

Contingency fees in the South African law

by

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CHAPTER ONE

INTRODUCTION

1.1 OVERVIEW

A contingency fee agreement can be defined as an agreement between a legal practitioner and a client, based on a future event probably occurring, whereby the parties agree that

- (a) the legal practitioner agrees to charge no fee if the client's matter is unsuccessful; and/or
- (b) in the event of success, the practitioner may charge a fee in excess of that usually charged, as compensation for the risk taken.¹

Historically, contingency fee agreements were considered to be unlawful in South African law. These principles had been adopted from Roman and Roman-Dutch law, from which our law derives its roots. Over time, the common-law approach to agreements whereby a sponsor was allowed to benefit from a share of the proceeds changed. The passing of the Constitution of the Republic of South Africa,² also changed the traditional approach, as litigants were now guaranteed the right to have their matter heard before a court of law, irrespective of whether they could afford to pay for the services of lawyers upfront. Throughout the world, legal systems also changed to allow contingency fee agreements and consideration will be had to these systems.

Whilst the Act was principally enacted to

- (a) provide the largely uneducated and poor third-world South African population with an opportunity to litigate in circumstances where they do not have funds to pay for legal services upfront;³ and to
- (b) provide litigants with the protection of having the fees of legal representatives limited and regulated within reason,⁴

the shortcomings of the Act have the effect that justice may be denied to those very people whom it was intended to assist, if legal practitioners are not prepared to take on their cases on a contingency basis.

1 Contingency Fees Act 66 of 1997 ("the Act").

2 Constitution of the Republic of South Africa, 1996.

3 SA Law Commission 24th annual report 1996 – Project 93: Report on Speculative and Contingency Fees 44 (hereafter referred to as "SALC Report").

4 SALC Report 71.

Having gone through an initial “teething” period of 18 years, this dissertation examines the historical background of contingency fee agreements, the common law before and after the passing of the Act, the provisions of the Act itself and problems arising therefrom.

1.2 PROBLEM STATEMENT AND MOTIVATION

I have been involved in personal injury law for over 26 years, and experience and note, on a daily basis, the problems that practitioners encounter in the application of the Act.

Until 1999 when the Act was passed, attorney’s fees were generally determined according to the guidelines as prescribed by the various Law Societies created in terms of the Attorneys Act.⁵ Problems in relation to the application of fees agreements seldom arose.⁶ Since the passing of the Act, the judiciary has been forced to strictly apply the provisions of the Act, with the result that various issues that never needed to be determined before, are now becoming subject to interpretation by the courts. However, some issues have not been subject to judicial scrutiny and still need to be deliberated on.

As it is in its infancy stage, the Act is creating challenges and highlighting anomalies which need to be addressed in order to enable claimants to pursue claims, whilst at the same time allowing practitioners to continue with financially viable practices in accordance with the Act and the rules of the statutory Law Societies and Bar Councils.⁷

1.3 ASSUMPTIONS

Whilst the Act makes provision for its provisions to be applied in many areas of law, this dissertation only deals with the field of personal injury law. Although advocates are also allowed to enter into contingency fee agreements, and whilst reference is made to various issues relating to the fees of advocates, the primary aim of this dissertation is to focus on the system regulating attorneys’ fees.

5 Law Societies are the controlling bodies of the attorney’s profession established in terms of s 56 of the Attorneys Act 53 of 1979.

6 Letter of the Law Society of the Northern Provinces to Van der Merwe DJP dated 1 August 2011 obtained from the Law Society of the Northern Provinces in June 2015.

7 The General Council of the Bar of South Africa is a federal body representing the organised advocates’ profession in South Africa, and has ten constituent societies of practising advocates called Bars. There is a Bar at the seat of every provincial and local division of the High Court of South Africa.

1.4 AIMS

The aims of this dissertation are to

- (a) bring to the attention of the legal profession and the legislature, certain anomalies arising from the application of the Act;
- (b) assist the profession in gaining an in-depth understanding of the complexities of the Act and the deficiencies arising therefrom;
- (c) ensure that justice is not denied to claimants due to the strict application of the Act;
- (d) ensure that attorneys are not unduly prejudiced in their practice due to the strict application of the Act;
- (e) provide a comprehensive reference base which the legislature can utilise to consider amending the current legislation;
- (f) provide a user-friendly guide for practitioners to use when drafting their contingency fee agreements and affidavits; and to
- (g) provide recommendations as to how the legislation can be amended to remedy the shortcomings of the Act.

1.5 APPROACH AND METHODOLOGY

The focus is on local and international comparative law. The legal systems of various other countries, including the USA, England and Wales, Australia, Canada, Scotland and various other countries are considered. The starting point is the Roman and Roman-Dutch Law, the South African common law prior to and after the passing of the Act, carrying on to the investigations and recommendations of the SA Law Commission, then dealing with the Act as it was passed, and case law thereafter.

1.6 CONCLUSION

This dissertation provides an in-depth study of the current legislation relating to contingency fee agreements in South Africa, having regard to the historical background and comparative legal systems throughout the world, and highlights the deficiencies of the Act. It provides the reader with a better understanding of the law as it now is applicable, and how it could be amended to provide a better system for use in daily legal practice.

CHAPTER TWO

HISTORICAL BACKGROUND

2.1 INTRODUCTION

Prior to the passing of the Act, contingency fees were prohibited at common law in South Africa. This chapter examines the progression from Roman and Roman-Dutch law to the traditional common-law position of the charging of legal fees in South Africa before and after the passing of the Act, as well as the approach to champerty agreements.

2.2 ROMAN AND ROMAN-DUTCH LAW

South African law has Roman-Dutch law, originally with Roman law, as its formative element.¹

In Roman Law, any agreement whereby a lawyer was to receive a share of the suit was condemned.² The emperors Valentinian and Valens to Olybrius declared that lawyers practising in the city of Rome were permitted to practise as much as they desired, provided that they did not take dishonourable profits and unreasonable fees.³ Where they were influenced by the love of money and gain, they were considered abject and degenerate and were classed as the meanest of mankind.⁴ An advocate was not entitled to enter into any contract with the litigant who had confided in him, and could not enter into any informal agreement with him.⁵

The emperor Constantine to Helladius emphasised the seriousness of overreaching by declaring that should advocates be found to have collected unlawful and excessive sums under the pretext of fees which resulted in serious injury and loss upon litigants, they shall immediately be expelled from the profession.⁶ Certain classes of people were forbidden from pleading in court,⁷ including patrons of causes who made an agreement with a client for a share in the suit.⁸

1 Roman-Dutch law is an uncodified, scholarship-driven, judge-made legal system based on Roman law as applied in the Netherlands in the 17th and 18th centuries.

2 C 2 6 6 (2); Voet 2 14 18.

3 C 2 6 6 (5).

4 C 2 6 6 (5).

5 C 2 6 6 (2).

6 C 2 6 5.

7 Minors under the age of seventeen, women and the blind.

8 Voet 3 1 2.

The principle of Roman law that an advocate may not stipulate for any share in the suit was also adopted in Roman-Dutch law.⁹ In Holland, agreements for payment by results only if victory had been won, were especially condemned.¹⁰ In fact, the oath which an advocate took on admission included the statement that he would not have a financial interest in the outcome of the suit.¹¹

It was against this background and based on these principles that contingency fees were deemed to be invalid in South African Law.

2.3 COMMON-LAW AGREEMENTS PRIOR TO PASSING OF THE ACT

Until the passing of the Act, contingency agreements were deemed to be *contra bona mores*¹² and prohibited in terms of the South African common law.¹³

Providing a service at no fee, or at a reduced fee, or with some sort of advantage which would make a particular practitioner's services more attractive than other practitioners' services, would amount to solicitation.¹⁴ Examples of advantageous arrangements would include "no-win, no-fee" agreements whereby a client would not be required to pay attorneys fees unless the case was successful; or agreements whereby the fees of the attorney would be limited by percentage; or agreements where clients would only be billed at the end of a matter and not be billed regularly on a monthly or regular basis. Legal practitioners were expected to obtain clientele based on merit only, and by no other method or means. Lewis aptly pointed out that it is ability, assiduity and integrity which thus establish reputations and promote the unsolicited testimonial.¹⁵

The reasoning behind the rule was to ensure that clients had the free and equal choice to make use of the services of any practitioner they wished to use, based on professional merit, and without any "frills" or financial attractions or other types of benefits being offered by one legal practitioner over another. Where unfair advantages

9 Van Leeuwen *Commentaries on Roman-Dutch Law* 5 4 2.

10 Voet 2 14 18.

11 Van der Linden *Judiciele Practijc* 1 8 6. Merula *Manier van Procederen* 4 16 1 (4) which reads "dat hy geen overkomste maken" and 4 16 1 (5) "om deel of part in de zaake te hebben".

12 Literally translated from Latin to mean "contrary to the good morals."

13 Lewis *Legal Ethics* (1982) 239; *Hitchcock v Raff* 1920 TPD 366; *Granowsky v Steyn* 1922 SWA 48; *Law Society v Reid* 1908 25 SC 612.

14 Lewis 19.

15 *Idem* 23.

continued on next page

were being offered, the wealthier practitioner was in a financial position to “carry” the expenses of litigation, whereas his colleague was not.

A further risk of contingency agreements was that they opened the door to abuse by practitioners when it came to charging of fees where perhaps a conflict of interests could arise with regard their own financial interests versus those of the client.

The Bill of Rights ensured basic rights which needed to be approached very differently to the manner in which they had traditionally been viewed.¹⁶ Notwithstanding the Constitution, it has always been accepted by the courts that the moral views of the public change as time goes by, and these changes, which are sometimes totally opposite to the traditional view, need be adapted having regard to the prevailing moral and ethical standards of the community.¹⁷ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*¹⁸ is a classic case where there was a complete change in approach as to what was considered to be *contra bona mores* regarding restraint of trade contracts, where the right to contract was switched in favour of the sanctity of the contract.

Interestingly, despite the perceived fears that contingency fee agreements could be abused by practitioners, the Law Society of the Northern Provinces recorded that “very few, if any” complaints had been received in respect of percentage common-law contingency fee agreements since the Council had authorised members to accept instructions on that basis.¹⁹

At common law, a legal practitioner was only entitled to a reasonable fee for work actually done,²⁰ and there was no provision for a “no-win no-fee” agreement, or an agreement whereby a practitioner would be entitled to an added “success fee” over and above the reasonable fee which ordinarily would have been charged by the attorney. In fact, apart from it traditionally being considered to be improper and unprofessional conduct for an attorney to overcharge (to “overreach”), it was equally frowned upon and wrongful for an attorney to undercharge.²¹ Attorneys were obliged

16 Chapter 2: Bill of Rights to the Constitution of the Republic of South Africa, 1996.

17 *PWC 74* where the court held that it is important to bear in mind that views about what public policy entails are constantly evolving and that a court must be careful not to conclude that an agreement is contrary to public policy just because some of its terms offend against its sense of propriety and fairness.

18 1984 (4) SA 874 (A).

19 Letter of the LSNP to Van der Merwe DJP dated 1 August 2011 *supra*.

20 Examples include the Cape Law Society Rule 14.3.11; *Bobroff supra*; *South African Association of Personal Injury Legal Practitioners v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ) 587B (hereafter “SAAPIL”); Lewis 226.

21 Lewis 226.

continued on next page

to charge for all services rendered, and save for various exclusions such as genuine *pro amico*, *pro bono* or *pro deo* work,²² they could not offer their services for no remuneration at all, or at rates below those normally and reasonably charged by the profession. The basis of the fees charged was regulated by the rules of the various Law Societies who are empowered to make rules by which practitioners are bound in terms of the provisions of the Attorneys Act.²³

In practice, however, before the passing of the Act it was common knowledge and widespread practice for practitioners to enter into contingency fee arrangements with clients, especially in personal damages claims.²⁴ The high costs of litigation and the general inability of the public to afford to pay for legal practitioners' fees forced practitioners and their clients to enter into these arrangements, albeit that they were contrary to the common law. The emergence of unregulated micro industries which encroached upon the services historically rendered exclusively by attorneys, such as those relating to the recovery of debts, also became of concern.²⁵ These micro industries were not subject to any legislation and were not controlled by any rules of professional bodies, and this lack of regulation enabled those involved to offer attractive benefits to the public as an enticement to use their services, rather than those of the legal profession. If steps were not taken to address the competition, legal practitioners would lose out on valuable work which was traditionally their sole domain.²⁶ In reality, the Law Societies generally "turned a blind eye" to the practice of contingency fee agreements being entered into by their members even though such agreements were contrary to their rules.²⁷

22 *Idem* 230. *Pro amico* (literally translated from Latin to mean "for a friend") relates to an agreement whereby a lawyer performs legal services for a colleague or friend at no charge, whereas *pro bono* or *pro deo* (literally translated from Latin to mean "for good" or "for god") relates to services performed by a lawyer for members of the public who cannot afford legal services.

