

rigidly by it,[40] and that any deviation from the prescribed tariff must be in the exercise of the Taxing Master's discretion, **"in extraordinary or exceptional cases"** as envisaged in Unifrom Rule 70 (5).[41] Another view is that the tariff is not binding to the attorney and own client scale, and that the fee is **"… always, *ab initio*, discretionary, albeit dictated by a margin of deviation from the tariff from 0 % to X %, which can be justified by reference to relevant norms."**[42]

[29] It is in our view unnecessary, in the context of deciding whether the attorney's normal fee which he is obliged to disclose in the contingency fee agreement is compliant with the provisions of the Act, to deal with the nature of the discretion which the Taxing Master exercises on taxation when he is tasked to quantify costs on an attorney and own client scale in the exercise of his authority in Court Rule 70 (1). The reason lies in the nature of the enquiry the court is called upon to conduct in the exercise of its duty to oversee compliance with the provisions of the Act. As will be more fully discussed hereunder, an enquiry in terms of the Act into the legality of the attorney's normal fee, is an objective assessment that will be conducted on the basis of certain specified considerations or factors, which factors are aimed at achieving proportionality and consistency of the amount that constitutes the basis for the agreed success fee. The purpose of incorporating

[40] Aircraft Completions Centre (Pty) Ltd v Rossouw and Others 2004 (1) SA 123 (W) at 166 E – 167A.

[41] Subrule (5) provides:

"The taxing Master shall be entitled, in his discretion, at any time to depart from any of the provisions of this tariff in extraordinary and exceptional cases, where strict adherence to such provisions would be inequitable."

[42] Sutherland J in Coetzee v Taxing Master, South Gauteng High Court and Another 2013 (1) SA 74 (GSJ) at para [21].

into the enquiry the norms and principles applicable to the taxation or assessment of costs on an attorney and own client scale, is to achieve some measure of consistency and certainty of the amount of the normal fee. In that context, the role played by the principle that the court tariff provides a guide for the determination of the reasonableness of fees an attorney charges his client, can simply be stated as that it provides a yardstick against which the attorney's normal fee in the contingency fee agreement is to be measured in an overall assessment of the reasonableness of that fee.

[30] The point of departure of any enquiry into the enforceability of an agreed contingency fee is therefore the base fee, which the Act requires to be the attorney's normal fee that must be set out in the agreement. What the normal fee is, is clearly defined in section 1 of the Act. It reads as follows:

> **"normal fees', in relation to work performed by a legal practitioner in connection with proceedings, means the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney and own client basis, in the absence of a contingency fees agreement."**

[31] On a reading of section 2 and the definition of **"normal fees"**, in section 1 it is clear that the base fee must be a fee that is reasonable for the services of the legal practitioner. Consistent with the common law position, it establishes

"reasonableness" as the standard by which the base fee must be judged. The question is, how is the reasonableness of the fee to be assessed? A reasonable fee is a fee that is fair. A fee is fair if it is appropriate for the work performed by the practitioner and falls within a range of fees that is usually charged for the same work. On a reading of the definition of **"normal fees"** in section 1 of the Act, this is exactly what the legislature had in mind.

[32] What is contemplated in the definition in section 1 is an objective assessment of the reasonableness of the fee essentially based on three factors: the nature of the work to be performed (**"such work"**); by the legal practitioner in question (**"such practitioner"**); and the norms and principles that find application in the taxation or assessment of costs on an attorney and own client scale, in the absence of a fee agreement. **"Such work,"** according to the definition is **"work performed by a legal practitioner in connection with proceedings"**. **"Proceedings"** are in turn defined in section 1 to include **"any proceedings in or before any court of law."** Read with section 2 (1) of the Act, that speaks of the forming of an opinion that there are reasonable prospects that the client may be successful **"in any proceedings,"** it is clear that **"such work"** in respect of which a reasonable fee may be charged is work performed in the proceedings which form the subject matter of the contingency fee agreement.

[33] As alluded to earlier, these factors are aimed at ensuring that the base fee is proportional to the work performed by the legal practitioner who is to perform the work in question, and is consistent with a fee that would otherwise have been

determined to be reasonable by applying the norms and principles applicable to the taxation of costs on the scale of attorney and own client. Further, the fact that the reasonableness of the base fee is assessed **"in the absence of a contingency fees agreement,"** contemplates an independent evaluation where reasonableness is measured free form any standard that may otherwise find application to fees that were agreed upon with the client.

