

SOUTH AFRICA / JUDGMENT

Letsoale v Road Accident Fund

[2023] ZAGPPHC 456; 2023 (6) SA 533 (GP) (12 June 2023)

[2023] ZAGPPHC 456

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

57337/2020

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personal/private details of parties or witnesses have been
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Policy

FLYNOTES:

ACTUARIAL – Road Accident Fund – Contingency fees –
Jurisdictional hurdle underpinning validity
of agreement –
Practitioner making a proper assessment of the risk of failure –
To enter into a contingency fee
agreement in instances where
success is so virtually guaranteed that no or only a negligible
contingency existed, would be
contrary to the Act and render the
CFA invalid – Four cases discussed and agreements declared
invalid in three –
Contingency Fees Act 66 of 1997.
HIGH
COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 57337/2020
REPORTABLE: YES
OF INTEREST TO OTHER
JUDGES: YES

	REVISED
DATE:	12 JUNE 2023 ITUMELENG VINCENT LETSOALE Plaintiff and ROAD ACCIDENT FUND Defendant CASE NO: 52869/2019 MATLOLE COUNCIL RABOPAPE Plaintiff ROAD ACCIDENT FUND Defendant CASE NO: 70299/2018 MARY NOMUSA MBONANI Plaintiff ROAD ACCIDENT FUND Defendant CASE NO: 54979/2018 CHRISTINAH DORAH REASIBE MABUSO Plaintiff
Summary:	Our courts have repeatedly warned against the risk of abuse by the inappropriate employment of contingency fee agreements. Apart from those risks associated with inappropriate use of such agreements mentioned in previous judgments, including overreaching often achieved thereby, it increasingly appears that these agreements are resorted to in instances where there are either no risk or contingency of failure or where no proper assessment of the risk of success has been undertaken as required by the Contingency Fees Act 66 of 1997. These agreements appear to be entered into for the sole purpose of increasing practitioners' fees. Such agreements are contrary to the provisions of the Act, constitute an abuse and are accordingly invalid. In addition, attempts are made at restricting the Master's discretion relating to the taxation of costs on a party and party scale, by including costs items

which have
not been agreed to between the parties in draft orders tendered to
courts. Such attempts amount to abuses which
courts should not
tolerate.

ORDERS

Case no: 57337/2020

1.

It is declared that the defendant is liable
for 100% of the plaintiff's damages suffered as a result of a
motor vehicle collision
which occurred on 24 February 2019.

2.

The defendant is ordered to pay the
plaintiff an amount of R2 462 274, 00 (Two Million Four
hundred and Sixty Two Thousand
Two hundred and Seventy Four Rand) in
respect of general damages and loss of earnings in full and final
settlement of the Plaintiff's
claim, payable within 180 days
from date of this order.

3.

The plaintiff has nominated as his account

into which this amount
must be paid, the
following Trust account:

Grosskopf Attorneys,
Account Number 40[...], ABSA Bank, Branch
code: 632005, reference: D SWANEPOEL/AA0185.

4.

The defendant shall furnish the plaintiff with an undertaking
in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of
1996 to pay all the costs of the future accommodation of plaintiff in
a hospital or nursing home, or treatment of or rendering of a service
or supplying of goods to him arising out of the injuries sustained by
the plaintiff in a motor vehicle collision on 24 February
2019 and
the sequelae thereof.

5.

The defendant is ordered to pay the plaintiff's taxed or
agreed party and party costs of the action.

6.

The following provisions will apply with regards to the

determination of the
aforementioned taxed or
agreed costs:

- 6.1.
The plaintiff shall serve the notice of taxation of the
plaintiff's party and party bill of costs on defendant's attorneys of
record;
- 6.2.
The defendant shall pay the plaintiffs' taxed and/or agreed
party and party costs within 14 (fourteen) days from the date upon
which
the accounts are taxed by the Taxing Master and/or agreed
between the parties; and
- 6.3.
Should the payment of the taxed or agreed costs not be
effected timeously, the plaintiff will be entitled to interest at the
applicable
rate from the date of the allocator to the date of
payment.

7.
It is noted that there is a valid
Contingency Fee Agreement in place.
Case no: 52869/2019

1.
By agreement between the parties the
defendant is ordered to pay the Plaintiff a capital amount of
R4 795 234.00 (Four
Million Seven Hundred Ninety Five
Thousand Two Hundred Thirty Five Rand) as full and final settlement

into the following bank
account:

- Account Holder: ET Nkuna
Attorneys Incorporated, Bank Name: Nedbank, Branch Name: Brooklyn,
Branch Code: 16314500, Account No:
12[...], Type of Account:
Trust Account.
2.
The above-mentioned capital is payable within the period of 180 days
from date
of settlement of this matter. In the event of the capital
not being paid within 180 days, mora interest will run at the
applicable
interest rate until date of payment.
3.
The defendant is ordered to furnish the
plaintiff with an undertaking in terms of Section 17(4)(a) of the
Road Accident Fund Act, 56 of 1996 for the reasonable cost of the
future accommodation of the plaintiff in a hospital or nursing home
or treatment of or rendering
of a service to him or supplying of
goods to him resulting from the accident related injuries sustained
by the plaintiff and the
costs of administering and enforcement of
this undertaking, as a result of the motor vehicle collision which
occurred on the 04th

December 2017.