23 S 69(d) read with s 74 of the Attorneys Act 53 of 1979.

24 Pearce "Clarity Soon on Legal practitioners Contingency Fees System" *Mail and Guardian* 19 May 1995; *Law Society of SA v Road Accident Fund* 2009 (1) SA 206 (C) 209C; Letter of the LSNP to Van der Merwe DJP dated 1 August 2011 obtained from the Law Society of the Northern Provinces in June 2015.

25 Law Society of the Northern Provinces Ruling 25 October 1995 allowed attorneys to perform debt collection services on a contingency basis.

26 SALC Report 78.

27 Pearce *supra*.

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For the aforementioned reasons, the Association of Law Societies²⁸ confirmed in 1990 its earlier resolution that attorneys were allowed to conduct cases on the basis of a special fee contingency basis (they used the term “speculative fees”).²⁹ Draft rules were approved by its Council in May 1991 which provided that:³⁰

- (a) The special fee could not exceed twice the taxed party and party fee;
- (b) the agreement had to be in writing and signed by both attorney and client;
- (c) the agreement had to be lodged with the Law Society concerned;
- (d) the opposing side was to be made aware of the agreement; and
- (e) a copy of the order and a closing statement giving details of the proceeds was to be lodged with the society.

At that stage, the General Council of the Bar had not yet made rules permitting advocates to enter into such agreements without first obtaining permission in special circumstances.

The problem therefore facing the profession, was to ensure that the public’s access to justice was not stifled by professional rules. The incurring of costs being a main factor in the conduct of litigation, the question arose as to what alternatives could be considered in the distribution of costs. Government legal aid, private ‘after the event’ legal expense insurance and variations of such schemes had been mooted, and it was suggested that the best option would be “an integrated system, which consolidates a variety of methods aimed at securing an effective right to legal services”.³¹

In March 1992, the Transvaal Law Society (as it was known then)³² amended its rules to allow for contingency agreements.³³ The remaining Cape, Free State and

28 Since March 1998 the Law Society of South Africa (hereafter “LSSA”) has represented the attorneys’ profession by bringing together its six constituent members in a national, non-statutory body. The LSSA’s predecessor was the Association of Law Societies of the Republic of South Africa, which existed from 1938 to 1998.

29 Botha “Your ALS” 1991 *De Rebus* 26.

30 Editorial “Special fee arrangements open new doors to justice” 1991 *De Rebus* 431.

31 McQuoid-Mason 8 S. Afr. J. on Hum. Rts. 74 (1992) *Access to Legal Services: A Need to Canvass Alternatives* 82.

32 The Transvaal Law Society was established during 1892 as the statutory body governing the attorney’s profession in the former Transvaal province. Under the new dispensation since 1994, the provinces of Gauteng, Mpumalanga, North West and Limpopo were reconstituted under what is now known as the Law Society of the Northern Provinces. The Transvaal Law Society was a society as contemplated in Chapter 3 of the Attorneys Act 53 of 1979 and is a juristic person in terms of s 56(c).

33 “Project 93 Report” ix as contained in the SALC Report 1.
continued on next page

Natal law societies began making steps to follow suit.³⁴ The Natal Law Society, however, wished to first obtain the approval of the Chief Justice of South Africa, Judge MM Corbett, and after addressing him, he responded in a letter to the Natal Law Society³⁵ where he expressed his concern that such contingency agreements would be unlawful at common law,³⁶ quoting authority for his opinion³⁷ (these views were later considered with approval by the South African Law Commission in its report in paragraph 3.9).³⁸ When the Cape Law Society attempted to amend its rules in line with those of the Natal and Transvaal Law Societies to allow for contingency agreements, the Chief Justice again expressed his concern.³⁹ In 1994 the Association of Law Societies requested the South African Law Commission to investigate the issue, specifically noting its concerns regarding unqualified members of the public who were offering services which had traditionally been performed and reserved for the attorney's profession, such as debt collecting, motor vehicle accident claims and other damages claims. Apart from the Association of Law Societies' concerns regarding the undermining of the vested interests of the attorneys' profession by these unqualified persons, a further fear was that advantage could be taken of the ill-informed, innocent and unsuspecting public, especially in the rural areas.⁴⁰ On 28 July 1994 the SA Law Commission approved for inclusion in its programme, an investigation into speculative and contingency fees for the entire legal profession, for both attorneys and advocates.

In the meantime, knowing that the moral trend had shifted favourably towards allowing common-law contingency fee agreements, the Law Society of the Northern Provinces in 1995 implemented a system of contingency fees in cases of claims for damages and for debt collection matters.⁴¹

34 Editorial "Special fee arrangements: Lets get going" 1992 *De Rebus* 360.

35 Letter from former Chief Justice Corbett to the Natal Law Society, dated 9 November 1992, at 2 where he opined that any contingency fee agreement between an attorney and his client would be unlawful at common law.

36 Which opinion was referred to in *SAAPIL* 587B.

37 The common-law authorities referred to are discussed above, namely, Voet 2.14.18; Kersteman *Woorden-Boek* sv "Conditie van Triumphe"; Grotius 3.1.41 and Schorer's note CCLXXV; Van der Keessel *Praelectiones* 3.1.41; Van Leeuwen *Roman-Dutch Law* 5.4.2; *Incorporated Law Society v Reid* (1908) 25 SC 612; *Goolam Mahomed v Janion* (1908) 29 NLR 304; *Hollard v Zietsman* (1885) 6 NLR 93, a judgment of Connor CJ containing a full review of the common law authorities; *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287.

38 SALC Report 29.

39 Pearce *supra*.

40 Referring to the Project 93 Report contained in the SALC Report 2.

41 Law Society of the Northern Provinces Ruling 25 October 1995 para 16.18.2.

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The findings of the Commission were contained in a report handed to the Minister of Justice on 6 December 1996.⁴²

The legal position was thus not certain – whilst the common law prohibited contingency fees, in practice the moral trend (and perhaps the economic and practical need by the public) had shifted towards a view that contingency fee agreements should be legally allowed in light of the fact that such agreements had already been used in practice for decades.⁴³ It is perhaps for this reason that it has thus been widely accepted that the primary need for the Act was to legitimise contingency fee agreements which were otherwise prohibited at common law.⁴⁴

2.4 SA LAW COMMISSION

Faced with the challenges discussed in the preceding paragraph, it was common cause amongst members of the legal profession and the public, that the system of contingency fees needed to be investigated and revised. With the support of Ismail Mahomed CJ (who incidentally chaired the SA Law Commission), the SA Law Commission was mandated to conduct investigations into the legalisation of contingency fees in 1995.

After extensive investigations and feedback from the public and the profession, the Law Commission tabled its findings in its 1996 Annual Report. An in-depth study of the SA Law Commission Report on Project 93 and its findings, is crucial to a dissertation on this subject, as it provides an insight into the background and thought process adopted by the Commission in arriving at its recommendations.⁴⁵ As law is ultimately determined by the prevailing moral standards of society, a study of the Report also provides a good yardstick as to what the views of the public and the profession were of the system at that time. The report is discussed in detail in chapter three.

42 Project 93 Report ix as contained in the SALC Report 29 (hereinafter “Project 93”).

43 *Law Society of SA v Road Accident Fund* 2009 (1) SA 206 (C) 209C.

44 Per Boruchowitz J in *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 (GSJ) 639B.

45 SALC Report ix.
continued on next page

A draft Bill was recommended after having had regard to comment by interested parties⁴⁶ and was included as Annexure “A” to the Report.⁴⁷ Whilst the Bill which was ultimately passed did by and large mimic the Commission’s proposed draft Bill, there are important differences between the Act as it now stands and the Commission’s proposed draft Bill.⁴⁸

2.5 CHAMPERTY AGREEMENTS

2.5.1 Introduction

A champerty agreement, otherwise known as a *pactum de quota litis*, can be defined as an agreement between parties regarding the funding of litigation by non-litigants who naturally have no interest in the action, in return for them receiving a portion of the proceeds if the action is successful. A “maintenance agreement” is a similar type of agreement entered into, similarly to fund litigation to the assistance of an impecunious litigant, but the main difference is that the funder does not share in the spoils of the litigation, if successful. As certain of the principles of champerty and maintenance agreements are similar to contingency fee agreements, a discussion of this topic is useful.

Although Roman and Roman-Dutch law recognised *pacta de quota litis*, they regarded them with disfavour as they were seen to encourage speculative litigation and amounted to an abuse of the legal process.⁴⁹ At common law, all agreements that are contrary to public policy are void and unenforceable.⁵⁰ *Pacta de quota litis* are not necessarily unlawful, but they may be unlawful.⁵¹ A distinction is to be drawn between an acceptable and an objectionable *pactum de quota litis* by having regard to the facts of each case.⁵² An arrangement which results in litigation having no purpose other than to produce money, all of which is to be consumed in paying the legal costs of the

46 SALC Report 82. The judges of the Appellate Division recommended that there should be a system of taxation of uplift fees at the request of the client, although the Commission felt that the existing para 5 sufficiently protected the interests of clients.

47 SALC Report 84.

48 A full discussion of this report appears in Chapter Three below.

49 *PWC supra*.

50 SALC Report 73.

51 Per Stegman J in *Goodgold Jewellery (Pty) Ltd v Brevadau CC* 1992 (4) SA 474 (W) 479G–H. Voet 2.14.18; Grotius 3.1.41; *Patz v Salzburg* 1907 TS 526; Christie *The Law of Contract in South Africa* (2016) 39.

52 *Goodgold* 481I; 482E–F.
continued on next page

litigation, is to be discouraged.⁵³ On the other hand, a transaction of this kind may be properly entered into and may be supported where it is a genuine case of assisting a litigant in a *bona fide* manner for a fair recompense.⁵⁴

Public policy continually changes over time, and has indeed changed over time when one has regard to *pacta de quota litis*. Even prior to the Constitution,⁵⁵ a *pactum* was found to be acceptable in some cases,⁵⁶ whilst in others it was not.⁵⁷ These cases illustrated that in a case where an injustice would be done if a litigant were not given financial assistance to conduct his case, a champertous arrangement would not be contrary to public policy. Notwithstanding this, the courts still generally discouraged agreements of champerty.⁵⁸

The Constitution enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.⁵⁹ Current public policy is evident from the values enshrined in the Constitution, and the interests of the public with regard to rights such as the freedom to contract, freedom to conduct business and access to the courts have had a large influence in the shift away from the traditional view that *pacta de quota litis* should be viewed with disfavour.

The Bill of Rights in the Constitution guarantees that every citizen has the right to choose their trade, occupation or profession freely with the proviso that the practice of a trade, occupation or profession may be regulated by law.⁶⁰ Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁶¹

In 2004, the tide changed when the full bench of the Supreme Court of Appeal in the matter of *Price Waterhouse Coopers Inc v National Potato Co-Operative*

53 *Idem* 482C.

54 *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287 294.

55 Constitution of the Republic of South Africa, 1996.

56 Patz 526; *Lekeur v Santam Insurance Co Ltd* 1969 (3) SA 1 (C).

57 *East London Municipality v Halberd* (1884) 3 SC 140; *Dr Leyds and The Rand Exploring Syndicate* [1895] 2 OR 289 293–294; *Hugo v Transvaal Loan, F and M Co* (1894) 1 OR 336; *Green v Leyds* [1895] 2 OR 289 where it was found that the agreement was essentially to be of a gambling nature; *Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* [1896] 3 OR 140 144–145; *CVJJ Platteau v SP Grobler* [1897] 4 OR 389 394–396; *Campbell* 292–294).

58 *Goodgold and Lekeur supra*.

59 Constitution of the Republic of South Africa, 1996, s 7.

60 S 22.

61 S 34.

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unanimously held that an agreement in terms of which a person provides a litigant with funds to litigate in return for share of proceeds of litigation, is neither contrary to public policy nor void.⁶² The court found that the law of maintenance and champerty had developed out of a need to protect the system of civil justice, and “as the civil justice system had developed its own inner strength” the need for the rules for maintenance and champerty had diminished to the extent that they may have entirely disappeared.⁶³

Contingency and champerty agreements do have characteristics which are of similar nature, in that litigation is pursued at a cost and risk to a non-litigant, whether that be the legal practitioner in contingency matters, or the funder in champerty agreements. A major difference, however, is that legal practitioners are subject to the prescriptions of the Contingency Fees Act,⁶⁴ whilst champerty funders have no binding legislation to control their conduct. The issue of the differences between attorneys acting in terms of the Act, and the layman entering into an agreement of champerty, was dealt with by the Constitutional Court in the matter of *Bobroff*⁶⁵ where the court approved and applied the principles raised by the court *a quo*.⁶⁶ Regarding the *regulation* of contingency fees for attorneys and that of champertous agreements amongst lay persons, the full bench held that:⁶⁷

“First, legal practitioners are responsible for conducting the litigation concerned. They run the case and are responsible for advising on and taking the litigation decisions. Lay persons who enter into champerty and maintenance agreements do not engage in any of these activities.