[34] What this means is firstly that, unlike in a case of an express or implied agreement in respect of fees where the starting point of the court's analysis is the agreed fee, the determination of the practitioner's normal fee in terms of the Act is an independent valuation of a reasonable fee. Secondly, it is not necessary for the normal fees in the contingency fee agreement to reach a degree of unreasonableness, to the extent that it would amount to overreachment and unprofessional conduct on the part of the legal practitioner concerned, before it will constitute an unreasonable fee for purposes of the Act. In other words, a determination of the reasonableness of the base fee is separate from the ethical basis of the right of judicial intervention in fee agreements between an attorney and his client where the enquiry is focused on the extent of the unreasonableness of the fee so as to constitute abuse, impropriety, or overreaching, and therefore unprofessional conduct.

[35] A determination of the reasonableness of the attorney's normal fees for purposes of the Act therefore requires an objective assessment of what is appropriate in the circumstances of a particular case. Factors to be considered with regard to

the nature of the work to be performed, would among other things include the nature and subject matter of the case, its complexity, and the time and effort likely to be spent on it. The list is not intended to be exhaustive. Factors relevant to the practitioner who will perform the work may in turn include among others his experience, the skills level and expertise that is required to perform the work in question and the fees charged in the jurisdictional area by practitioners with comparatively the same level of skill and expertise. The relevance of any of these factors and the weight to be given thereto, will be dictated by the facts and circumstances of any particular case and the aim of achieving a measure of consistency and certainty in the determination of the reasonableness of the fee charged, as envisaged by the third criterion.

[36] As stated, the third criterion for determining the reasonableness of the disclosed fee incorporates into the assessment the norms and principles applicable to the taxation or assessment of the fee on an attorney and own client scale in the absence of a fee agreement. This means that the enquiry into the reasonableness of the base fee is guided by the court tariff that serves as a standard against which the reasonableness of the practitioner’s normal fee is measured. It serves as an indicator, with any adjustment thereto according to what can be justified by taking into account the number of factors which are relevant in the circumstances of any particular case.

[37] The question is then whether Mr de Sousa’s hourly fee, which he disclosed in the fee agreement with the plaintiff, is a reasonable fee, as envisaged in the

definition of a normal fee in section 1 of the Act. Counsel for Mr de Sousa urged the court to refer the issue to the Legal Practice Council for determination as envisaged in section 5 of the Act.[43] That section provides for a client of a legal practitioner who feels aggrieved by any provision or fees chargeable in terms of a contingency fee agreement to refer it for review to the professional controlling body of which the legal practitioner may be a member of.

[38] I agree with the *amicus* that we should not follow the suggested course, or for that matter, refer the matter to the Taxing Master to determine the reasonableness of the fee in accordance with this judgment. The issue is before us and we have been placed in a position to deal therewith to finality. The issues have been fully ventilated on the evidence and the court should not lightly and without good reason refuse to exercise its supervising duties and functions alluded to earlier when it is placed in a position to do so. Further, as will appear more fully hereafter, the premise on which the attorney proceeded to determine his normal fee, was fundamentally flawed. Another reason for us to decide the matter is that the contingency fee agreement is also invalid for other reasons which fall outside the mandate and the authority of the professional controlling body. This is dealt with later in this judgment.[44]

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[43]" **Client may claim review of agreement or fees**

(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section.

(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust".

[44] See paragraphs [46] and further.

[39] The hourly fee in the fee agreement in the present matter for an attorney with 10 years' experience is nearly four times the rate in the court tariff as is presently stands. At the hearing of the matter the Rules Board's proposed amendments to the court tariffs were placed before us. The proposed new fee tariffs have not as yet been adopted and promulgated. The proposed amendment makes provision for incorporating into Uniform Rule 69 a tariff of fees calculated at an hourly rate for attorneys with the right of appearance in the High Court, which rates are higher than the existing tariff in Uniform Rule 70, and where the hourly rate is proportionally increased according to the attorney's years of experience. By way of example, the suggested tariff for an attorney with ten years' experience is set at a minimum of R1 726-00 and a maximum of R2 071-50. That represents an increase of approximately 77 % from the existing fee in the tariff in Uniform Rule 70. In the context of the present matter, that still leaves Mr de Sousa's declared normal fee in the fee agreement at more than double the proposed maximum fee. The difference in the proposed tariff rates and the hourly rates in the fee agreement becomes even more pronounced in respect of those attorneys with less than 10 years' experience.