4.

The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs of the action.

5.

The aforementioned taxed or agreed party and party costs, once determined, must

also be paid to the Plaintiff's Attorneys, ET

Nkuna Attorneys Inc. by direct transfer into their aforementioned trust account

and in the event that such costs are not agreed the

plaintiff shall serve on the defendant's Attorneys notice of taxation

and the plaintiff shall allow the defendant fourteen (14)

ordinary days from the date of taxation/settlement of costs to make such

payment. In the events of the cost not being paid within

14 days as aforesaid, interest will run at the applicable interest rate till date of payment.

6.

The Contingency Fee Agreements between the plaintiff and his attorneys are declared

invalid.

Case no: 70299/2018

1.

By agreement between the parties, it is declared that the defendant is liable for 100% of the plaintiff's damages suffered

as a result of a motor vehicle collision which has occurred on 26 January 2018.

2.

The defendant is ordered to pay the plaintiff the amount of R812 999.55 (Eight Hundred and Twelve Thousand, Nine Hundred and Ninety

Nine Rand, Fifty Five Cents) in respect of past and future

loss of support within 180 days from the date of this order and as full

and final settlement of this matter.

3.

The defendant will not be liable for interest on the capital amount should same be paid before or on the date calculated in terms of paragraph 2 supra failing which the defendant will be liable for interest calculated at the applicable prescribed rate of interest from time to time from date of judgment.

4.

The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs up to the date hereof.

5.

Payment of the capital amount as set out in paragraph 2 supra

hereof, shall be made into the following bank account: Bank: STANDARD

BANK; Account Holder: STRYDOM ING; Account Number: 01[...];
Account Type: TRUST; Branch Code: 014845; Reference: 3071.

6.

The contingency fee agreement entered into between the
plaintiff and her attorneys is declared invalid.

Case

no: 54979/2018

1.

By agreement between the parties the
defendant is ordered to furnish the plaintiff with an undertaking in
terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996,
for the costs of future accommodation in a hospital or a nursing home
or treatment of or rendering of a service or supplying of
goods to
the plaintiff after such costs have been incurred and on proof
thereof, relating to the injuries sustained by the plaintiff
as a
result of a collision which occurred on 27 October 2017.

2.

By agreement the defendant is ordered to
pay the Plaintiff an amount of R 900 000.00 (Nine Hundred
Thousand Rands only) in
respect of general damages suffered by the
Plaintiff, payable within 180 days from the date of this acceptance
and such amount
to paid into the plaintiff's attorneys of
record trust account with the following details: ACCOUNT HOLDER:
BALOYI (T.S) &
MOROBÉ ATTORNEYS INC, BANK NAME: FNB,
ACCOUNT NO: 62[...], BRANCH NAME: PRETORIA, BRANCH CODE:
251445,
REF'S NUMBER: RAF0098/TS/MVA.

3.

The defendant will not be liable for
interest on the above mentioned amount, save in the event of failing
to pay on the due date,
in which event the defendant will be liable
to pay interest on the outstanding amount at the prescribed rate of
interest from time
to time.

4.

The defendant is ordered to pay the taxed
or agreed party and party costs of the plaintiff in this action to
date hereof.

5.

The issues relating to the quantum of the
remainder of the plaintiff's claims are postponed sine die.

6.

The contingency fee agreement between the
plaintiff and her attorney is declared invalid.

JUDGMENT

These matters have been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

- [1] Contingency fee agreements (CFAs) serve a laudable goal of assisting indigent plaintiffs in realizing their rights of access to courts and to justice. These types of agreements are prevalent in actions against the Road Accident Fund (the RAF).
- [2] During the course of a week of sitting in the court dealing with default judgments and settled RAF matters, numerous matters raised concerns of abuse of either the CFA regime or the manner in which practitioners appearing for plaintiffs in RAF matters seek to fetter the discretion of the Taxing Master when costs orders on the scale as between party and party are sought or agreed on. I shall deal with the issue of the CFA regime before separately dealing with four matters which came before this court and which prompted this judgment and thereafter deal with the issue of costs manifested by these four matters.

The CFA regime

- [3] This issue has featured in many judgments and it is therefore unnecessary to detail the scheme of the CFA regime, as that has already been done[1]. I shall therefore deal with the relevant features as succinctly as possible.
- [4] At common law, CFAs were prohibited. CFAs have only become legitimized by the Contingency Fees Act 66 of 1997, which came into operation on 23 April 1999 (the Act) [2].
- [5] It follows that all CFAs which fall foul of the Act are legally invalid[3].
- [6] The Act allows a practitioner to enter into an agreement with his or her client that the practitioner shall not be entitled to any fees for services rendered in legal proceedings unless such client is successful in such proceedings[4] or that the practitioner, if successful in claims sounding money, may be entitled to a “success fee” of up to 100% of his or her “normal fees” on condition that such success fees may not exceed 25% of the total of the claim[5].
- [7] The “normal fees” must be agreed to in writing in the CFA and is despite its attorney and own client nature, still subject to the principle of reasonableness[6].