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

62 *PWC supra*.

63 *PWC* 76C.

64 *Bobroff supra*.

65 *Ibid*.

66 *De La Guerre v Ronald Bobroff & Partners Inc* [2013] ZAGPPHC 33.

67 *Bobroff* 140B.

ethical duties to the court or to litigants. There is, therefore, no possibility of a conflict of interest in this regard.”

The upshot of this finding on the *regulation* of contingency fees, is that a different system of law is applied to an agreement between a layman and a legal practitioner, and an agreement between a layman and a champerty funder. This creates an unfair system whereby two persons who are fulfilling the same function of assisting the public, have completely different rules and standards by which they are to comply, and financial outcomes applicable to them. The champerty funder is free to enter into a common-law champerty agreement, whereas the legal practitioner is not permitted to enter into a common-law contingency fee agreement with a client.

When applying the Act, the following table illustrates the differences:

	Section of the Act	ATTORNEY	CHAMPERTY FUNDER
PROSPECT OF SUCCESS	2(1)	a strict requirement	no requirement
FEES	2(2)	fees limited to double normal fee or 25% whichever is the lesser	no limitation
ETHICAL RULES	6	subject to Rules of Law Society / Bar Council	subject to no ethical rules
FORMALITIES	3(1)	must be written agreement in accordance with CFA	no formalities required
ALTERNATIVE FINANCING	3(3)(b)(i)	client to be advised of alternatives of financing litigation	no requirement
CONSEQUENCES OF FAILED LITIGATION	3(3)(b)(ii)	client to be advised	no requirement
INFORMED CONSENT	3(3)(b)(iv)	client must confirm understanding in writing	no requirement
DEFINITION OF SUCCESS	3(3)(c) / 3(3)(d)	to be agreed in writing	no requirement
METHOD OF CALCULATION	3(3)(f)	to be agreed in writing	no requirement
DISBURSEMENTS	3(3)(g)	manner of dealing therewith to be agreed in writing	no requirement
COOLING OFF PERIOD	3(3)(h)	client has 14 days to withdraw from agreement	Funder can enforce agreement immediately
AMENDMENTS	3(3)(l)	manner to be in writing	no requirement
COPY OF AGREEMENT	3(4)	to be furnished to client on date of signature	no requirement

SETTLEMENT	4	attorney and client to file affidavits at Court / controlling body	no requirement
COURT ORDER	4(3)	settlement to be made an Order	no requirement
GRIEVANCES	5	attorney subject to review by controlling body	subject to no review

The *Bobroff* judgment is open to criticism as to why the court motivated that a rational distinction may be made between the regulation of contingency fees for attorneys and unregulated champertous agreements.⁶⁸ One cannot ignore the fact that it seems as if the starting point of the bench was to assume that legal practitioners are unethical, and that the legal practitioner would not inherently act in the interest of the client. It appears as if the attitude was that, apart from the rules of the various Law Societies by which attorneys are bound, a client needed a second safeguard in the form of the Act. It is indeed strange that legal practitioners should be viewed with such circumspection especially where they are *already* subject and accountable to the ethics and rules of their controlling bodies. The champerty funder on the other hand has no such ethical rules to abide by and no controlling body to monitor the legitimacy of his or her conduct in terms of our law, yet there was little or no comment made on this.

It is not only the position of the attorney or champerty funder that must be considered. The rights of the client/champerty litigant must also be looked at. Whilst the client of the legal practitioner is protected by various ethical standards and rules of the various Law Societies, as well as by the Act, the champerty litigant who has engaged the assistance of an unregulated funder has no such protection and is open to abuse. It must be borne in mind that the reason that the champerty layman seeks the assistance of the funder in the first place, is because he is already “on the back foot” and in the vulnerable position that he does not have funds to litigate. He is the one who could be taken advantage of and should be protected across the board from unscrupulous acts by practitioners and champerty funders. One would think that the courts should have given more credibility to the legal profession, and rather have questioned, warned and guarded against unregulated champerty agreements.

68 De Broglio “Contingency Fees – Quo Vadis” May 2014 *De Rebus* 52.

Although *Bobroff* did not involve a champerty agreement, the court ventured to differentiate between the issue of contingency agreements where attorneys were involved, and champertous agreements, and gave four main reasons for requiring regulation of attorneys:⁶⁹

- (a) their active role in the litigation process;
- (b) their specialised skill;
- (c) their ethical duties towards their clients; and
- (d) their duties towards the Court.

2.5.2 Litigation decisions

The reasoning behind the finding that legal practitioners can influence the conduct of the case, was that “they . . . are responsible for . . . taking the litigation decisions”, whereas “lay persons . . . do not engage in *any* of these activities”.⁷⁰ This reasoning must be questioned. Legal practitioners are ethically bound to *inter alia* ensure that their clients:

- (a) understand the instructions and the nature and extent of the mandate;⁷¹
- (b) understand the prospects of success or failure;⁷²
- (c) grasp the facts essential to the litigation and procedural process;⁷³ and
- (d) understand costs implications.⁷⁴

It is further the legal practitioner’s ethical duty to keep his client informed of the progress of the case,⁷⁵ and when reasonably necessary, to only act *on the instructions* of their clients before taking litigation decisions or entering into settlements.⁷⁶ The Act furthermore provides safeguards discussed above. If these rules are adhered to as one expects of a professional, the client layman can indeed be said to be involved in some aspects of litigation to a large extent. One simple example is that whereby attorneys are obliged to discuss settlement offers with clients before accepting them. There is, however, no legislation to ensure that the champerty layman has any

69 *Bobroff* 140A.

70 *Idem* 140B; own emphasis.

71 Lewis 103.

72 *Ibid.*

73 *Idem* 104.

74 *Idem* 105.

75 *Idem* 125.

76 *Idem* 162.

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involvement or input in the litigation process, or that his instructions are obtained before the champerty funder proceeds with any step or settlement.

2.5.3 Legal practitioners' skills

The reasoning behind the finding that by virtue of lawyers' "specialised knowledge and training which equip them to conduct litigation", "they are perceived by their clients as being experts on the decisions to be taken" and for this fact, it "puts legal practitioners in a powerful position to influence the actual conduct of litigation"⁷⁷ is also questioned. Is it implied that legal practitioners, as a general rule, will be more likely deceive their clients because they possess greater skills than the client? Surely it is this knowledge and those skills which are an advantage to the client, whereas champerty funders cannot provide this knowledge and place the champerty litigant at risk. At least the client has the protection that the legal practitioner is subject to the rules of court, peer review, the rules of the controlling body and the like, which the champerty layman does not have when a funder is involved in making decisions. It would once again seem as if the court used the dishonest practitioner as its starting point.

2.5.4 Ethical duties

The reasoning behind the finding that a legal practitioner's ethical duties "may well come into conflict with their own pecuniary interest in the litigation",⁷⁸ is also not understood. Surely the exact opposite applies? Is it not these very ethical duties that will ensure that the practitioner will act ethically, rather than he would not? Where an attorney is using his own funds at his sole risk, is this in itself not a protection which ensures that he will not litigate unless he has a chance of success? The emphasis on lawyers relying on satisfied clients as a source of referral, is also important to bear in mind as being a safeguard.⁷⁹ The question arises as to whether a greater risk does not lie with the champerty funder acting in his own pecuniary interest for the very reason that he has no ethical rules by which he is bound. Not being bound by ethics, is there not a greater risk that the champerty funder may act unethically to ensure that he wins his case at all costs to ensure that he obtains his fee? Witnesses can be approached surreptitiously, or could be paid handsomely to cooperate and give "favourable" evidence. Court officials can be bribed to have matters allocated sooner

77 *Bobroff* 140C.

78 *Idem* 141A.

79 Kritzer "Seven Dogged Myths Concerning Contingency Fees" 2002 *Wash U LQ* 739 757-61.

on court trial rolls, which avoids having to wait months for the normal trial allocation process and thus expedites the timeline of the financial return. Public advertisements can be placed offering results, or making promises which are unobtainable.

It has been said that it is not an unwise consideration to expect that a person who hazards funds in litigation naturally wants to control the litigation.⁸⁰

The fact that lay persons who enter into champerty and maintenance agreements have no such ethical or other duties, is the very reason as to why a conflict of interest could arise between the champerty layman and the champerty funder, as there are no rules to regulate the conduct between them and protect the champerty layman. A simple example would be where an impecunious layman (who may be desperate to have his matter heard), is taken advantage of by the champerty funder who charges an excessive percentage of the award and who knows that the desperate layman will probably not refuse his terms of the agreement, no matter how unreasonable they may be.

Kritzer,⁸¹ a law professor from the USA, submitted that an important consideration is that the key for the lawyer is not the outcome of a single case, but rather the result obtained over time from a series of cases and the resultant reputation earned thereafter, thus negating that concern. It is submitted that his views are correct and that as a noble profession, as a starting point, attorneys should be given the benefit of the doubt and be presumed to be honourable. Apart from raising speculative scenarios, the court in *Bobroff* did not quote a plethora of reported cases where of complaints by clients on these grounds were illustrated.

2.5.5 Duty to court

As with ethical duties, one wonders why any conflict of interest would arise where a legal practitioner has a duty to the court as an officer of the court.⁸² The conflict of duty rather arises where a legal practitioner acts against his obligation to court, unlike the champerty funder who would have no bar on acting unethically to the detriment of the champerty layman. Whilst it is acknowledged that there is a distinction between the legal practitioner and the champerty funder, it is suggested that because of its legal and ethical duties to its client and the court, there will be *less* of a risk of a legal

80 Australian case of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; 229 ALR 58; [2006] HCA 41.

81 Kritzer *supra*.

82 *Bobroff* 141B.

practitioner conducting litigation unethically in his own interests, as opposed to the champerty funder who has no obligations to the champerty layman, and who is also not bound to answer to any controlling body.

It is thus argued that attorneys whose services are engaged under contingency fee agreements have an economic incentive to maximise their profits by minimising the hours and resources that they invest in a case. That incentive is hardly consistent with the claim that contingent-fee plaintiffs' lawyers are responsible for the costs of protracted litigation. If any group of lawyers has an incentive by reason of their fee arrangements for delay or for taking frivolous positions in litigation, it is practitioners who bill purely on a time basis.

The result of the current state of affairs where champerty agreements are permitted without regulation, may give rise to the flourishing of a practice which has been implemented abroad for a number of years. So-called "third party funding agreements", where specialised loan finance companies sponsor litigation in return for a large cut of the award, allow impecunious litigants an opportunity to have their matters heard. In the United Kingdom, litigation funders are regulated by a voluntary code of conduct which was introduced in 2011.⁸³ In South Africa, there is no regulation of such funding by non-lawyers. Where lawyers are not prepared to take on matters because of the limitation of the cap, these clients may end up in "the lions den" of champerty funders where the industry is not regulated and is open to abuse.

2.6 COMMON-LAW AGREEMENTS AFTER PASSING OF THE ACT

Whilst the Act legalised contingency agreements from 1999 and prescribed a formal manner and form by which such agreements could be entered into between attorney and client, uncertainty loomed as to whether common-law agreements (which fell outside the prescriptions of the Act and which had for decades been already been used⁸⁴ and in circumstances accepted by Law Societies), could exist side by side with formal agreements in terms of the Act.

The rules of the respective Law Societies which had been applied prior to the commencement of the Act in terms of which common-law contingency agreements

83 Association of Litigation Funders of England and Wales *Code of conduct for litigation funders* (2011) 2. The Code was revised in 2016.

84 LSSA 209C; letter of the LSNP to Van der Merwe DJP dated 1 August 2011 obtained from the Law Society of the Northern Provinces in June 2015.

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were permitted,⁸⁵ had never been formally withdrawn or amended after the Act came into operation. Due to the fact that the Act had been badly drafted, the judiciary even recognised that the agreement prescribed by the Act was not widely applied or used by practitioners, who preferred to enter into agreements in terms of the common law.⁸⁶ To the contrary, in 2002 the Council of the Law Society of the Northern Provinces welcomed the move that attorneys may enter into success/common-law contingency/percentage contingency/contingency fee agreements “in the knowledge of the acceptance by the Law Society of the Northern Provinces of such agreements”.⁸⁷ This came as a result of the Council (on the recommendation of its Court Practice Committee) having resolved as follows on 21 June 2002:

- (a) Common law contingency agreements may be validly entered into by attorneys and that the Contingency Fees Act does not proscribe such agreements.
- (b) Such agreements must continue to be keenly scrutinised by the courts, and even *mero motu* by the courts at their discretion.
- (c) The common-law contingency fee agreement should meet the following criteria:
 - (1) It should relate to a genuine case of assisting an impecunious client to assert his rights. Impecunious does not mean totally indigent but in context it would refer to someone who, due to lack of means, is unable to assert his right to relief in the courts;
 - (2) the attorney’s remuneration must be fair; and
 - (3) the agreement must not amount to gambling, speculation or trafficking in litigation.
- (d) The reasonableness of the percentage of the monetary proceeds retained as a success fee will be measured according to various criteria, some of which are to be found in the opinion, but it seems more than likely that a court will also have regard to the 25% cap referred to in the Contingency Fees Act.

