

SOUTH AFRICA / JUDGMENT

Dyongo v Road Accident Fund (2465/2021) [2023] ZAECKMKHC 56 (4 May 2023) [2023] ZAECKMKHC 56

COURT

Eastern Cape High Court, Makhanda

BEFORE

Tilana-Mabece

CASE / FILE NUMBER

2465/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, MAKHANDA)****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED.****Case****No: 2465/2021****Matters****heard on: 3 March 2023****Judgment****delivered on: 4 May 2023****In**

the matters between: MAWANDE
DYONGO
PLAINTIFF
and
ROAD
ACCIDENT FUND
DEFENDANT
Case
No: 2093/2021
CLAUDIO
JOHNVE MINNIE
PLAINTIFF
ROAD
ACCIDENT FUND
DEFENDANT

JUDGMENT

Tilana-Mabece AJ

Introduction

- [1] The issues for determination in both cases involved the validity of the contingency fees agreements entered into with the respective legal representatives which, practically and conveniently, required that a consolidated judgment be produced.

Background

- [2] In order to elucidate a better understanding of the issues arising, it is necessary to provide a brief background. The plaintiffs instructed their respective attorneys to institute actions against the Road Accident Fund ('the RAF') for payment of damages suffered as a result of injuries sustained in motor vehicle collisions. The RAF made settlement offers which were eventually accepted by the attorneys on behalf of their respective clients. Subsequent to the settlement of the matters, draft orders were prepared and presented to court to be made orders of the court.
- [3] It became apparent when the parties were presenting the draft orders that there were contingency fee agreements entered into with the legal representatives in both matters. What prompted concern in these matters was the fact that when the files were brought before a Judge in chambers, the requisite affidavits in terms of the Contingency Fees Act 66 of 1997 ('the Act') were not in the files. It was further noted that the legal practitioners would initially present their draft orders and only thereafter alert the court to the existence of the contingency fee agreement and the requisite affidavits.

[4] In the Dyongo matter affidavits together with the contingency fee agreement were submitted to the Judge after the draft order had already been made an order of court. This resulted in the order being recalled so as to exercise the monitoring function on the agreement as enjoined by the Act. This prompted the need for this judgment as the practice was apparently widespread in the division.

[5] In the interest of justice and in order not to prejudice the plaintiffs and having satisfied myself with the competency of the draft orders, I proceeded to issue orders in terms of the drafts that were presented by the parties. My approach was informed by the passage in the case of *Mfengwana v Road Accident Fund*[1] where the court remarked as follows:

‘. . . I am able to make an order, in the absence of compliance with s 4(1) and s 4(2) of the Act, to settle Mr Mfengwana’s claim against the RAF. I do so because, it seems to me, [the claimant] will be prejudiced by any further delay, which is not of his making, and because, having been seized of the matter, I have satisfied myself (to the extent that I am able) that the settlement is fair. . .’

[6] Upon consideration of the contingency fee agreements I formed a prima facie view that the agreements were not in compliance with the Act. This prompted a directive to be issued applicable to both matters which read as follows:

‘Having read the contingency fee agreement and the documents filed it is directed as follows:

1. The contingency fee agreement was presented with the draft order and in order not to prejudice the plaintiff, the draft orders agreed between the parties were granted and judgement was reserved on the validity of the Contingency Fee Agreement.
2. For a proper adjudication and proper exercise of the court’s judicial function in monitoring these contingency fee agreements the following aspects have been identified:

2.1 The form and content of the agreement does not seem to meet the requirements as stated in Sections 2,3 and 4 of the Contingency Fee Act;

3. Flowing from this prima facie view the parties and/or legal representatives are invited to submit written arguments to the Judge in chambers on the following aspects:

3.1 Whether Sections 2,3 and 4 of the Act are prescriptive or enabling;

3.2 Whether the agreement in question is compliant with the Act in view of the provisions in the above-mentioned sections and to what extent.

3.3 Whether substantive compliance is sufficient to render the agreement valid.

4. The written submissions must be delivered on or before Friday, 10 March 2023 at 13:00.’

[7] Submissions under case no: 2465/2021 (Dyongo matter) on behalf of Matyeshana Townley Inc. were received on the due date. Attached to the submissions was a copy of the form prescribed in terms of section 3(1) of the Act.