- [8] A CFA must be entered into and signed by both parties at a sufficiently early stage of the proceedings to enable the requirements of the Act to be complied with. This includes the requirement that the 14 day “opt-out” period for the client remains effective. Whether a CFA was timeously concluded, is dependent largely on the nature of the particular proceedings and whether compliance with the Act was reasonably possible at that stage[7].
- [9] An invalid agreement cannot be replaced by a subsequent agreement which seeks to improve or replace those aspects of an invalid prior agreement[8].
- [10] Once a CFA is found to be invalid, a practitioner is under the common law only entitled to a reasonable fee in relation to the work performed. The reasonableness of such a fee is determined by taxation of a bill of costs and is subject to the discretion of the Taxing Master[9].
- [11] The requirements for a valid CFA, in addition to those referred to above in relation to the timing thereof, are that the agreement must substantially comply with the prescribed form. It must also reflect the particulars of the proceedings to which it relates and state that, before the agreement was entered into, the client had been advised of other ways of financing the litigation, was informed of the nature and extent of the success fees and that he or she understood the agreement[10].
- [12] The Act also provides for judicial oversight over CFAs in matters which are settled whilst being “before court” and oversight by the Legal Practice Council (LPC) when matters are settled without being “before court”[11]. This oversight requires that affidavits be produced by the legal practitioner and his or her client, dealing with the contents of the settlement[12].
- [13] The most important principle pertaining to CFAs for purposes of this judgment is that they should be entered into where the practitioner has made a proper assessment of the risk of failure (or conversely, the prospects of success) of his or her client’s case and was prepared to share that risk with the client. This is the jurisdictional hurdle underpinning the validity of a CFA. In this regard section 2(1) expressly provides that “... notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his opinion there are reasonable prospects that his or her client may be successful in proceedings, enter into a ...” CFA with such client. (my emphasis)
- [14] The “reward” created by a CFA for a practitioner by potentially doubling his or her fees is not intended as compensation for funding the disbursements of a case – these must be catered for separately. The “reward” of a doubled fee is also not meant to be a compensation for the attorney having to wait until a matter is concluded and the defendant (in the majority of cases, the RAF) has made payment – in fact, a great many practitioners do this in any event without resorting to CFAs.

[15] Our courts have understood the principles applicable to CFAs to be “... 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”[13] (again, my emphasis). Not only do I respectfully align myself with this pronouncement of the law but, coming from a full court, it also carries considerable weight. This interpretation of the Act, with reference to PWC, in my view properly enunciates the context within CFAs have been legitimised[14].

[16] The “contingency” contemplated in the Act does not find application where a case is hopeless and has no reasonable prospects

of success. To assist a client to pursue such an action would be to act contrary to Clause 3.10 of the Code of Conduct applying to legal practitioners[15]. Logically, the converse would also hold true – where there is no risk or contingency of failure the Act should also find no application. Properly interpreted, the Act only permits a legal practitioner in instances where, after proper assessment, he or she has determined that there are some risks attached to the client’s case, but that there is a reasonable prospect of success and that the practitioner is prepared to share in that risk for the reward of a “success fee”.

[17] The fact that the Act also provides for CFA’s on a “no win, no fee” basis i.e one without an additional “reward”,

confirms the interpretation that something more must be present in a matter before a practitioner becomes entitled to doubling of his or her fees or effectively sharing in the spoils of successful litigation in monetary terms. This “additional”

element is the risk or contingency attached to the merits of the case. It is the sharing in the “speculative”

nature[16] of otherwise doubtful litigation by the practitioner with his client, that entitles the practitioner to the “reward” reflected by the success fee.

[18] The Act is also not intended to be “... a mechanism for a legal practitioner to charge fees that are unreasonable and to unjustifiably increase his [or her] fees simply

to place him [or her] in apposition to recover the maximum of the success fee which the Act allows”[17].

[19] The assessment of the merits or prospects of success of a client’s case, requires “... that before entering into the agreement, a full and proper assessment of the client’s prospects of being successful in the proceedings be undertaken”[18].

- [20] In reinforcement hereof, our courts have required practitioners to enter into CFAs at an early stage in the litigation and not when fees have already been incurred but not yet claimed and which are then “doubled” by later or even belated CFAs, often shortly before culmination or settlement of the matter. Such CFAs have been found to be contrary to the Act and invalid[19].
- [21] Because of the speculative nature of litigation wherein a practitioner’s fees are governed by a CFA and to “... minimize the disadvantages inherent in the contingency fee system and to guard against its abuse ...” the safeguards and oversight functions provided for in sections 2, 3 and 4 of the Act have been promulgated[20].
- [22] An abuse of process exists where a process or mechanism “... is divested from its true course so as to ... achieve an improper end...”[21].
- [23] To enter into a CFA in instances where success is so virtually guaranteed that no or only a negligible contingency existed,

would be contrary to the Act and render the CFA invalid[22]. The same would apply when no proper assessment of any risk has been undertaken. The vast majority of actions instituted against the RAF fall into these two categories. Why do certain practitioners then enter into these agreements and not simply either wait until culmination of the litigation for their fees or enter into a “no win, no fee” agreement? The only inference is that it is a simple mechanism where practitioners in effect double their fees with little or no risk. This amounts to an “improper end” and an abuse.