85 Law Society of the Northern Provinces Ruling 25 October 1995 para 16.18.2.

86 Wallis “Access to Justice: Costs” Aug 2011 *Advocate* 35; Letter of the LSNP to Van der Merwe DJP dated 1 August 2011.

87 Editorial July 2002 *Order Nuus /Society News* 2; Letter of the LSNP Van der Merwe DJP dated 12 Oct 2011 *supra*; Cloete R Nagel C “Die erkenning van gemeenregtelike gebeurlikheidsgelde-ooreenkomste. *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (HHA)” 2005 *De Jure* 420 – 425 at 423.

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- (e) The restrictions to be found in the Contingency Fees Act will probably resonate in various guises in judicial scrutiny of a common-law contingency fee agreement.

Other provinces did not follow suit,⁸⁸ and at the Annual Meeting of the Law Society of South Africa held in March 2003, an *ad hoc* committee was appointed to consider the matter of common-law contingency agreements. Members of the Law Society of the Northern Provinces were in the interim permitted to continue entering into common-law contingency agreements pending the outcome of the *ad hoc* committee's recommendations.⁸⁹

In 2004, the first of a long line of judgments pronouncing on the invalidity of common-law contingency agreements was delivered in the *PWC* matter discussed above. Whilst *PWC* essentially had to do with an agreement of champerty, the historical basis of *pacta de quota litis* was dealt with, including the question as to whether common-law contingency agreements were valid. The court's view was that where a contingency agreement did not strictly comply with the provisions of the Act, the agreement was not valid in terms of the Act and was unenforceable – there was simply no place for common-law contingency agreements to exist side by side with those in terms of the Act.⁹⁰

In 2010 in *Mnisi v Road Accident Fund*,⁹¹ Southwood J reiterated the view expressed by the Supreme Court of Appeal in *PWC* relating to the illegality of contingency fee agreements between legal practitioners and their clients that are not covered by the Act. Southwood J held that the fees that the plaintiff agreed to pay to the attorney for the conduct of the case were clearly not covered by the Act and that the agreement appeared to be illegal. However, he declined to make an order declaring the agreement to be invalid, and rather made an order directing the registrar to send a copy of the judgment to the President of the Law Society for the Northern Provinces to investigate the conduct of the attorney.

88 Cloete *ibid* 423.

89 *Order Nuus/Society News* 2003.

90 *PWC* 78F; Cloete *supra* at 424, where the authors agree with the Court and opine that the standpoint of the Law Society of the Northern Provinces to allow common law contingency fee agreements is challengeable, in that the question arises as to whether they had any authority to make such a ruling which is rather the function of the Courts.

91 *Mnisi v RAF* [2010] JOL 25857 (GNP) 40.
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In March 2011 in *Thulo v Road Accident Fund*,⁹² Morrison J, referring with approval to the *PWC* judgment, similarly found that contingency fees may be raised only under the Contingency Fees Act, and that there is no such thing as a “common-law” contingency fee.⁹³

In the meantime, under cover of a letter dated 1 August 2011, the Law Society of the Northern Provinces addressed a letter to the then Honourable Deputy Judge President van der Merwe, wherein it raised various concerns relating to the application of the Act, and iterated its ruling that common-law contingency agreements were permitted by a resolution of its Council.⁹⁴ In subsequent correspondence dated 12 October 2011,⁹⁵ it advised that, in light of the *PWC* judgment,⁹⁶ it had cautioned its members to provide for alternative fee agreements with clients in the event that the common-law agreement was disputed or ruled invalid by a court.

In August 2012 in *Mofokeng*,⁹⁷ Mojapelo DJP was faced with various issues concerning contingency agreements which had purportedly been entered into in terms of the Act, but which did not comply with the Act. At issue were, *inter alia*, the validity of common-law contingency agreements and the requirements relating to the furnishing, filing, monitoring and approval of the court of the so-called “section 4” affidavits. After referring to English law and authorities on champerty and contingency,⁹⁸ and to “Project 93”⁹⁹ as well as endorsing the judgment in the *PWC* matter,¹⁰⁰ Mojapelo DJP concluded that:

“The clear intention of the legislature is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fees agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fees agreement between such parties which is not covered by the Act is therefore illegal and unenforceable”.¹⁰¹

92 *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ).

93 *Idem* 450.

94 Available from the Law Society of the Northern Provinces.

95 Available from the Law Society of the Northern Provinces.

96 *PWC supra*.

97 *Mofokeng v Road Accident Fund, Makhuvale v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012).

98 *Idem* 14.

99 SALC Report 29. It is noted that attorney Mojapelo (who was subsequently appointed as the Deputy Judge President of the South Gauteng High Court) was the project leader of Project 93 of the SA Law Commission at the time of the compilation of the report.

100 *PWC supra*.

101 *Mofokeng* 20.

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Shortly after the *Mofokeng* judgment, three similar matters involving the validity of contingency fees also came before the Court in October 2012 in the matter of *Tjatji*.¹⁰² Here, although the contingency agreements purportedly complied with the Act, they were only entered into on the day of the trial or shortly before. In the three matters which were heard simultaneously, Boruchowitz J held that there is no room whatever for a legal practitioner to enter into a contingency fee agreement with a client outside the parameters of the Act, or under the common law.

The next matter to deal a further blow to the possibility that common-law contingency agreements may be permitted, was the matter of *De La Guerre*.¹⁰³ Having referred to the letter from the former Chief Justice Corbett to the Natal Law Society,¹⁰⁴ the court also held that it is clear from all authorities that common-law contingency fee agreements are prohibited and that any contingency fee agreement which does not comply with the Act is invalid.

At the same time that the *De La Guerre* matter was before the court, the matter of *South African Association of Personal Injury Legal Practitioners v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)*¹⁰⁵ was also heard.¹⁰⁶ Also referring to the *De La Guerre* and *PWC* judgments as well as to the advices of Corbett CJ, the court found that there appeared to be only the *Headleigh* decision of Cameron J in the Witwatersrand Local Division of the High Court (as it then was)¹⁰⁷ which suggested that a contingency fee agreement between a legal practitioner and his client might not be contrary to public policy. The court was of the view that *Headleigh* was out of step with the rest of South African jurisprudence on the common-law status of contingency fee agreements between legal practitioners and their clients. Three years later Cameron JA (as he then was) seemingly acknowledged

102 *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 (GSJ).

103 *De La Guerre v Ronald Bobroff & Partners Inc* [2013] ZAGPPHC 33.

104 Letter from former Chief Justice Corbett to the Natal Law Society, dated 9 November 1992, 2 where he said: "I am prima facie of the view that any [contingency fee agreement] between an attorney and his client . . . would be unlawful at common-law. I list some common-law authorities which I have consulted in this regard and also some case law."

105 *SAAPIL* 2013 (2) SA 583 (GSJ).

106 It must be noted that attorney Bobroff was a founding and active member of the South African Association of Personal Injury Legal practitioners ("SAAPIL") and accordingly the matters should be seen to be linked by his personal financial interest in the two matters. In 2017 he was found guilty of various offences involving the charging of fees in terms of the Attorneys Act 53 of 1979, was struck off the practising roll of attorneys, was sequestered and is currently under investigation by the National Prosecuting Authority as he absconded from the country.

107 *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys* 2001 (4) SA 360 (W) 369E–371J.

that his decision in *Headleigh* was wrong when he concurred with the *Price Waterhouse* decision of the Supreme Court of Appeal, which held that the Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited at common law. Cameron JA accepted that since *Headleigh* had been overruled by the decision in *Price Waterhouse*, there was no common-law basis for the contention that a contingency fee agreement between a legal practitioner and a client was permissible.

Leave to appeal having been denied, the matters of *De La Guerre* and *SAAPIL* were referred to the Constitutional Court so that the question of common-law agreements could be “put to bed” once and for all. In *Ronald Bobroff & Partners Inc v De La Guerre*,¹⁰⁸ the court considered the position that

- (a) certain Law Societies had made rulings allowing their members to charge in excess of the percentages set in the Act, as a result of which
- (b) uncertainty reigned in the attorneys’ profession about the correct legal position in relation to contingency fees, and
- (c) whether fees could be charged only under the Act, or also outside or in addition to the provisions of the Act.

The Constitutional Court unanimously held that there was no prospect of success on appeal and accordingly dismissed the applications for leave to appeal. The court was clear in its judgment – common law contingency agreements were not permissible in any form or content.¹⁰⁹

At present, the courts have unanimously concurred that common-law contingency fee agreements between legal practitioners and clients are not permitted in South African law. There are, however, no such judgments prohibiting such agreements being entered into by laymen amongst themselves in the form of champertous agreements.

2.7 CONCLUSION

Because contingency fees were traditionally not lawful in terms of the common law in South Africa, most of the population could not afford to hire the services of legal

108 *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) (both matters being heard simultaneously).

109 This principle has consistently been upheld in the matters of *Bitter obo De Pontes v Ronald Bobroff & Partners Inc* 2014 (6) SA 384 (GJ).

practitioners to take their litigation matters to court, and hence were denied access to the courts. Legal practitioners on the other hand were placed in the unfavourable situation of not being allowed to assist these people to take their cases to court. The enactment of the Constitution¹¹⁰ guaranteed everyone the opportunity to have their matter heard in court, and for legal practitioners to be fairly compensated where they took matters on risk, and so it was necessary that the system of contingency fees be revisited. The recommendations of the SA Law Commission were considered and the Act was subsequently passed, allowing contingency fee agreements to be entered into between practitioners and clients. There are, however, deficiencies in the Act which have arisen over the last 18 years, and these need to be reviewed. The system whereby legal practitioners are bound by legislation when it comes to the charging of their fees on risk, whereas champerty funders have no legislation or rules by which they are bound, is another matter that deserves the legislature's attention.

110 Constitution of the Republic of South Africa, 1996.

CHAPTER THREE

SOUTH AFRICAN LAW COMMISSION REPORT

3.1 INTRODUCTION

A large part of the foundation of contingency agreements in South Africa, and the subsequent formalisation thereof in terms of the Act, is based on the findings and recommendations of the South African Law Commission in its 1996 Annual Report.¹ It is important to have regard to the findings of the Commission as the information gleaned from the investigations showed what the concerns of all the parties concerned were at that time. Twenty years on, it is also instructive to have regard to the findings to compare and assess where the legislature may have erred in not having accepted certain proposals put to the commission, which now in hindsight appear to have merit.

3.2 BACKGROUND

As at 1995, there was uncertainty as to whether a system of contingency fees was permissible or not. In May 1995, comment was called for from the public and by interested parties on the desirability of the proposal system.² Using the feedback obtained, a working paper containing the Commission's tentative proposals ("Working Paper 63"), was compiled by the Commission. 458 copies of the working paper were distributed to various interested parties for comment, including the law societies, bar councils, the courts and NGOs representing the public.³ Working Paper 63 contained the following proposals:⁴

- (a) Both attorneys and advocates should be permitted to enter into contingency fee agreements;
- (b) fees payable to the attorney in the event of success may be double the normal fee but should be limited to a maximum percentage of the proceeds of the litigation;
- (c) such agreements should not be permissible in family and criminal law matters;

1 Interestingly, the leader of the task team at the time was an attorney, Mr P Mojapelo, who subsequently became and still is the Deputy Judge President of the Gauteng Division of the High Court, and who has recently delivered most authoritative judgments on issues concerning the interpretation of the Act. See *Mofokeng v Road Accident Fund*, *Makhuvele v Road Accident Fund*, *Mokatse v Road Accident Fund*, *Komme v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012), and *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ), both discussed below.

2 GN 387 of 1995 in GG 16415 of 19 May 1995.

3 The working paper was also published in GN 297 of 1996 in GG 17028 of 15 March 1996.

4 Referred to in the Project 93 Report 33.

- (d) there must be a reasonable prospect of success and the agreement must be modelled on a standard agreement containing safeguards prescribed by law;
- (e) the unsuccessful party should be responsible for the successful parties' costs as per the common-law rule.