[40] On the evidence placed before us Mr de Sousa justified the departure from the court tariff essentially on the following basis: The first is that his firm almost exclusively deals with personal injury litigation and consequently has the necessary skills and expertise required for that type of work. Secondly, to undertake litigation of this nature on a contingency basis carries with it a

considerable financial risk. Thirdly, **"these type of matters … (are) of great importance and significance to the Plaintiff, is often complex … (and) is normally also a great volume of work."** Finally, according to Mr de Sousa, his firm's hourly rate is commensurate with that charged by other attorneys in Durban in Kwazulu-Natal whom he consulted on the matter.

[41] What is immediately evident from Mr de Sousa's evidence is that he justifies the amount of his normal fee by relying on generalisations, and that the hourly fee which he charges is what he regards as the standard fee that he charges in all personal injury cases. There has clearly been no attempt to justify the fee with reference to the complexity of the plaintiff's case, and the nature of work expected to be performed in prosecuting the plaintiff's case to its finality. A practitioner is not placed in too onerous a position to be expected to make an assessment of his fees at the outset on an individual basis, in respect of each case. The reason simply lies in the fact that the Act requires him to make an assessment of whether his client's case carries any prospects of success and to form an opinion that the case carries reasonable prospects of success, before he enters into a contingency fee agreement with the client. **"Section 2(1) provides that a legal practitioner may only enter into a contingency fee agreement with a client if of the opinion that the client has reasonable prospects of success in any proceedings. It is therefore a requirement that, before entering into the agreement, a full and proper assessment of the client's prospects of being successful in the proceedings be undertaken."**[45] An assessment, as envisaged in

[45] Tjatji v Road Accident Fund and two Similar Cases 2013 (2) SA 632 (GSJ at para [16].

section 2 (1), will place the legal practitioner in a position to determine the nature of the issues in the matter, their complexity, and the expected volume of work.

[42] It is correct, as stated by Mr de Sousa, that the undertaking of litigation on a contingency basis is speculative in nature and carries with it some risk of financial loss. It is in our view not a relevant factor in the context of the present enquiry. To the extent that it may be found to be a relevant factor in an assessment of the reasonableness of the base fee, any weight that may be attached thereto is diminished by the fact that the legislature has pertinently made provision for the legal practitioner to be compensated for undertaking the risk of litigation on a contingency basis by authorising him to charge his client an agreed fee that may exceed his normal fee by up to 100 %. It is not the intention that the risk be discounted by the charging of a higher than what would otherwise be a reasonable base fee in the circumstances of any particular case. With regard to the attorney’s claimed level of skills and expertise, those are factors which are not capable of being objectively measured with any certainty. It will consequently carry very little or no weight in the assessment of determining the reasonableness of the attorney’s normal fee. A more objective standard of measurement that promotes certainty and consistency, is an assessment of skills based on the attorney’s years of experience, as the proposed tariff for attorney’s with the right of appearance in the High Court sets out to do.

[43] As stated, Mr de Sousa further seeks to justify the base fee by relying on fees charged by attorneys with the same level of experience in the Durban area. The

difficulty with this is that the plaintiff is resident in Queenstown in the Eastern Cape and the action was instituted out of Mr de Sousa's office in the High Court in Grahamstown. The pleadings in the matter were signed by Ms Jepp and there is no evidence that it was necessary for any of the work in connection with the case to be performed in Durban by Mr de Sousa or any other attorney employed in the firm of A C de Sousa Attorneys. There accordingly exists no justification for Mr de Sousa to have based his normal fee on what is charged by attorneys in another jurisdictional area.

[44] For these reasons we are not satisfied on the evidence placed before us that what is reflected as Mr de Sousa's normal fees in the fee agreement which he entered into with the plaintiff, justifies the departure from either the existent or the proposed court tariff. We accordingly find that the fees do not meet the requirements for a reasonable fee as envisaged in section 1 of the Act. It renders the contingency fee agreement invalid. As stated, strict compliance with the Act is required. Further, the normal fee of the legal practitioner is the base fee from which his success fee is agreed and calculated. It is clearly not severable from the rest of the terms of the agreement. The contingency fee agreement is consequently invalid and unenforceable.