- [24] Of course, there are many instances where there may be a risk, but they have to be properly assessed and the determination must be case-specific[23]. In a recent and as yet unreported judgment[24] Roelofse (then AJ) complained that practitioners merely use templates for the affidavits of themselves and their clients when presenting

CFAs to court for judicial scrutiny. He exasperatedly put it thus: “Surely it would not be too difficult to disclose to the court, as part of the requirements for the section 4(2) affidavit what the prospects of success were”. I have, in the four matters under consideration, enquired from the practitioners who had presented the matters to court for scrutiny, particulars as to the merits of the matters, and the reasons for the dates of and considerations involved in the CFAs. In some instances the court was furnished by explanatory affidavits by the attorneys involved. I shall deal with each of the matters and “their” CFAs hereunder and thereafter deal with the issue of how practitioners appear to attempt to fetter the discretion of the Taxing Master when they seek costs on a party and party scale.

Case no: 57337/2020

- [25] This matter came before court as an application for judgment by default. The claim had been lodged with the RAF on 6 November 2019 and summons was subsequently served on 3 November 2020. A notice to defend had been delivered on 23 May 2022. A notice of bar to plead had been delivered on 13 July 2022 but elicited no response by way of pleading. The matter was subsequently set down on 4 August 2023 for hearing on 22 February 2023.
- [26] What had transpired in the meantime, however, was that the RAF had accepted 100% liability as a result of the negligence of the insured driver. This had been done as long ago as on 19 March 2020. There is no explanation for the two years' lack of inactivity from then onwards until the delivery of the notice to defend, which was followed by an offer from the RAF, which included amounts for general damages and loss of earnings. The offer was however not acceptable to the plaintiff.
- [27] The plaintiff, who was a trackless machine operator, was a passenger in a "bakkie" with unknown particulars, which had overturned on a rural junction of two roads in the Brits district on 24 February 2019. He sustained a traumatic head injury, a perforated tympanic membrane which left him with partial loss of hearing, soft tissue facial injuries and was left with cervicogenic headaches, aggravated by psychological stress, orthostatic hypotension and residual cognitive and a progressively deteriorating post-traumatic stress disorder.
- [28] The plaintiff had acquired reports from a neurosurgeon, neuropsychologist, an ear, nose and throat specialist, as forensic psychiatrist, an occupational therapist, and industrial psychologist and an actuary. Their reports have been confirmed by way of affidavits accepted in terms of Rule 38. Based on the contents of the reports and the actuarial calculations, proper application of contingencies and consideration of case law regarding non-pecuniary damages, an amount of R1 812 271,00 was awarded as loss of earnings and R600 00,00 as general damages.
- [29] The contingency fee agreement presented to court provided for a 100% increase of the attorney fees as a success fee or 25% of the claim, whichever is the lesser. In form and content, it complied with the Act and was accompanied by the necessary affidavits by the attorney and the plaintiff. It was, however, entered into on 11 October 2021, which prompted enquiries from the court. The answer was that this was a second CFA and that an explanation could be furnished for its existence.
- [30] The matter was postponed and the attorney was allowed to file an explanatory affidavit prior to the reservation of judgment. In her affidavit the attorney explained that she was the attorney who had initially attended to the plaintiff's matter since her initial consultation with him on 27 February 2019. She was then the only attorney in the practice of Ayob and Associates, (an incorporated firm of attorneys) to whom the plaintiff had furnished a power of attorney. The attorney, Ms Swanepoel, decided to leave Ayob and Associates on 28 September 2021. By that time, she was still the only attorney in the practice and a director thereof. She held 33⅓ of the shareholding in the company at the time and 66,6% shareholding was held by another attorney, who was a director of another law firm, Mothle,

Jooma and Sabdia (MJS). Upon her resignation, Ms Swanepoel did not resign as director as she was uncertain of the intentions the other shareholder. Concerned about absentsing herself from the practice as its only attorney, she approached the LPC for advice. She was advised to inform all clients of Ayob and Associates of her departure and to advise them of their rights. The clients could remain with Ayob and Associates, should a new attorney be appointed, or furnish new attorneys (including the current attorneys of record at which Ms Swanepoel subsequently became a director) with the necessary mandates or the files would be sent to the LPC for safekeeping or distribution to their panel of attorneys for finalization.

[31] Hereafter the following chain of events occurred, which was confirmed by a separate affidavit from the plaintiff: he was contacted by MJS and was called to their offices where he was requested to sign a power of attorney in their favour. He was uncomfortable with the situation, left the offices, telephoned Ms Swanepoel's assistant and met up with them. He was then advised of the LPC's advices whereafter he terminated the mandate with Ayob and Associates and gave his current attorneys a mandate. It was then that the second CFA was entered into with the plaintiff on the same day.

[32] Both the plaintiff and Ms Swanepoel saw the CFA of 11 October 2021 as a continuation of the initial CFA albeit with a new firm of attorneys. I find that, in these circumstances, this CFA does not fall foul of the judgment in Tjatji and neither does it contravene the Act. I had regard to the uncertainty of the identity of the insured driver and lack of

particularity of his vehicle as well as the foreseeable difficulties in obtaining witnesses. Even the accident report form is, save for the plaintiffs description, devoid of particulars and virtually blank and uncompleted. I am accordingly satisfied that there had been a sufficient, albeit small, "contingency" regarding the prospects of success to justify the CFA. I consequently find it to be compliant with the Act and therefore valid.