The closing date for comments on the working paper was 15 May 1996. The comments received in response thereto were then used by the Commission to prepare its Project 93 Report.

After having conducted its investigations, the Commission approved a report on 30 November 1996 and submitted same to the Minister of Justice on 6 December 1996. The report formed part of the SA Law Commission Annual Report of 1996.⁵ The main recommendations and conclusions of the Commission were discussed in chapter 4 of the SALC Report, and embodied in the summary.⁶ A draft Bill was attached to the Report as Annexure A.⁷ The recommendations can be summarised as follows:

- (a) Contingency fees in terms of which a legal practitioner would only be allowed to charge fees if they were successful, should be legalised and the common-law prohibition on such fees should be removed;
- (b) such a system could contribute significantly to promote access to the courts;
- (c) in the event of success in a litigation matter "sounding in money", legal practitioners should be entitled to receive, in addition to their normal fees, an "uplift" to a maximum of 100% of their normal fees;
- (d) contingency fees should be prohibited in both family law and criminal law cases;
- (e) the "uplift" fee should not exceed 25% of the proceeds in cases sounding in money;
- (f) both attorneys and advocates should be entitled to enter into such agreements and that the rules of the General Bar Council of South Africa be amended to allow for advocates to enter into such arrangements;
- (g) where attorneys and advocates were parties to such an arrangement, the total of the success fee payable to both the attorney and advocate should not exceed 25% of the proceeds of the action;

5 Project 93 Report as referred to in the SALC Report 29.

6 SALC Report ix.

7 *Idem* 84.

- (h) the form and content of the agreement should be formalised to include safeguards to ensure the interests of the public were protected, and to eliminate abuses of such agreements;
- (i) such agreements should only be permissible where there was a reasonable prospect of success;
- (j) there should be no qualification regarding the financial means of persons wishing to enter into such agreements; and
- (k) the payment of disbursements should be a separate matter of contract between legal practitioner and client.

It is important to consider some of the factors which led to the Commission arriving at its recommendations, and these are now briefly discussed.

3.3 COMPARATIVE LEGAL SURVEY

The legal systems of the USA, England, Wales, Scotland and Australia were considered by the Commission.⁸ After having considered the manner in which contingency fee agreements were approached by these countries, the Commission's conclusions included that:⁹

- (a) these countries also promoted and favoured the legalisation of contingency fee agreements;
- (b) generally the cost follows the event;¹⁰
- (c) they all have legal aid structures, although these structures are for the benefit of the indigent and do not assist the middle class who are neither too poor nor too rich to be able to engage in litigation;
- (d) safeguards are needed, such as the capping of fees, cooling off periods and review;
- (e) the system in the USA whereby a legal practitioner was permitted to take a percentage of the actual award, rather than an uplift fee, was not preferred and was criticised by the other jurisdictions.¹¹

8 *Idem* 12.

9 *Idem* 21.

10 *Idem* 57 para 4.58. The rule is not applied in the USA.

11 *Idem* 34 para 4.8 and 4.9. See the comparative study in Chapter 4 below where these criticisms are discussed.

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3.4 ARGUMENTS FOR AND AGAINST CONTINGENCY FEE AGREEMENTS

The main arguments *in favour of* contingency fee agreements¹² can be summarised from the conclusions reached:¹³

- (a) access to justice is increased;
- (b) the risks involved in litigation is spread;
- (c) greater public satisfaction may be achieved;
- (d) freedom to contract will be promoted;
- (e) legal practitioners may be inclined to put more effort into a case where their fee is dependent upon their result, rather than just earning a fee for time spent no matter the result; and
- (f) existing restrictions may be removed by deregulation.

The main arguments *against* contingency fee agreements were detailed as follows:¹⁴

- (a) A conflict of interests may arise between the legal practitioners own interests and those of his client;
- (b) a conflict of interests may arise between the legal practitioner's own interests and those of the court;
- (c) fees may not be proportionate to the time spent or amount of work done;
- (d) contingency fee agreements may encourage frivolous, spurious and unmerited litigation; and
- (e) touting¹⁵ may be encouraged.

The overwhelming advantage which weighed heavily in favour of adopting a contingency fee system, was that clients have an increased access to justice.¹⁶ Reducing the effect of an inability to pay for legal costs was seen as part and parcel of positive steps towards the promotion of access to justice in terms of the section 22 of the Constitution at that time.¹⁷ The conflict of interests between attorneys' interests

12 SALC Report 23.

13 *Idem* 29.

14 *Ibid.*

15 Touting is defined in the *Oxford Dictionary* as meaning "to look out busily for customers: to solicit custom, employment etc importunately". Touting is to this day regarded as unprofessional conduct by all law societies and is forbidden.

16 SALC Report 29.

17 *Idem* 30. This was in terms of the interim Constitution of the Republic of South Africa Act 200 of 1993. In terms of the 1996 Constitution, the same provisions are embodied in s 34, which reads that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

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and those of their clients was, however, a major negative concern, yet was insufficient *per se* to warrant the rejection of the system and could be cured with sufficient safeguards being built in.¹⁸

3.5 NATURE OF THE FEE

Three types of fee were considered,¹⁹ namely, the percentage fee, the speculative fee and the uplift fee.

The *percentage* fee,²⁰ which allows a flat rate percentage fee being charged on the capital awarded, and which was permitted in the USA, was not favoured by the Committee. They considered that the dangers thereof which could arise, are that frivolous litigation may be encouraged, and/or a conflict of interests may arise between attorney and client and/or the risk of excessive fees being charged.

The *speculative* fee²¹ is one where a legal practitioner charges his usual fee (without any increase of any type) in the event of success. This system was not favoured by the Commission in that it was doubted whether such a system would promote access to the courts in that legal practitioners would have no real incentive to take on cases where they would invest large sums of money and bear the risk without receiving any extra reward.²²

The *uplift* fee²³ is based on the principle that the legal practitioner charges his normal fee, and as an added incentive to compensate for the investment of his time and money and the risk that the legal practitioner is taking, he be rewarded by being permitted to charge an extra fee over and above the normal fee, either based on a flat rate or on a percentage “uplift” on the normal fee. Such systems are adopted in England, Wales and Australia. It has been suggested that the USA should adopt this system.²⁴ The Commission’s preliminary view was that such a system whereby the uplift was calculated as a percentage of the legal practitioner’s normal fee, was preferred over the percentage and speculative fee basis. An uplift of up to 100% was considered to be apt in appropriate cases, but that a cap, as is applied in England and

18 SALC Report 30.

19 *Idem* 34.

20 *Ibid.*

21 *Idem* 35.

22 It is, however, interesting to note that the Act does indeed contain such a provision in s 2(1)(a).

23 SALC Report 36.

24 *Idem* 22; Aranson “The United States percentage contingent fee system: Ridicule and reform from an international perspective” 1992 *Texas International LJ* 788.

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Wales, should be introduced to restrict the uplift to no more than 25% of the proceeds of the award.²⁵

Prior to the publication of Working Paper 63, the opinion of the judges of the Appellate Division of the Supreme Court of South Africa²⁶ was sought. The judges surprisingly disfavoured the introduction of such a system on a number of bases, including that there would be no advantage to the client and that by allowing legal practitioners a direct participation in the outcome of a matter could potentially be damaging to the profession.²⁷ Although they recognised that a speculative fee system may be acceptable on the condition that such is dependent upon success, they were of the view that should the inevitable happen and a system of contingency fee agreements be adopted, they preferred the concept of an uplift fee (to a maximum of 33,3% of the normal fee) as opposed to the percentage fee principle.²⁸ Comment was also received from numerous other persons and bodies,²⁹ including the Orange Free State Society of Advocates who cautioned against impartiality arising, on the basis that objective advice to clients could be eroded away where an incentive to earn a higher fee was possible, with alternatives being put on the table.³⁰ The system was on the other hand favoured by the law societies of the Transvaal and Cape of Good Hope. The Association of Law Societies did not make separate submissions but advised that it would abide by the submissions made by these societies.³¹ It is worthy to note that some respondents even felt that an uplift fee of 100% of the normal fee would not necessarily be a sufficient incentive for practitioners to take matters on in certain cases (supposedly where the investment of money, risk and time of conducting litigation outweighed the benefit which could be gained).³²

Having regard to the submissions, the Committee recommended that:³³

- (a) the common-law prohibitions against contingency fee agreements, be removed; and that

25 SALC Report 37.

26 The Appellate Division was the predecessor to the current Supreme Court of Appeal of South Africa. The name of the court was changed on the adoption of the Constitution in 1996. At the time, it and the Constitutional Court were both "apex courts" with different areas of jurisdiction.

27 SALC Report 37 and 40.

28 *Idem* 49.

29 *Idem* 37.

30 *Idem* 39.

31 *Idem* 41.

32 *Idem* 49.

33 *Idem* 50.

continued on next page

(b) an uplift of 100% of the normal fees be permitted.

3.6 CASES MOST SUITABLE TO BE CONDUCTED ON A CONTINGENT BASIS

There appears to be consensus throughout the world that contingency fee agreements should not be allowed in criminal cases and family law matters, and despite believing that there was merit in not limiting the types of cases to only claims sounding in money, the Commission followed these views.³⁴

In criminal law, the outcome of the matter should not be dependent on any influence which may affect the legal practitioner's judgment or conduct.³⁵ In family law, because human emotions and welfare are at stake, the main aim should be to have matters resolved as quickly as possible, especially where the interests of children are paramount. Where large estates are involved, legal practitioners and clients should be discouraged from protracting litigation in order to obtain better financial settlements, as the object of the law in these matters "is to achieve a just and equitable distribution of the family property".³⁶

Whilst the Transvaal Law Society and the General Council of the Bar agreed with the Commission's proposals to exclude family and criminal law matters, not all parties that made submissions to the Commission agreed with the above views.³⁷ The Society of Advocates of the Orange Free State, the Academy for Mediation and the Cape Law Society all were of the view that contingency fee agreements should apply to all legal work, including family and criminal law matters.³⁸ The collective comments from the judges of the Appellate Division was that the exclusion of an entire class may deprive genuine impecunious litigants access to justice, and that apart from criminal and family law matters there should be no limitation based on the nature of the claim.³⁹

In debating the merits of the proposals, the Commission also had regard to the comments of interested persons with regard to whether contingency fee agreements should be available to both plaintiffs and defendants, and whether they should relate to all claims, and not only those "sounding in money" (for example, in matters of

34 *Idem* 51.

35 *Idem* 50.

36 *Ibid.*

37 The Transvaal Law Society proposed that contingency fee agreements should apply only to litigious work.

38 SALC Report 52.

39 *Idem* 53.

continued on next page

restitution, specific performance claims and the like). The committee was of the view that contingency fee agreements should be available to both plaintiffs and defendants.⁴⁰ With regard to whether they should be applicable to all matters or not, the Commission felt that to limit claims only to those sounding in money may severely limit the parties' contractual freedom, and that the regulation thereof should be left to the various controlling bodies.⁴¹

Having regard to the submissions, the Committee recommended that:⁴²

- (a) both plaintiff and defendants should be permitted to enter into contingency fee agreements;
- (b) contingency fee agreements should not be limited to claims sounding in money and the control thereof should be left to the various controlling bodies; and that
- (c) contingency fee agreements should not be permitted in criminal and family law matters.

3.7 COSTS FOLLOW SUIT AND PAYMENT OF DISBURSEMENTS

There is a misconception amongst the public and even legal practitioners that all contingency fee agreements imply that in the event of the client not being successful, the client will be liable for none of the attorney's fees, and/or costs and/or disbursements, and that the client will not be "out of pocket" in any respect. This is not correct. All that the Act regulates, is that the *fees* of the legal practitioner will be forfeited in unsuccessful matters.⁴³

The Commission considered whether an Act should regulate the arrangement between the attorney and client as to disbursements incurred, or whether this aspect should be a separate contractual matter between attorney and client. The Commission went into great detail to define that in the ordinary sense of the word, disbursements would include those costs paid by the attorney on behalf of the client in the course of litigation, including but not limited to sheriff's fees, travelling expenses, costs of counsel and correspondent attorneys, experts and the like. In practice, however, where instructions are taken from an impecunious client (as is the case in the absolute majority of personal injury matters in the country), most attorneys are prepared to take

40 *Idem* 54.

41 *Ibid.*

42 *Idem* 56.

43 *Ibid.*

on matters on the understanding that the attorney will bear the risk of the disbursements as well as his fee in the event of the claim not being successful.