- [8] The opening paragraph in the written submissions by counsel for Matyeshana Townley Inc. read as follows: ‘This matter was settled between the parties and an order taken by agreement on 1 March 2023. The contingency fee affidavits as required by the Section 4 of the Contingency Fee Act were filed with this honourable court with the copy of contingency fee agreement’.
- [9] I hasten to point out that this submission is inaccurate and incomplete for reasons that will appear below. The matter was on the roll on 1 March 2023 and was rolled over to the following day because parties were finalizing settlement and the draft order to be presented in court. The draft order was made an order of court only on 3 March 2023. This paragraph further suggests that there was compliance with section 4 (1) of the Act, which is not correct.
- [10] It must be mentioned at this stage that the contingency fee agreements and the requisite affidavits did not bear a court stamp indicating when they were filed in court. Unfortunately, the submissions by counsel also failed to indicate when the contingency fee affidavit required in terms of section 4 of the Act was filed in court. It is a fact that the aforesaid documents were handed during the sitting in chambers after the proposed settlement by the RAF was already accepted.
- [11] The essence of the submissions made by counsel is that the contingency fee agreement signed with Matyeshana Townley Inc. is in compliance with sections 2, 3 and 4 of the Act. I find it difficult to understand how counsel came to this conclusion after having attached the prescribed form to the submissions. At a glance and in comparison, the documents are far apart, though the paragraphs incorporated therein closely resemble those set out in the prescribed form.
- [12] Counsel further requested that the specific paragraphs in the agreements considered not to be in compliance with the Act be identified and a court hearing be convened. It is not clear to me how the request would assist with the shortcomings identified in the agreement as they are not capable of correction, at least in this current matter, let alone by oral submissions. I say so acutely alive to the audi alteram partem principle which was adequately satisfied by allowing the respective parties to make the submission. The directive issued clearly stated the sections of the Act that needed to be dealt with.
- [13] No submissions were received in respect of case no: 2093/2021 (‘Minnie matter’) on behalf of Ketse Nonkwelo Incorporated. It is a matter of concern that legal representatives for the plaintiff did not accede to the request, despite the directive from the court. When the file in this matter was returned from the registrar’s office after the directive was issued it appeared to me that the contingency fee agreement that was presented to me earlier was not in the file. Instead it was substituted by a completely new document which I saw for the first time when I was preparing this judgment. Again it is an unfortunate situation that the documents do not bear a court stamp, without which I was constrained to accept and deal with the new document that had now been placed before me.

[14] After considering the new agreement I found that to a certain extent some of the issues raised in the directive no longer applied to this agreement in that it is currently in compliance with sections 2 and 3 of the Act. The notable shortcoming with this agreement that needs determination relates to compliance with sections 4(1) and 4(3) of the Act. This is based on the fact that the required affidavits were submitted to the court after the presentation of the draft orders which were to be made an order of the court. At that point the settlement proposal from the RAF was already accepted.

Legal framework

[15] The Contingency Fees Act 66 of 1997 was introduced to regulate contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited in terms of our common law. The purpose of the Act and the intention of the legislature was considered in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another*[2] and applied by the courts in various other matters like *Mofokeng v Road Accident Fund*[3] where the court held: ‘The clear intention of the legislature is that the contingency fees be carefully controlled. The Act was enacted to legitimize contingency fees 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 and

unenforceable’.

[16] Section 2 of the Act deals with contingency fee agreements and provides:

‘(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.’ (Emphasis added.)

[17] Section 3 of the Act deals with form and content of the agreement and provides:

‘(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.’ (Emphasis added.)

[18] Section 4 of the Act deals with settlement and provides as follows:

‘(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 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.
- (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.’ (Emphasis added.)

Analysis

[19] I will first deal with the contingency fee agreement entered in the Dyongo matter. The following information appears on the face of the contingency fee agreement:

‘Done and entered into and between

MAWANDE GIDION DYONGO

ID NO: 7[....]

(hereinafter referred to as the client)

And

MATYESHANA TOWNLEY INC.

(herein after referred to as the Attorney)

- [20] Section 2(1) of the Act makes provision for an agreement to be entered into with a legal practitioner. A legal practitioner is defined in the Act as an advocate or an attorney. As can be clearly seen from the quoted passage of the agreement, this agreement has not been entered into with the legal practitioner as required in terms of the Act. It was entered into with Matyeshana Townley Inc., a law firm based in East London and this is not what is envisaged in the Act. The law firm is a separate juristic person from the legal practitioners as it is an incorporated entity.
- [21] In my view the contingency fee agreement does not meet the requirements in section 2(1) of the Act insofar as it provides for an agreement to be entered into with the legal practitioner. By reason of its failure to meet the said statutory requirements it renders the agreement non-compliant with the Act and therefore stands to be declared unlawful.
- [22] The second notable shortcoming is the form of the contingency fee agreement. It is not in the prescribed form as stipulated in section 3(1) of the Act. The Minister of Justice, acting under section 3(1)(a) of the Act has in terms of Regulation R547, dated 23 April 1999, prescribed the form of a contingency fee agreement that must be used. The prescribed form requires that the full details and address of the clients or authorized person if acting in a representative capacity. The form further provides for names of the attorney, name of practice and address. The form and the content of a contingency agreement is prescribed and should be adhered to at all times for the agreement to be enforceable.
- [23] In my view the agreement failed to comply with both sections 2(1) and 3(1)(a) of the Act. The wording of both sections is peremptory which is clear from the wording of the Act, where in both sections the word 'shall' is used repeatedly. It was held in *Mostert and Others v Nash and Another*[4] that 'any non compliance with or departure from the requirements of the Contingency Fees Act, either as to substance or as to form renders the contingency fee agreement invalid and unenforceable'.
- [24] With regard to compliance with section 4 of the Act what follows below applies equally to both matters. It is clear that both matters were before court as envisaged in both sections 4(1) and 4(3) of Act. Section 4(1) of the Contingency Fees Act provides that once an offer of settlement is made to a claimant who has concluded a contingency fees agreement with a legal practitioner, the latter is not entitled to accept the offer of settlement without the approval of the court, if it is a litigious matter, or the professional controlling body, in case of a non-litigious matter.