Case no 52869/2019

[33] This matter came before court as one enrolled on this court's (then) settlement roll. The particulars of claim indicated that the plaintiff had been a passenger in a vehicle which had overturned on 4 December 2017. In the summons issued on 24 July 2019, damages of some R7.3 million was claimed from the RAF, who had subsequently entered an appearance to defend on 30 July

2019. A plea was delivered on 18 September 2019. The (then) Trials Interlocutory Court had ordered the RAF on 13 September 2021 to attend a pre-trial conference. Upon the RAF's failure to do so, its defence was struck out on 12 April 2022.

[34] The matter was subsequently settled by the plaintiff's acceptance of an offer made by the RAF on 20 February 2023, to pay R 3 895 235,00 in respect of loss of earnings and R 900 000,00 in respect of general damages. An undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 was also offered, together with a tender to pay the plaintiff's "... taxed or agreed party and party costs, on the appropriate scale ...". The offer

was accepted in writing on the same day. This settlement precluded the court from scrutinising its contents for propriety, save for the issue of the CFA.

[35] The CFA was only entered into on 25 January 2022, which again, prompted enquiries from the court. As with the previous matter, the current attorneys delivered an explanatory affidavit. In it the reason for the date of the CFA was explained. It was, in almost similar fashion as the previous matter, intended to simply replace a prior CFA entered into between the plaintiff and his initial attorneys on 4 December 2018. The attorney, Ms Nkuna explained that “there shall be no duplicate payment of fees as the client is in no worse situation than would be the case if represented by the same legal practice from the beginning to the end” and “... the legal practices involved have per agreement cooperated and collaborated to advance the interests of the client and shall share

pro-rate at the end of the process which they shall fix themselves based on the activities undertaken by the respective legal practices”.

[36] In this matter the plaintiff had also been a passenger in a motor vehicle which had overturned, causing him to sustain injuries. In contradistinction to the previous matter however, the name of the insured driver, the particulars of the vehicle and a completed

accident report had been available. There was no discernable contingency risk of the plaintiff not being able to prove 1%

negligence on the part of the insured driver and the merits have been 100% conceded at the first pre-trial conference held on 4 March

2020. Hereafter the matter proceeded only in respect of the issue of quantum.

[37] In similar fashion as in all four of the matters under consideration and in fact, in respect of virtually all matters where practitioners seek to justify their motivation to enter into CFAs in terms of which they double their fees by agreeing to a success fee equal to 100% of their “normal” fees, Ms Nkuna argued in her affidavit that “... the absence or presence of any discernable risk is not a test to determine if the matter can be handled on Contingency Fee basis or not but the crucial element is that there should be a reasonable prospect of success if the legal suit is to be pursuit (sic) on that basis”. Without furnishing any particularity at all of any risks in this particular matter, she submitted that “... in any legal suit there are all manner of risks which may affect the outcome of the legal suit ...”.

[38] This approach illustrates the attitude of practitioners who choose not to be content with charging their normal fees and to wait until the finalization of the matter for the recovery or payment thereof or those practitioners who enter into “no win, no fee” agreements, but without any difference from those matters in respect of the risk or lack of prospects of success, choose to “double” their fees by entering into CFA’s. Without labelling such conduct as avaricious, there is also no explanation why those practitioners do not consider apportioning any risk that there might be by limiting their success fees to 10% or 20% or any percentage lesser than the full 100% which the Act caters for[25].

[39] In this matter, apart from the “continuation” of the agreement from one legal practitioner to the next by way of successive

agreements, there was no risk from the start, i.e no “contingency” or “reasonable prospect”, the success was without doubt. The claim was simply, as in the majority of similar claims against the RAF, a matter of going through the proceedings of compiling all the relevant evidence. The only “contingency” was how big the eventual payment sounding in money was going to be. I therefore find that the initial agreement, was invalid. Consequently, it also invalidates the later CFA, entered into when any risk of not being successful had even more been extinguished.

Case no 70299/2018

[40] This matter similarly came before the court by way of settlement. It is a claim by a biological unmarried mother for the loss of support as a result of the death of her son who had been living with her and who has been her sole provider. There was no doubt about the identity of the parties, corroborated by birth and death certificates, nor about the issue of the plaintiff's

dependency, which had been corroborated by affidavits of five witnesses. The issue of negligence of the insured driver in

whose vehicle the deceased had been a passenger, had been placed beyond doubt by way of a police docket, indicating that the insured driver had been found guilty of culpable homicide. Accordingly, should the claim be properly and accurately calculated, there could be no foreseeable dispute or risk of failure.

[41] The industrial psychologist's report, and salary slips led to a simple actuarial calculation. After having delivered a plea on 19 February 2018 in response to the summons whereby action had been instituted on 26 September 2018, the RAF's defence was struck out on 9 May 2022 for having failed to comply with a court order compelling the RAF to attend a pre-trial conference.

[42] The matter had thereafter become settled after the plaintiff's acceptance of an offer made on 20 January 2023 which, as is customary, included a tender to pay taxed or agreed costs on a party and party scale.