A further component, which although it is a separate issue but is closely linked, is the procedural rule that where a litigant loses the case, he has to bear the opposing successful party's taxed costs and disbursements. This element, just like the payment of the disbursements incurred on behalf of the client by the attorney, is largely overlooked when contingency fee agreements are entered into, and most clients are probably unaware (and not made aware) of the risks of being liable to pay the successful opponent's costs should they lose the matter. The Black Lawyers Association argued that excluding disbursements from the definition of a "no-win no-fee" agreement seems to defeat the object of the contingency fee agreement, namely, to give the impecunious litigant access to justice – "if a man cannot afford an attorney's fees, he will be less in a position to afford a specialist's fee".⁴⁴

In this regard, the Commission proposed that the issue of who is to bear the payment and risk of disbursements should be contractually decided between the parties.⁴⁵ The Commission's proposals were accepted by the General Council of The Bar, the Cape Town Attorneys Association and the Law Society of the Cape of Good Hope. On the side issue, the Cape Town Attorneys Association, however, suggested that the 25% cap should refer only to the proceeds of the capital award and not include any costs awarded – as this could work to the detriment of the attorneys.⁴⁶ The Appellate Division judges agreed that the total uplift fee should not exceed 25% of the capital and costs, yet observed that when considering the 25% cap, practitioners may well feel that they should be entitled to at least their normal fee in circumstances where the normal fee exceeds the 25% of the award.⁴⁷

The Commission agreed with submissions that the costs orders should follow the result, as has always been the case. What is important, however, is that practitioners and clients often do not consider this obligation and liability by the client when entering into the agreement. This issue is discussed below.⁴⁸ The Commission also agreed that any arrangement relating to disbursements should be a separate contractual issue

44 *Idem* 57 – referring to the disbursement paid to an expert who may be engaged by the attorney on behalf of the client as an expert witness.

45 *Idem* 58.

46 *Ibid.* The practicalities of this problem are discussed by way of example in Chapter 6.

47 *Idem* 59.

48 Chapter 6 below.
continued on next page

between attorney and client. Reference was made to the Australian system which allows for a national fund to be set up whereby litigants (their attorneys) can apply for financing in the form of a loan to cover disbursements, with the repayment of the loan plus an administration fee in the event of success. Although the system was supported, no recommendations were made in that regard.⁴⁹

3.8 THE 25% CAP

There appeared to be much confusion about the 25% cap and what it related to.⁵⁰ The aim of the 25% cap was obviously to ensure that the proceeds of a claim were not “swallowed up” by the fees. In discussing their recommendations, the SA Law Commission Report states that the uplift – and not the normal fee – should be limited.⁵¹

By excluding the words “and not the normal fee”, confusion was created as to the interpretation of the cap on the “uplift” fee. Was this to mean that only the part of the fee that was in excess of the normal fee (the “uplift” portion) was subject to the cap, or the normal and uplift fee together? The original Bill, however, differed from the Act in that it included the phrase “the total of any fees higher than such normal fee . . . shall not exceed 25%”, whereas the Act provides that “the total of such success fee . . . shall not exceed 25%”.⁵² A further interpretation arose to mean that the practitioner could, in addition to an uplift of 100% on the normal fee, also recover 25% of the proceeds, or that the cap was only limited to the uplift portion. The Commission consequently stated that the 25% cap related to all fees, and having regard to the submissions, the Committee recommended that:⁵³

- (a) the rule that costs follows the result should be retained;
- (b) The arrangement as to how disbursements are to be paid is a separate matter of contract between attorney and client;
- (c) In claims sounding in money, the uplift fee should not exceed 25% of the proceeds, and that costs awarded should not be included in the definition of ‘proceeds’ when calculating the 25% portion.

49 SALC Report 60.

50 *Ibid.*

51 *Idem* 61.

52 *Idem* 86.

53 *Idem* 62.

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3.9 SAFEGUARDS

It was accepted that internationally, there were common safeguards⁵⁴ which were accepted in most systems. These include

- (a) that the agreement should be in writing;
- (b) that there must be a reasonable prospect of success;
- (c) that the agreement should set out the nature of the payment in the event of success;
- (d) what the client's liabilities and obligations would be in the event of failure; and
- (e) the procedure and nature of payment in the event of termination of mandate.

The commission proposed the following safeguards in the Working Paper:⁵⁵

- (a) There must be a reasonable prospect of success;
- (b) the controlling bodies have the power to review and set aside contingency fee agreements;
- (c) there is an obligation on the practitioner to advise the client of alternative financing methods;
- (d) a standard form of agreement must be adopted to include
 - (1) a statement by the lawyer setting out the reasons why the fees are deemed to be appropriate;
 - (2) the basis upon which the fee is to be included;
 - (3) the manner in which costs and disbursements are to be dealt with and paid in the event of failure or termination;
 - (4) a "cooling off" period in terms of which a client is afforded a reasonable time after having entered into the agreement to consider his/her position, and to withdraw therefrom if he/she chooses; and
 - (5) that details of any offer which is made by the opponent is to be conveyed to the client, with an explanation as to the implications of accepting the offer, as opposed to proceeding to trial.

Contrary to what was finally passed in the Act, the Commission did not find the need to require that the agreement be filed with the court or controlling body. It also was of the view that the opponent need not be made aware of the existence of the agreement.

54 *Idem* 63.

55 *Ibid.*

continued on next page

This latter requirement has been debated at length amongst practitioners, as it is viewed that such a requirement impinges on the sanctity of attorney and client confidentiality of which information the opponent has no right to be informed.⁵⁶

A further question which arose, was whether the system should be made applicable to only certain classes of litigants who could not afford litigation.⁵⁷ Van den Heever JA was of the view that the system should not be available to those who can afford to litigate.⁵⁸ Whilst she was supported,⁵⁹ others⁶⁰ opined that there should be no bar as to who could enter into such agreements. A practical problem would of course be defining who is able to afford litigation, and who not. The matter was not taken further and at this stage there is no bar as to who may enter into contingency fee agreements.

The judges of the Appellate Division were divided as to whether the agreement should be disclosed to the controlling body and the courts. Both the Transvaal Law Society and the Cape of Good Hope Law Society expressed their concerns against over regulation. The Cape of Good Hope Law Society also proposed that it be permitted that contingency fee agreements be entered into at any time during the attorney client relationship, stating that the need for such an arrangement sometimes only occurred during the course of litigation. The ramifications as to when such a contingency fee agreement can be entered into only became evident years later when the issue was raised in the matter of *Tjatji v Road Accident Fund and Two Similar Cases*.⁶¹

Having regard to the above, the Commission therefore recommended⁶²

- (a) the exclusion of criminal and family law matters;
- (b) a limitation on the cap;
- (c) that there must be a reasonable prospect of success;
- (d) that alternative options of funding must be explained to the client;
- (e) that controlling authorities should have a right of review and power to set aside a contingency fee agreement;

56 See discussion in Chapter 6 below.

57 SALC Report 65.

58 *Idem* 68.

59 *Idem* 67.

60 *Ibid.* (The judges of the Appellate Division; Adv Louw; Northern Cape Law Society – subject to restrictions; Transvaal Law Society; Cape Law Society; Council of South African Bankers.)

61 *Tjatji supra*, where the court found that an illegal agreement entered at the commencement of the matter could not be remedied by a subsequent (illegal) agreement. The issue is discussed in chapter 6 below.

62 SALC Report 74.

- (f) that a standard agreement format should be formulated and which is to include
 - (1) a statement by the attorney in which he confirms that the fees which are to be charged are appropriate;
 - (2) the details of the basis upon which the fees are to be charged;
 - (3) the details as to who will bear the successful opponent's costs in the event of failure;
 - (4) a cooling off period;
 - (5) arrangements as to costs payable in the event of termination of the attorney's mandate;
 - (6) that the details of the offer are to be conveyed to the client when an offer is made, as well as the implications of accepting the offer versus proceeding to trial if the offer is not accepted.
- (g) That contingency fee agreements should not be confined to any class of persons (that is, whether they be plaintiff or defendant, wealthy or impecunious, and so forth).

3.10 A DIVIDED SYSTEM: ATTORNEYS VS ADVOCATES

It needed to be ensured that the attorneys' and advocates' professions were of one mind regarding contingency fee agreements.⁶³ The General Council of the Bar, although it allowed speculative fees at that stage, did not allow uplift fees, whilst the Association of Law Societies favoured an uplift fee and disfavoured speculative fees. The Commission's preliminary view was that uplift fees should be allowed for both professions.⁶⁴

The Orange Free State Society of Advocates strongly opposed contingency fee agreements stating that the professions themselves, and not legislation, should regulate such agreements.⁶⁵ This view was not dissimilar to the Appellate Division judges who were of the view that the two professions' rules did not need be the same.⁶⁶ The advocates' profession, however, seemed to be divided on the issue.⁶⁷ The Banking Council of South Africa favoured a system which should be applicable to both

63 *Idem* 74 per the Chief Justice and Judge President Eloff.

64 *Idem* 75.

65 *Ibid.*

66 *Ibid.* Advocate Van der Byl did not favour it, whilst advocate Louw did.

67 *Ibid.*

continued on next page

professions, and the Natal and Northern Cape Law Societies both favoured an uplift system.

Having considered the English Law,⁶⁸ the Commission recommended that:⁶⁹

- (a) General Council of the Bar rule 7.3 be amended to allow advocates to conclude uplift contingency fee agreements;
- (b) it must be explained to clients that they will be liable for the uplift portion of the advocate's fees in the event of success; and that
- (c) the total uplift fee portion payable to both attorney and advocate cannot exceed 25% of the proceeds, which definition of proceeds should not include costs.

3.11 ADDITIONAL MEASURES: DEBT COLLECTING ATTORNEYS

An industry had developed in South Africa whereby non-attorneys were engaging in the practice of debt collection on a "no win, no fee" basis.⁷⁰ This placed undue strain on the attorney's profession which was placed in a disadvantageous position with regard to its clients, who obviously were at less financial risk to pay the obligatory attorney's fees, and preferred to use the debt collection agencies at no risk and without having to pay fees and disbursements as and when they were incurred.⁷¹

The Transvaal Law Society had already in 1995 allowed its members to charge contingency fees in debt collection matters,⁷² subject to the following conditions:

- (a) The debtor shall not pay more than the amounts determined in the guidelines issued in terms of Rule 82;
- (b) the contingency fee agreements must be in writing;
- (c) contingency fee agreements must be entered into at the time that the mandate was given and before the instruction was commenced with;
- (d) a "no win, no fee" basis was acceptable; and
- (e) touting would not be permitted.

The Commission was of the view that debt collectors would still have to make use of attorneys if pre-litigation methods did not yield payment, and that the earning of collection commission operated separately from the fees earned in legal

68 *Idem* 76.

69 *Idem* 84.

70 *Idem* 78.

71 *Idem* 79

72 Law Society of the Northern Provinces Ruling 25 October 1995 paragraph 16.18.2.
continued on next page

proceedings.⁷³ It was further of the opinion that the attorney essentially wore two caps in the process – one as debt collector and one as attorney – and that the actual collection of the debt can never form part of the *lis* itself. The attorney was thus free to earn collection commission on a “no win, no fee” basis.⁷⁴

The Commission therefore found that attorney debt collectors were sufficiently protected and that no further measures were required to protect their interests.⁷⁵

3.12 PROPOSED DRAFT BILL

Included as Annexure “A” to its Report, the Commission formulated a draft Bill upon which it believed an Act should be modelled.⁷⁶ Whilst the Bill which was ultimately passed⁷⁷ did by and large mimic the Commission’s proposed draft Bill, there are important differences between the Act as it now stands and the Commission’s proposed draft Bill. The differences,⁷⁸ which although at face value seem to be of minor significance, actually have lead to varying interpretations of certain sections by the profession and the courts. These variations have had and will in all likelihood have major potential consequences in the future. These are discussed in Chapter 6 below.

The Bill was tabled before Parliament and assented to by the President on 21 November 1997.⁷⁹ The Act would come into operation on a date fixed by the President by proclamation in the *Gazette*. The Act came into operation with effect from 23 April 1999 by virtue of Proclamation R48 of 1999 in *Government Gazette* 20009 of 23 April 1999.

73 SALC Report 81.

74 *Idem* 82.

75 *Ibid.*

76 *Idem* 84.

77 Discussed below.

78 For example, in s 2(2), the phrase “(herein referred to as the success fee)” has been added in the Act. In the same section, the word “fee” has been replaced with “fees”. The phrase “the total of any fees higher than such normal fee” has been replaced with “the total of such success fee”.

79 GG 18542 Vol 389 of 21 November 1997.

CHAPTER FOUR

COMPARATIVE STUDY

4.1 INTRODUCTION

This chapter is a comparative study of the legal systems of certain countries in the Western world, with specific emphasis on contingency fee agreements. It shows that the protection of a client against unfair and harmful practices of overcharging is a major concern throughout the world. The safeguards which are built in, whilst having many common elements, vary from country to country and even from state to state within these countries.