[45] That leaves the issue raised by the fact that the contingency fee agreement was entered into subsequent to summons having been issued. From the explanation advanced for that fact in the affidavits filed, it is evident that it came about as a result of the concern raised by Pickering J about the reasonableness of the normal fee in an obviously similarly worded fee agreement in another unrelated

matter. That caused Mr de Sousa to enter into a second agreement with the plaintiff, which agreement is the subject matter of this judgment. For good reason he was clearly of the view that the base fee of R5 000-00 in the first agreement would not pass judicial scrutiny. On a reading of the second agreement it is evident that it was a new agreement that was intended to replace the first agreement, and not simply to introduce an amendment thereto. Further, the plaintiff's attorney did not, either before us or before the trial Judge, seek to place any reliance on the first agreement. In the circumstances it can safely be accepted that the attorney had elected to abandon the first agreement.

[46] In *Tjatji v Road Accident Fund and Two Similar Cases*[46] the court, like in the present matter, dealt with a scenario where two contingency fee agreements were concluded between the clients and their respective legal representatives. Each client entered into a contingency fee agreement with his or her legal representative which agreements later turned out to be invalid. The clients thereafter entered into new contingency fee agreements a few days before the trial date or on the same day when the matter was set down to be heard.[47] The

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[46] 2013 (2) SA 632 (GSJ).

[47] The court summarised the contingency fee agreements in each case as follows in paras [5] – [7].

> **"[5] A new contingency fee agreement was entered into in case No 2009/11632 on 27 August 2012, some four days before the trial and three days before an acceptable offer was put by the defendant. The plaintiff's attorney explains that, when he was instructed to proceed with the claim, the plaintiff signed a 'cost agreement' and was at no stage required to carry any risk for fees or disbursements; and nor has the plaintiff paid any fees or disbursements to him.**
> **[6] The new contingency fee agreement in case No 2010/22475 was entered into on 29 August 2012, one day before the date set down for the trial. The plaintiff's attorney admits that in terms of the fee agreement in question he was to provide the plaintiff with funds to prosecute the action. He concedes that the agreement did not comply with the Act and that the new contingency fee agreement was entered into with the object of ensuring compliance.**

issue was whether the new contingency fee agreements complied with the provisions of the Act, and, were therefore valid and legally binding.

[47] It was argued that since the Act does not expressly state when and at what stage of proceedings the agreement should be concluded, such agreement may be entered into at any stage of the proceedings prior to the achievement of success, or what the parties consider to be success. The court once again dealt with this argument emphasising the need for compliance with the Act, and that a contingency fee agreement not concluded in compliance with the Act is illegal.[48] It found that, although the Act is silent as to when and at what stage of proceedings a contingency fee agreement may be concluded, there are textual indications in the Act that such agreements should be concluded at a sufficiently early stage of the proceedings in order to make it possible to comply with the provisions of the Act.[49] Whether or not the agreement was concluded at a sufficiently early stage was said to be a question of fact, and depends largely on the nature of the particular proceedings and whether compliance with the requirements of the Act was reasonably possible at that stage.[50] The textual

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[7] In case No 2006/4412 the new contingency fee agreement was executed on the date of the trial, 30 August 2012, after an acceptable offer was put to the plaintiff. The plaintiff deposes that at the outset of the action her attorney agreed to act on a contingency basis, but the agreement recording their arrangement is lost. Counsel for the plaintiff has conceded that the missing agreement did not comply with the Act, and hence the conclusion of the new contingency fee agreement."

[48] Tjatji v Road Accident Fund and Two Similar Cases 2013 (2) SA 632 (GSJ) at paras [13] and [21].

[49] Idem at para [15].

[50] Ibid.

indications referred to were the peremptory nature of sections 2[51] and 3,[52] where section 2 (1) requires a thorough evaluation of the merits of the client's claim to be made before the contingency fee agreement is concluded; subsections (2) and (4) of section 3 that require the legal practitioner to sign and deliver the agreement to the client before acting on a contingency basis; and subsections (1)

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[51] Idem at paras [16] and [18].

[52] Section 3 reads:

3 Form and content of contingency fees agreement

(1) *(a)* A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the *Gazette*, after consultation with the advocates' and attorneys' professions.
(b) The Minister of Justice shall cause a copy of the form referred to in paragraph *(a)* to be tabled in Parliament, before such form is put into operation.

(2) A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, 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.

(3) A contingency fees agreement shall state-
- *(a)* the proceedings to which the agreement relates;
- *(b)* that, before the agreement was entered into, the client-
  - (i) was advised of any other ways of financing the litigation and of their respective implications;
  - (ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;
  - (iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and
  - (iv) understood the meaning and purport of the agreement;
- *(c)* what will be regarded by the parties to the agreement as constituting success or partial success;
- *(d)* the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;
- *(e)* the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
- *(f)* either the amounts payable or the method to be used in calculating the amounts payable;
- *(g)* the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;
- *(h)* that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and
- *(i)* the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.