[43] In this matter there was again no risk of not being successful in the prosecution of the claim, but an CFA was, without explanation, entered into and then only on 27 January 2020.

[44] The CFA in this matter falls foul of the Act and should be therefore declared invalid.

Case no 54979/2018

- [45] This matter also came before the court by way of settlement. The plaintiff was a passenger in a vehicle driven by the insured driver who had collided with a stationary motorcycle. The accident must have been a serious affair as the plaintiff had sustained excruciating injuries, both orthopaedic and otherwise. The plaintiff, having been heavily pregnant at the time, tragically lost her unborn child, which understandably caused extensive psychological and emotional trauma.
- [46] This “one-percenter” action was instituted on 1 August 2018. After various undue delays, the pleadings were amended on 4 October 2022 to increase the claim but not before a CFA was entered into on 22 June 2022.
- [47] Pursuant to the acceptance of an offer made on 8 February 2023, the issue of general damages in the amount of R900 000,00 and the furnishing of a Section 17(4)(a) undertaking, became settled. Although not expressly mentioned, this implied an acceptance of liability by the RAF. Again, the accepted offer included a tender to pay the plaintiff’s taxed or agreed costs on a party and party scale.
- [48] A CFA was entered into on 22 June 2022. There was no explanation for the lateness in the proceedings at which the CFA was entered into, nor of any perceived risk of failure or contingency in the matter. Strangely, the draft order presented to court, erroneously stated that no CFA had been entered into. In the absence of any explanation tendered for the belatedly agreed CFA, it should be declared contrary to the Act and therefore invalid.

The costs orders included in the drafts presented to the court

- [49] As already set out above, in each of the instances the respective plaintiffs became entitled to costs of suit on a party and party scale, either by default (in case no 57337/2020) or by way of acceptance of the RAF’s tender in this regard (in all the settled matters).
- [50] Despite the above, none of the draft orders presented to court, merely contained a prayer for payment of costs of suit on a party and party scale (either as taxed or agreed costs).
- [51] All of the draft orders, in similar fashion as has apparently become the standard practice by practitioners representing plaintiffs in claims against the RAF in this division, included prayers which indicated that the costs which the RAF had to pay “will” include a number of items. These included a whole list ranging from all attorneys’ consultations with counsel, counsel’s fees for drafting of heads argument on default judgment, the costs of uploading bundles onto Caselines, costs of obtaining specified lists of expert reports, the experts’ “preparation and reservation fees”, certain traveling fees of attorneys and the plaintiffs, costs of “sorting, arranging and compiling of bundles” and other items.

[52] It is not the purpose of this judgment to revisit the principles applicable to orders of costs on a party and party scale or the taxation thereof. It is however, due to the practice of practitioners to persistently seek to insert qualifications to such an order in their drafts presented to court, apposite to remind parties of the purpose and nature of a costs order and its taxation. This is to be found in Rule 70(3) of the Uniform Rules, which provides as follows:

“with a view to affording the party who have been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate or special charges and expenses to witnesses or to other person or by other unusual expenses”.

[53] The unfettered discretion of the Taxing Master to implement and apply the above Rule in every taxation, is also beyond doubt[26].

[54] It is therefore unnecessary for plaintiffs to seek to add particularity to a simple costs order issued by a court. Courts have also themselves been cautioned to not fetter the Taxing Master’s discretion in the performance of its duties[27]. Insofar as practitioners seek to incorporate words such as “will include” into a court order when listing items, such efforts encroach on the terrain of the Taxing Master. It is an attempt to bind the hands of a Taxing Master by way of a court order, which is impermissible.

[55] In addition to the above, the attempts at inserting qualifying fees for experts into party and party costs orders, partially convert those orders to orders awarding costs on an attorney and client scale, as I shall explain hereunder.

[56] Qualifying fees (including preparation fees) are expenses incurred or charged by an expert witness in order “to make himself or herself eligible or qualified to adduce evidence ... it is not the costs for drafting a report”[28].

[57] On taxation of a bill of costs on a party and party scale, the qualifying fees of a witness are not allowed without an order of

court or the consent of all interested parties[29]. This also applies to medical witnesses and actuaries[30].

[58] It has happened in the past that insurance companies in the position of the RAF under previous statutory regimes catering for claims pursuant to motor vehicle accidents have, when a matter has become settled, agreed to pay “... taxed costs as between party and party, plus such medico-legal fees as are allowed by the Taxing Master”. In such a case, it has been found that the “medico-legal fees” referred to in the agreement must have, having regard to the stage of litigation upon which is had been tendered, “embraced” any qualifying fees for

such medical witnesses”[31].