4.2 BACKGROUND

Contingency fee agreements¹ are permitted in various countries throughout the world, including the United States of America, England and Wales, Australia and Scotland. However, certain countries such as Germany² and France³ do not favour the system, and it is illegal to enter into contingency fee agreements.

Whilst contingency fee agreements have been in use in the USA for more than 150 years, the system is relatively new to other westernised countries such as England, where damages-based contingency fees were not permitted until 2013.⁴

Confusion often arises as to what a “contingency fee agreement” actually is, as there appears to be differing definitions depending on who is referring thereto. When referring to a contingency fee agreement, persons in the UK and USA would essentially have a percentage or damages-based agreement in mind. The method of speculative fees prescribed by the South African legislation is based on an “uplift fee”, and hence the title of the Act as being the Contingency Fees Act would appear to be a misnomer if compared to the basis of other legal systems.

Before embarking on this comparative study of the different country’s legal systems, one must have regard to the subtle differences of each system before arriving at a conclusion as to whether a particular fees basis or percentage (or limitation thereof) in

1 Including percentage or damages-based agreements.

2 S 49 b 2 of the Federal Lawyers’ Act (*BRAO*) of 2004.

3 French Business Lawyers “French Attorneys and Legal Fees” <http://www.french-business-law.com/french-attorneys-and-legal-fees-page21.html> (accessed on 12 July 2017).

4 See Chapter 4 below.

one particular country constitutes fair compensation when compared to that in another system.

One such important principle to consider, is the “costs follow the result” rule in terms of which the courts will require the losing party in a lawsuit to pay the winning side’s legal costs. This differentiates the USA system from most other countries where this rule does not apply. The implication of the exclusion of this principle is that where litigants do not bear the risk of costs orders being made against them, lawyers are more likely to take on cases which are more risky because of absence of sanctions against the losing party. On the contrary, under the “loser pays” system, the ability to recoup fees from the losing party (or perhaps being liable if you indeed lose) gives plaintiffs and their attorneys a clear incentive to focus on truly meritorious cases only and to conduct thorough investigations prior to proceeding in order to avoid bringing questionable cases. On the other hand, in a system where the threat of having to pay an opponent’s legal fees is removed, attorneys can afford to become far more litigious, including initiating civil actions based on cursory investigations, and perhaps based on the hope of obtaining a “nuisance value” settlement from the defendant.

There are thus advantages and disadvantages of either including or excluding the “costs follow result” rule. One advantage of inclusion is that because the winner will recoup some of its costs, the financial risks of litigating at one’s own expense where a claim is seemingly with merit are reduced, whilst at the same time the added advantage is that the successful award effectively becomes more lucrative where a costs contribution is received in addition to the capital awarded and the recovered (party and party) costs are effectively set off against the increased “success fee”. The disadvantage of the system is that the losing litigant runs a risk of bearing the winner’s costs. In the USA system, the litigant will have to bear his expenses out of the proceeds of his award thus making the award worth less, whilst on the other hand there is no risk of bearing the winner’s costs if one loses the case. These considerations have an influence on the extent to which a lawyer wishes to be exposed to risk (versus the reward), and hence the extent of the fee cut of the award which the lawyer would expect. Risk needs to be weighed against reward.

Another aspect which needs to be considered when comparing legal systems, is the nature and demographic make-up of the population of each country. In countries where the population is generally of a low income status where the man in the street cannot afford to hire lawyers, a contingency-fee system would provide the public with

the “key to the courthouse”,⁵ whereas in first world countries which are relatively well-off (for example, Switzerland and Germany) one finds that such systems are not needed as litigants are able to finance their own litigation.

A further consideration when comparing legal systems, is the fact that the USA, unlike England,⁶ Australia,⁷ Canada⁸ and South Africa,⁹ has no comparable nationally-financed “legal aid” programme for providing counsel to aggrieved persons in civil cases. Because the United States lacks such a system, the contingency-fee contract is widely recognised as the means by which all Americans may retain counsel to seek legal assistance, irrespective of their means.

To obtain a comprehensive view on the subject, the legal systems of various countries are considered individually.

4.3 UNITED STATES OF AMERICA

Contingency fee agreements have been recognised in the USA since 1853¹⁰ and are an integral characteristic of their legal system. The American contingency fee is most closely associated with personal injury cases, where research shows that virtually all plaintiffs pay their lawyers on a contingency basis.¹¹ In 1994, the American Bar Association found that contingency fee agreements fell squarely within the bounds of American legal ethics.¹²

USA law is governed by Federal and State law. Each state has its own rules for the charging of contingency fees. Traditionally, medical malpractice and personal injury law has been under the authority of the individual states and not the federal government.¹³ All US jurisdictions permit contingent fees subject to the general ethical

5 Corboy “Contingency Fees: The Individual's Key to the Courthouse Door” 1976 *Litigation* Summer 27–28.

6 Access to Justice Act 1999, and supplementary legislation, the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

7 Commonwealth Legal Aid Commission Act 1977 (LAC Act).

8 Currie “Legal Aid Delivery Models In Canada: Past Experience And Future Developments” <http://faculty.law.ubc.ca/ilac/Papers/04%20currie.html> (accessed on 12 July 2017).

9 Legal Aid South Africa is an independent statutory body established by the Legal Aid South Africa Act 39 of 2014.

10 *Wylie v Coxe* 56 US 415 (1853).

11 Kritzer *The Justice Broker: Lawyers and Ordinary Litigation* (1990).

12 American Bar Association: Committee On Ethics and Professional Responsibility *Formal Opinion* (Dec 1994) 94–389.

13 Bal “An Introduction to Medical Malpractice in the United States” 2008 *Clinical Orthopedics and Related Research* (2008 Nov 26) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/> (accessed on 6 May 2016).

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requirement that such fees must be reasonable and not excessive.¹⁴ In addition, federal and state laws impose a myriad of limits on the fee percentage ranging from 10 percent to 50 percent.¹⁵ Twenty-eight states have provisions that place limitations on attorneys' fees.¹⁶

In the state of New York there is a presumption that the maximum allowed fee is deemed to be fair and reasonable if it is equal to or less than one-third of the capital awarded or settled.¹⁷ In medical malpractice cases, the Judiciary Law establishes a maximum sliding-scale fee ranging from 30 percent of the first \$250 000 to 10 percent of the recovery over \$1.25 million.¹⁸ Where the normal allowed fee does not provide adequate compensation because of extraordinary circumstances, an application can be made to court to allow the lawyer to charge a higher fee. Such applications have frequently been made in large medical malpractice cases where the fees are capped at a low percentage and significant effort is required to obtain a proper result.¹⁹ In cases involving minors, all contingent fees are subject to court approval based on an application filed by the attorney. In cases not involving minors or an incompetent party, there is generally no court review of a contingency fee.²⁰ New York courts have routinely approved contingent fees of 33.33% as being fair and reasonable, whilst at the same time reducing fees in cases settled before trial to 25% in cases involving minors.²¹

14 American Bar Association *Model Rules of Professional Conduct* NY Rule 1.5(a).

15 Kritzer "Seven Dogged Myths Concerning Contingency Fees" 2002 *Wash U LQ* 739 757–761. According to Kritzer, about two-thirds of the cases, excluding those governed by special regulation, involve a fixed percentage (flat fee), and about one-third involve a variable percentage. In 88% of flat-fee cases, the contingency fee is 33% of the recovery. The common pattern in the cases employing a variable percentage is to charge 25% of the recovery if the case does not go to trial or does not involve substantial trial preparations, 33% if the case goes beyond that point and 40% to 50% if the case results in an appeal.

16 A very comprehensive schedule listing the laws applicable in each state, including the fees allowable to attorneys and a summary of what damages can be claimed is found on the website of the National Conference of State Legislatures "Medical Liability/Medical Malpractice Practice Laws" (2011) <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-medical-malpractice-laws.aspx> (accessed on 14 July 2017).

17 Supreme Court of the State of New York First Judicial Department *Conduct of Attorneys* Part 603.7(e)(1), (2) - 2017. The rule also provides for an alternative sliding-scale fee starting at 50% on the first \$1 000 down to 25% of the recovery above \$25 000, but the scale is rarely used. Pounian and Green "Nuts and Bolts of Contingent Fees" (2010) <http://www.kreindler.com/Publications/NYLJ-Nuts-Bolts-6302010.pdf> (accessed on 6 May 2015).

18 NY Judiciary Law s 474-a; Pounian and Green *loc cit*.

19 *Ibid*.

20 NY Judiciary Law s 474; Pounian and Green *loc cit*.

21 Pounian and Green *loc cit*.

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Connecticut rules, similar to those of New York, have a sliding-scale limit. It is based on 33.33% on the first \$300 000, reducing to 10% of the recovery over \$1.25 million.²² However, the Connecticut fee limit may be waived in writing by the client if the claim or civil action is substantially complex, unique or different from the normal case, provided that the total fee does not exceed one-third of the recovery.²³ Whilst this provision has its merits, it is submitted that such a loose-ended arrangement may cause more litigation than for the good of clients, especially where the population subject thereto is from the largely uneducated third world.

New Jersey also has a sliding-fee scale ranging between 33.33% and 20% of the recovery on the first \$2 million, and where the award is in excess of \$2 million, the settlement is subject to court review and approval.²⁴ New Jersey courts have approved fees of as high as 33.33% in matters in excess of the \$2 million provisional limit.²⁵

In all cases brought under the Federal Tort Claims Act,²⁶ federal law imposes a strict 25% cap on fees, subject to criminal penalties.²⁷

Wisconsin limits percentage fees in medical malpractice cases (33% or 25% of the first \$1 million depending on whether the liability is stipulated within a statutory deadline, and 20% of any amount over \$1 million).²⁸ Interestingly, a requirement similar to that contained in section 3(3)(b)(i) of South Africa's Contingency Fees Act²⁹ is that the client must be given an option of entering into an hourly fee arrangement as opposed to a percentage fee.³⁰

22 2011 Connecticut Code Title 52 Civil Actions, Chapter 901 Damages, Costs and fees, s 52-251c(b).

23 S 52-251c(c),(d),(e) & (f).

24 NJ Court Rule 1:21-7.

25 *King v County of Gloucester* 483 F Sup 2d 396 (DNJ 2007); Pounian and Green *op cit*. The court held that excellent work and result merited 33.3% fee on recovery above \$2 million.

26 The Federal Tort Claims Act permits persons to sue the government of the United States in federal courts for monetary damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

27 US Code 2678 Title 28 – Judiciary and Judicial Procedure 517.

28 WI Stat s 655.013 (2012 through Act 45) (2012 Wisconsin Statutes & Annotations 655: Health care liability and injured patients and families compensation; 655.013: Attorney fees.

29 S 3(3)(b)(i) of the Act: the contingency fee agreement shall state that before the agreement was entered into, the client was advised of any other ways of financing the litigation and of their respective implications.

30 WI Stat s 655.

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In summary, the USA permits contingency fee agreements subject to varying requirements.

The position of contingency fee agreements in the USA was one of the legal systems considered by the South African Law Commission when formulating its recommendations.³¹

4.4 ENGLAND AND WALES

The law in England clearly distinguishes between “contingency fee agreements” (CFAs) and “conditional fee agreements”. In case of contingency fee agreements (or “damages-based agreements” (DBAs) as they are referred to) the lawyer’s fee is based on an agreed percentage of the award, which is only payable in the event of success. Before 1 April 2013, contingency fee agreements were not permitted for contentious work (litigation or arbitration proceedings) in England and Wales. However, such arrangements had previously been permitted for employment and other tribunal work under the definition of conditional fee agreements, as these fields of practice were considered to be non-litigious business.³²

Since 1995,³³ lawyers could conduct litigation under contingency fee agreements (CFAs), whereby they would in addition to normal fees receive a success fee (up to 100% of the normal fee)³⁴ if the case succeeded, and nothing, or sometimes a discounted fee, if it was lost. This is comparable to the South African “uplift” fee.³⁵

On 1 April 2013 the legislation was amended to allow for contingency fee agreements in contentious legal matters (litigation and arbitration proceedings) in England and Wales.³⁶

As with most Anglo-Saxon legal systems, the “costs follows the result” principle applies in England.³⁷

31 SALC Report 12 para 2.2 *et seq.*

32 S 58AA of the Courts and Legal Services Act, 1990 which was amended by the Legal Aid, Sentencing and Punishment of Offenders Act, 2012.

33 Conditional Fee Agreement Regulations of 1995.

34 *Idem* s 3.

35 *McQuoid supra* 81.

36 Ss 58 and 58A of the Courts and Legal Services Act, 1990. The Laws in Wales Acts 1535–1542 annexed the legal system of Wales to England (Laws in Wales Act 1535, Clause I).