(4) A copy of any contingency fees agreement shall be delivered to the client concerned upon the date on which such agreement is signed."

and (3) of section 3 that prescribe the form and content for a valid contingency fee agreement.

[48] The court in Tjatji found that it is clear from a reading of section 3 that prior to concluding a contingency fee agreement, the legal practitioner must comply with subsection (3)(b)(i)–(iv), and agreement must also be reached on the matters specified in subsection (3)(c)–(g) and (i), in order to enable the client to appreciate the financial implications of the agreement. It would accordingly be inconsistent with the Act to agree on these issues only after the legal practitioner had already commenced acting on a contingency fee basis, and after disbursements had already been incurred.[53]

[49] The court in Tjatji also pointed to the fact that section 3(3)(h) makes provision for a 14 day cooling-off period during which the client is entitled to withdraw from the agreement. To enable the client to effectively exercise this right, he or she must be informed thereof by using the prescribed form of agreement which expressly refers to section 3(3)(h). It was held that to do so only after the legal practitioner had commenced acting on a contingency basis, and shortly before the trial would render the cooling-off provision nugatory and ineffectual.[54] It was accordingly held that although the new agreements appeared to be valid in form, as the prescribed form of agreement had been

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[53] Tjatji v Road Accident Fund and Two Similar Cases 2013 (2) SA 632 (GSJ) at para [19].

[54] Idem at para [20].

used, they were substantially invalid since the parties had not complied with the prescriptions of the Act.[55]

[50] We agree with the reasoning in Tjatji. In the present matter the contingency fee agreement upon which the plaintiff's attorney relies was only concluded a few months before the trial on 30 August 2018 despite the fact that the plaintiff's attorney had been working on the matter on a contingency basis since June 2017 when the firm took over the plaintiff's claim from another firm. It accordingly, for the reasons stated in Tjatji, does not comply with the provisions of sections 2 and 3 of the Act. As stated earlier, it is now settled law that non-compliance with the provisions of the Act renders a contingency fee agreement invalid and therefore legally unenforceable.[56]

[51] It follows that the plaintiff's attorney shall be entitled to recover from the plaintiff a reasonable fee for the services rendered to her.[57] Those fees are to be on the attorney and own client scale. The reasonableness of the fee will be assessed upon taxation by the Taxing Master. With regard to costs, the plaintiff should not in the circumstances be burdened with any costs occasioned by the entering into of the two contingency fee agreements, and the hearing and determination of the issues raised by the trial court.

[55] Idem at para [24].

[56] *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* note 6 at para [41]; *Mfengwana v Road Accident Fund* 2017 (5) SA 439 (ECG) at par [12]; and Mathimba and Others v Nonxuba and Others 2019 (1) SA 550 (ECG) at para [118.1].

[57] Tjatji v Road Accident Fund and Two Similar Cases 2013 (2) SA 632 (GSJ) at para [26].

[52] In the result, it is ordered:

52.1. That the contingency fee agreement between the plaintiff and Antonio de Sousa of A C de Sousa Attorneys concluded on 30 August 2018 be and is hereby declared invalid and set aside.

52.2. That the plaintiff's attorney shall be entitled to recover from the plaintiff his taxed attorney and own client costs on the high court scale, such costs to exclude any costs occasioned by the entering into of both contingency fee agreements and the hearing of this matter on 9 March 2020.

52.3. Before the taxation referred to in paragraph 53.2 above, the plaintiff shall be served with:

52.3.1. a copy of this judgment;

52.3.2. a copy of the attorney's attorney and own client bill of costs; and

52.3.3. a notice informing the plaintiff of the date of taxation and that she is entitled to legal representation by an attorney other than A C de Sousa Attorneys at the taxation.

52.4. The service referred to in paragraph 53.3 above shall be effected by the Sheriff at the instance of the plaintiff's attorney.

SIGNED

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D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

BLOEM J:

I agree.

SIGNED

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G H BLOEM
JUDGE OF THE HIGH COURT

RAWJEE AJ:

I agree.

SIGNED

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A RAWJEE
ACTING JUDGE OF THE HIGH COURT

For the Plaintiff: No Appearance

For the Defendant: No Appearance

For A C De Sousa Attorneys: Adv Paterson SC

Amicus curae: Adv D H De La Harpe SC / K L Watt

Date heard: 9 March 2020.

Date of delivery of judgment: 2 July 2020