- [59] Contrary to the above, the RAF, in making offers to settle claims against it, invariably only offers to pay agreed or taxed party and party costs. It has done so in all the settled matters forming the subject of this judgment. Offers formulated like that exclude qualifying fees[32].
- [60] What should a plaintiff then do if it wishes to recover qualifying fees of its experts? It must either obtain an offer or tender or consent in this regard from the RAF or such orders must expressly be requested from the court. In the last-mentioned instance, proper notice must be given to the RAF that such an order will be applied for, to enable the RAF to be heard on this aspect[33]. In view of the current practice whereby in many instances (if not the majority) expert evidence is nowadays presented by way of affidavit as contemplated in Rule 38, it is an open question as to whether experts still prepare themselves to give evidence in respect of matters proceeding by default (let alone those which have become settled) but again, this would be a question of fact in each case and subject to the provision of proof, either to court or on taxation.
- [61] In some instances (such as in case no 70299/18) practitioners attempt to obtain the consent of the RAF for the insertions of the above costs aspects into a draft order by obtaining a letter or telefax from a claims handler, confirming the contents of the draft order to be presented to court. Although such a consent letter was obtained by email in case no 70299/2018, the “confirmation”

erroneously stated that “... the contents of the said settlement agreement and order is in accordance with the Road Accident Fund offer ...” when it clearly wasn’t insofar as the issue of costs were concerned. Significantly the “consent letter” ends with the following “Costs is also tendered on High Court Scale and are also subjected (sic) to the discretion of the taxing master”. This conclusion accords with the initial accepted offer. The purported “consent” to the insertion of qualifying fees by way of a draft order, is therefore not an unambiguous consent or something which this court could find would amount to a novation or replacement of the accepted offer. It is therefore disregarded. In each case an order should only be made in terms which accord with the proven settlement, that is the unambiguous offer and its equally unambiguous acceptance.

- [62] It follows that the costs orders sought in the settled matters which went beyond that agreed upon will be reduced to orders for payment of agreed or taxed costs on a party and party scale. The same will apply to the default judgment in case no 57337/2020.

Order

- [63] Accordingly the following orders are granted:

6.1 The plaintiff shall serve the notice of taxation of plaintiff's party and party bill of costs on defendant's attorneys of record;

6.2 The defendant shall pay the plaintiffs' taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties; and

6.3 Should the payment of the taxed or agreed costs not be effected timeously, the plaintiff will be entitled to interest at the applicable rate from the date of the allocator to the date of payment.

1. By agreement between the parties the defendant is ordered to pay the Plaintiff a capital amount of R4 795 234.00 (Four Million Seven Hundred Ninety Five Thousand Two Hundred Thirty Five Rand) as full and final settlement into the following bank account: ACCOUNT HOLDER: ET NKUNA ATTORNEYS INCORPORATED; BANK NAME: NEDBANK, BRANCH NAME: BROOKLYN, BRANCH CODE: 16314500, ACCOUNT NO: 12[...], TYPE OF ACCOUNT : TRUST ACCOUNT.
2. The above-mentioned capital is payable within the period of 180 days from date of settlement of this matter. In the event of the capital not being paid within 180 days, mora interest will run at the applicable interest rate untill date of payment.
4. The defendant is ordered to pay the plaintiff's the taxed or agreed party and party costs of the action.
5. The aforementioned taxed or agreed party and party costs, once determined, must also be paid to the Plaintiff's Attorneys, ET Nkuna Attorneys Inc. by direct transfer into their aforementioned trust account and in the event that such costs are not agreed the plaintiff shall serve on the defendant's Attorneys notice of taxation and the plaintiff shall allow the defendant fourteen (14) ordinary days from the date of taxation/settlement of costs to make such payment. In the events of the cost not being paid within 14 days as aforesaid, interest will run at the applicable interest

rate till date of payment.

2. The defendant is ordered to pay the plaintiff the amount of R812 999.55 (Eight Hundred and Twelve Thousand, Nine Hundred and Ninety Nine Rand, Fifty Five Cents) in respect of past and future loss of support within 180 days from the date of this order and as full and final settlement of this matter;
3. The defendant will not be liable for interest on the capital amount should same be paid before or on the date calculated in terms

of paragraph 2 supra failing which the defendant will be liable for interest calculated at the applicable prescribed rate of interest

from time to time from date of judgment;

5. Payment of the capital amount as set out in paragraph 2 supra hereof, shall be made into the following bank account: Bank: STANDARD

BANK, Account Holder: STRYDOM ING, Account Number: 01[...], Account Type: TRUST Branch Code: 014845, Reference: 3071.

2. By agreement the defendant is ordered to pay the Plaintiff an amount of R 900 000.00 (Nine Hundred Thousand Rands only) in respect of general damages suffered by the Plaintiff, payable within 180 days from the date of this acceptance and such amount to paid into the Plaintiff's attorneys of record trust account with the following details: ACCOUNT HOLDER: BALOYI (T.S) & MOROBE ATTORNEYS INC, BANK NAME: FNB, ACCOUNT NO: 62[...], BRANCH NAME: PRETORIA, BRANCH CODE: 251445, REF'S NUMBER: RAF[...]
3. The defendant will not be liable for interest on the above mentioned amount; save in the event of failing to pay on the due date, in which event the defendant will be liable to pay interest on the outstanding amount at the prescribed rate of interest from time to time.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 22 February 2023

Judgment delivered: 12 June 2023

APPEARANCES:

For the Plaintiff:

Adv L Schreuder

Attorney for the Plaintiff: Grosskopf Attorneys, Pretoria

For the Defendant:

No appearance

Case no: 52869/2019

For the Plaintiff:

Adv T Maphellela

Attorney for the Plaintiff: E T Nkuna Attorneys, Inc., Pretoria

Case no: 70299/2018

For the Plaintiff:

Adv H Joubert & Adv W Coetzee

Attorney for the Plaintiff: Strydom Inc,

Pretoria

For the Plaintiff:

Adv Motloung

Attorney for the Plaintiff: Baloyi (T.S) & Morobe Attorneys Inc.,

For the Respondent: No appearance

[1] See: Mkuyana v RAF

[2020] 3 All SA 834 (ECG); 2020 (6) SA 405 (ECG) and (Mkunyana) and the cases referred to therein.