[25] Section 4(1) makes it mandatory for the attorney to file the contingency fee agreement affidavits for judicial oversight before an offer of settlement is accepted if the matter is before court. In the present cases, the offers were accepted without judicial oversight. I associate myself with what the Supreme Court of Appeal stated in a recently decided case *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* [5] where it was held that:

‘Thus, pursuant to those provisions, the attorneys were undoubtedly obliged to obtain judicial approval before accepting the offers of settlement agreements from the RAF. As mentioned already, it is common cause that the attorneys did not comply with this requirement.’

[26] It went on to state the following: ‘In each of the two instances, the claimant’s legal practitioner has an obligation to seek approval of the offer of settlement from the professional controlling body or the court, as the case may be, depending on whether the matter is litigious or non-litigious. The legal practitioner has no discretion in this regard.’ (Emphasis added.)

[27] The attorneys failed to seek judicial approval before accepting the offers made by the RAF, thus rendering the contingency fees agreements invalid and unenforceable. This then brings us to the issue of fees to be payable to the attorneys for services rendered. I agree with what the court stated in dealing with fees in *Mfengwana*[6] when it said the following: ‘As the contingency fee agreements are invalid, the common law applies. That means that Mr Rubushe is entitled to a reasonable fee in relation to the work performed, with taxation being the means by which the reasonableness of a fee is assessed’. I fully agree with this statement and in the current matters, the attorneys, as a result of the non-compliance, are not entitled to the success fee resultant from the contingency fee agreement, which is invalid.

[28] The consequences flowing from such failure are dire as the legal practitioner would not be entitled to charge the client higher fees set out in the contingency fees agreement, but only his or her reasonable attorney and client fees. This means that the attorney will not be entitled to the success fee as provided in terms of section 2(1)(b).

[29] In *Tjatji and Others v Road Accident Fund*[7] these consequences were properly explained when the court stated: ‘Under the common law, the plaintiffs’ 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 plaintiffs’ attorneys are therefore only entitled to such fees as are taxed or assessed on an attorney and own client basis’.

Order

[30] Consequently I make the following orders:

In re: case number 2465/2021 – Dyongo matter:

1. The contingency fees agreement entered into between Matyeshana Townley Incorporated and the plaintiff is declared invalid.
2. Matyeshana Townley Incorporated are directed to submit a bill of costs in respect of their attorney and own client fees to the Taxing Master of this Court within fifteen (15) days of this order.
3. The Registrar of this court is directed to contact the plaintiff and to explain to him the import of the judgment and the rights that it accords him.

In re: case number: 2093/2021 – Minnie matter:

1. The contingency fees agreement entered into between Ketse Nonkwelo Incorporated and the plaintiff is declared invalid.
2. Ketse Nonkwelo Incorporated are directed to submit a bill of costs in respect of their attorney and client fees to the Taxing Master of this Court within fifteen (15) days of this order.
3. The Registrar of this Court is directed to contact the plaintiff and to explain to him the import of the judgment and the rights that it accords him.

TILANA

- MABECE

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

Appearances:

For the plaintiff: Adv. K Watt

Instructed by:

Matyeshana Townley Incorporated

For Defendant:

Ms Jeram

Instructed by:

State Attorney

For the plaintiff: Mr Niekerk

Instructed by:

Ketse Nonkwelo Incorporated

For Defendant:

Ms Jeram

Instructed by:

State Attorney

[1] *Mfengwana v Road Accident Fund*

[2016] ZAECGHC 159; 2017 (SA) 445 (ECG) para 30.

[2] *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another*

[2015] ZASCA 2; [2015] 2 All SA 403 (SCA).

[3] *Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund*

[2012] ZAGPJHC 150 para 41.

[4] *Mostert and Others v Nash and Another*

[2018] ZASCA 62; [2018] 3 All SA 1 (SCA); 2018 (5) SA 409 (SCA) para 54.

[5] *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* [2023] ZASCA 50 para 36.

[6] *Mfengwana v Road Accident Fund*

[2016] ZAECGHC 159; 2017 (SA) 445 (ECG) para 26.

[7] *Tjatji and Others v Road Accident Fund*

[2012] ZAGPJHC 198; 2013 (2) SA 632 (GSJ) para 26.

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