[2] Price Waterhouse Coopers Inc v National Potato Co-op 2004

(6) SA 66 (SCA) (PWC) at par 41.

[3] PWC above and Tecmed (Pty) Ltd v Hunter and another

[2008] ZAGPHC 41; 2008 (6) SA 210 (W), Davis “The limited purview of the Contingency Fees Act” De Rebus, March 2019, G van Niekerk, “Door closed on Common Law Contingency”, De Rebus, April 2013.

[4] Section 2(1)(a) of the Act.

[5] Section 2(2) of the Act.

[6] Thalo v RAF 2011

(5) SA 446 (GSJ), Masango v RAF (2012/21359) [2016] ZAGPJHC 227 (31 August 2016) paras 19-25 and Mkuyana (above)

[7] See Tjatji v RAF and two similar cases 2013 (2) SA 632 (GSJ) (Tjatji) at paras 16-20, DP obo LD v RAF (15/29274)

[2019] ZAGPJHC 334 (6 September 2019) and Mkunyana (above).

[8] Tjatji at paras 24-25.

[9] Tjatji at par 26 and Rule 70 as well as Theodosiou and Others v Schindlers Attorneys (14038/2021) [2022] ZAGPJHC 9 (20 January 2022).

[10] Section 3(3) of the Act reads as follows: (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

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(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

[11] Section 4(1) of the Act reads as follows: 4(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 files an affidavit with the court, if the matter is before court, or has files an affidavit with the professional controlling body, if the matter is not before court, stating- (a) The full terms of the settlement; (b) An estimate of the amount or other relief that may be obtained by taking the matter to trial; (c) An estimate of the chances of success or failure at trial; (d) An outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial; (e) The reasons why the settlement is recommended; (f) That the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and (g) That the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

[11] Section 4(1) of the Act reads as follows:

4(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 files an affidavit with the court, if the matter is before court, or has files an affidavit with the professional controlling body, if the matter is not before court, stating-

- (a) The full terms of the settlement;
- (b) An estimate of the amount or other relief that may be obtained by taking the matter to trial;
- (c) An estimate of the chances of success or failure at trial;
- (d) An outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
- (e) The reasons why the settlement is recommended;
- (f) That the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and
- (g) That the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

[12] Section 4(2) of the acts reads as follows: 4(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 r she understands and agrees to them; and (c) His or her attitude to the settlement. See also: Mofokeng v RAF and related matters [2012] ZAGPJHC 150.

[12] Section 4(2) of the acts reads as follows:

4(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.

See also: Mofokeng v RAF and related matters [2012] ZAGPJHC 150.

[13] Mkunyanana at [17].

[14] It therefore conforms to the “modern” principles of interpretation of statutes espoused in Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) and Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA).

[15] Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, LPC Notice 198 of 2019, Clause 3.10: “Legal practitioners shall ... advise their clients at the earliest possible opportunity on the likely success of such clients case and not generate unnecessary work nor involve their clients in unnecessary expense”.

[16] PWC at 42.

[17] Mkunyanana at par 14 and Erasmus v Williams 2016 JDR 2007 (ECG 3364/2016, 8 December 2016) at para 13.

[18] Tjatji at par 16.

[19] See Tjatji at paras 19 - 20

[20] See Tjatji at par 21 and see also SAAPIL v Minister of Justice and Constitutional Development (RAF, Intervention party) 2013 (2) SA 583 (GNP).

[21] See PWC at par 50.

[22] See Tjatji at par 23.

[23] See for example Tjatji at 14 and the CFAs dealt with in that judgment.

[24] Mbethe v RAF and eight similar matter (856/2020)

[2023] ZAMPMBHC 5 (26 January 2023).

[25] See for example Mkunyanana at par 18.

[26] See inter alia Hastings v The Taxing Master 1962 (3) SA 789 (N) and City of Cape Town v Arun Property Development (Pty) Ltd 2009 (5) SA 227 (C).

- [27] Bowman v Avraanides 1991 (10 SA 92 (w) and NUS South Africa (Pty) Ltd v R & F Holdings (Pty) Ltd 2000 (3) SA 522 (E).
- [28] Francis-Subbiah, Taxation of Legal Costs in South Africa, 1st Ed (Francis-Subbiah) at 22.9. and Kohne and National Insurance Ltd 1968 (2) 499 (N) at 500.
- [29] Cilliers, The Law of Costs, Butterworths, at 13.3, Francis-Subbiah at 22.9.1 and The Government v The Oceana Consolidated Co 1908TS43.
- [30] Stevens v Provincial Insurance Co Ltd 1966
- (3) SA 62 (N).
- [31] Muller v AA Mutual Insurance Association Ltd and Another (Muller) 1973 (2) SA 787 (TPD), in particular 789A.
- [32] Muller at 789 B-C.
- [33] Donaldson v Seaward 1958
- (2) SA 198 (O).

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