37 Civil Procedure Rules part 44.

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The form and content of such agreements are regulated by the Courts and Legal Services Act 1990,³⁸ the Civil Procedure Rules and the Damages Based Agreement Regulations 2013.³⁹ Features thereof include:

- (a) The agreement must specify the nature of the claim; the circumstances under which payment of the legal representatives fees and disbursements will be made; and the reason for setting the payment at an agreed level.⁴⁰
- (b) In personal injury matters, the lawyer is paid up to double the normal fee if the case is won, and nothing, or sometimes a discounted fee, if the case is lost. The uplifted fee is called a success fee, and it is capped at 100%. The fee payable by the client must, however, not exceed 25% (VAT inclusive) of the “award”.⁴¹
- (c) For purposes of calculation of the “award”, only general damages and pecuniary losses – other than “future pecuniary loss” – are to be taken into account.⁴²
- (d) In matters other than those involving personal injury, the cap on fees is limited to 50% (VAT inclusive).⁴³
- (e) The percentage caps only apply to proceedings “at first instance”.⁴⁴
- (f) The client will only be liable for payment of the shortfall of costs not recovered from the losing party, and the claimant cannot recover more in costs than it is liable to pay its own lawyer.⁴⁵
- (g) In personal injury matters, there is an exception to the “costs follows the result” principle, known as “Qualified one-way costs-shifting”. In terms hereof, orders for costs against the claimant can normally only be enforced by a defendant if the total of the defendant’s costs does not exceed the amount of damages and costs which a defendant has to pay out.⁴⁶
- (h) Where parties fund their litigation via conditional fee agreements (CFAs) and/or after-the-event (ATE) insurance, the CFA success fee and ATE premium are no

38 S 58 of the Courts and Legal Services Act sets out the conditions applicable to a “conditional fee agreement” and includes provisions such as that it must be in writing and set out the percentage by which the amount of the fees, which would be payable if it were not a conditional fee agreement, must be increased.

39 Regulation 2013 No 609 which came into force on 1 April 2013.

40 Regulation 3.

41 Regulation 4(2)(b).

42 Regulation 4(2)(a).

43 Regulation 4 (3).

44 Regulation 4(4). This means proceedings prior to appeal proceedings.

45 Regulation 4(1)(a).

46 Civil Procedure Rules 44.13 to 44.17 (from 1 April 2013).

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longer recoverable from the losing opponent if the case is successful. Defendants therefore no longer face an increased costs liability where a claim is pursued with the benefit of a contingency fee agreement.⁴⁷

- (i) To counter the impact of non-recoverability of fees, from 1 April 2013 general damages are automatically increased by 10%.⁴⁸
- (j) The indemnity principle applies to DBAs, so that the claimant cannot recover more in costs than it is liable to pay its own lawyer.⁴⁹
- (k) Contingency fee agreements are not permitted in family and criminal law matters.

4.5 AUSTRALIA

Agreements to recover personal injury damages by way of contingency fee agreements (“damages based agreements” based on percentages) are forbidden throughout Australia, whereas “uplift” agreements are permitted. As with the various provincial Law Societies in South Africa having different rules, each state regulates the profession within its jurisdiction, and as such there may be differences from state to state.

Under current regulations, lawyers are restricted to offering “conditional” billing where they charge no fee, or a lower fee, if the case is lost but may charge an uplift based on normal rates (rather than a share of damages) if the case is successful. This uplift is capped at 25% of the normal fee. Damages-based billing is where the lawyer receives a pre-determined percentage of the award of damages and is not paid if the legal action is unsuccessful. Damages-based billing has been and remains prohibited in Australia.⁵⁰

Victoria and New South Wales are both party to legislation which prohibits contingency (not uplift) fees agreements.⁵¹ The Victorian Law Reform Commission⁵²

47 Implemented by ss 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which amend the relevant sections of the Courts and Legal Services Act 1990.

48 The change has been implemented by Court of Appeal guidance in *Simmons v Castle* [2012] EWCA Civ 1288 (amending the initial guidance given in the same case: [2012] EWCA Civ 1039).

49 Civil Procedure Rule 44.18(1)(b).

50 Hobson and Moran “Contingency fee arrangements and tighter controls for litigation funders: proposed reforms” in Norton Rose Fulbright June 2014 *Insurance Update* 2.

51 The Legal Profession Uniform Law Application Act 2014 (Vic) includes the Legal Profession Uniform Law as Schedule 1. The Act itself addresses matters that are specific to Victoria while the Legal Profession Uniform Law is the same for Victoria and New South Wales.

52 Victoria Law Reform Commission *Civil Justice Review Report* 14 (March 2008). The Commission was established under the Victorian Law Reform Commission Act 2000.

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noted that for an effective justice system to be in place, there must be a balance between the reward which the client receives and the fees which the lawyer is allowed to charge. It held that a prohibition on “damages-based fees” is contrary to proportionality – a key goal of an effective civil justice system. The amount of work required from one matter to another may vary due to their complexity, but even the amount of work required in the same case is dependent on the vigour with which the defendant chooses to resist the claim.⁵³ Schedule 1 of the Legal Profession Uniform Law Application Act 16 of 2014 sets out the regulations that apply to Victorian practitioners in relation to the maximum amount of costs that are payable to practitioners in personal injury damages matters.⁵⁴ Interestingly, the Schedule does not apply to motor vehicle accidents and work injury damages.⁵⁵ The Legal Profession Uniform Law Act 16 of 2014 prescribes that the uplift fee must not exceed 25% of the legal costs (excluding disbursements).⁵⁶ Similar to most other legal systems, the agreement must *inter alia* be in writing,⁵⁷ must have a five-day cooling off period,⁵⁸ and not be in respect of criminal or family law matters.⁵⁹

The Productivity Commission was later commissioned by the Australian Government to address the issue of access to justice, and released its Inquiry Report on 3 December 2014.⁶⁰ Part of the mandate was to investigate the issue of conditional and contingency fees agreements. In arriving at its recommendations, the Inquiry Report stated that damages-based billing has the potential to provide several advantages, including better aligning the interests of lawyers and their clients by removing incentives to perform unnecessary services. In the circumstances, the Commission considered that the prohibition on damages-based billing should be removed, subject to consumer protections such as comprehensive disclosure requirements and percentage limits on a sliding scale to prevent lawyers earning windfall profits on high value claims.⁶¹ The Commission considered the threat posed

53 *Idem* 657.

54 Legal Profession Uniform Law Application Act 16 of 2014. S 61 (which prescribes that fees shall be regulated according to Schedule 1 of the Act).

55 S 1(2) of the Schedule.

56 S 182(2)(b).

57 S 180(2).

58 S 181(4).

59 S 181(7).

60 Australian Government Productivity Commission Inquiry Report: *Access to Justice Arrangements* No 72 5 Sept 2014.

61 *Idem* 22.

to lawyers by litigation funders and opined that it may create some competition for litigation funders. Importantly, it recognised that attorneys were subject to restrictions and controls whereas the practice of third-party funding by non-lawyers was unregulated, and thus recommended that equal controls be put in place in respect of attorneys and funders.

A further advantage of a damage-based agreement is that it benefits claimants by providing an upfront assurance that legal fees will be commensurate to the value of taking legal action.⁶² The initial recommendation that damage-based agreements be allowed, was vehemently opposed by some sectors.⁶³

The Commission recommended⁶⁴ that the Australian, State and Territory Governments should remove restrictions on damages-based billing (contingency fees), subject to protections being put in place for consumers, such as:

- (a) The prohibition on damages-based billing for criminal and family matters in line with restrictions for conditional billing, should remain.
- (b) Comprehensive disclosure requirements in the agreement which are to include details of the percentage of damages, and where liability will fall for disbursements and adverse costs orders.
- (c) Percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients.
- (d) Damages-based fees should be used on their own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).

It was further recommended⁶⁵ that the Australian Government should establish a licence for third-party litigation-funding companies, designed to ensure that they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest. Coupled to this, Recommendation 18.3 suggested that the court rules should be amended to ensure that both the discretionary power to award costs against non-parties in the

62 Australian Government Productivity Commission Inquiry Report: *Access to Justice Arrangements* No 72 5 Sept 2014. Volume 2 625.

63 *Idem* 626.

64 *Idem* 627.

65 Recommendation 18.2 *idem* 633.

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interests of justice and obligations to disclose funding agreements apply equally to lawyers charging damages-based fees and litigation funders.⁶⁶

The Law Institute of Victoria supported the above recommendations of the Productivity Commission and the Victoria Law Reform Commission to permit all classes of contingency fee agreements.⁶⁷

As at time of writing,⁶⁸ the recommendations of the Committee had not yet been accepted. It is submitted that these have merit and could be applied to the South African Act.

4.6 CANADA

Contingent fee agreements are legal in some provinces of Canada (Alberta, British Columbia,⁶⁹ Ontario⁷⁰ and Quebec among others). Whilst there are varying rules for each of the provinces, the rules (save for Quebec) are similar.

In Ontario, an exact limitation on the percentage share allowed in a contingency fee agreement has never been formalised by the Law Society.⁷¹ However, it is common practice to have contingency rates averaging between 20% and 45 % of the amount recovered.⁷² As in the other systems, safeguards are built in. In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client must consider a number of factors including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs.⁷³ The lawyer and client may agree that in addition to the fee payable under the written agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid

66 *Idem* 637. This is an aspect which the SALC failed to deal with extensively, and it is suggested that similar steps be put in place in South Africa to protect lawyers against champerty and litigation funders.

67 Law Institute of Victoria *Percentage-Based Contingency Fees: Position Paper* 25 May 2015 (released 17 February 2016) 4.

68 August 2017.

69 Law Society of British Columbia *Rules of Professional Conduct*.

70 Ontario Solicitors Act RSO 1990 and its Regulations 195/04; Rules of Professional Conduct of the Law Society of Upper Canada Rule 3.6-2.

71 Law Society of Upper Canada.

72 Hutchinson "A study of the costs of legal services in personal injury litigation" Insurance Bureau of Canada <http://www.ibc.ca/on/resources/studies/a-study-of-the-costs-of-legal-services-in-personal-injury-litigation-in-ontario-by-allan-c-hutchinson> (accessed on 3 Aug 2017)

73 Polten, Weiser and Klünspies "Rules of Costs and Fees for Lawyers – A Comparison of German Law and the Law of the Province of Ontario/Canada" Polten and Associates <http://www.poltenassociates.com/Resource-Links/Legal-Fees-English.pdf> (accessed on 3 Sept 2016).

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to the lawyer. Such agreement must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee is fair and reasonable in all of the circumstances.⁷⁴ The regulations strictly prescribe the form and content of what is to be included in a contingency fee agreement and are very similar to (and even more prescriptive than) those required by section 3 of the Contingency Fees Act in South Africa.⁷⁵ Whilst the agreement also must be in writing and contain *inter alia* full disclosure of fees, costs, disbursements and early termination, it also must include a simple example that shows how the contingency fee is calculated.⁷⁶ Interestingly, where the claimant is under disability, any proposed settlement agreement and the fees and disbursements which will be charged, must be approved by a judge to ensure that understanding by the client and lawyer is reached.⁷⁷

In British Columbia the maximum contingency fee allowed is one-third of the amount recovered in a claim for personal injury or wrongful death arising out of a motor vehicle accident. In all other cases involving personal injury or wrongful death, the maximum allowed is 40% of the amount recovered.⁷⁸ Contingency fees are not permitted in family law cases involving child custody or access. They are permitted in other types of family law cases, but must be approved by the court. A provision (notably lacking from the South African legislation) caters for the fees that can be charged over and above the agreed percentage where a matter is taken on appeal.⁷⁹ The agreement, (which also has to be in writing), is not as prescriptive as that required by Ontario rules, but must also contain a declaration specifically setting out the percentage fee and an acknowledgement that extra fees may be charged on appeal.⁸⁰

74 Law Society of Upper Canada "Manage your Practice: Contingency fees" <http://www.lsuc.on.ca/ContingencyFees/> (accessed on 3 Sept 2016).

75 Regulation 195/04 to the Solicitors Act "Contingency Fee Agreements".

76 S 2.6. It is recommended that this provision be incorporated in South African law so as to eliminate any misunderstanding as to the complex calculation of fees where the population making use of contingency fee agreements is largely third-world.

77 S 3.5.

78 Law Society of British Columbia *Rules of Professional Conduct* rule 8-2(1).

79 Rule 8-2(3).

80 Rule 8-4(1) & (2).

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In Alberta, as with Ontario, no maximum fee is prescribed. In terms of the Legal Profession Act⁸¹ and the rules of the Alberta Law Society⁸² the agreement has to be in writing, and a five-day cooling off period allowing a client to withdraw from the contract is obligatory.

A common provision in Canada is that if the client terminates, the fees will be based on hourly rates for all work done up to termination (but payable only upon the successful conclusion of the case) and if the lawyer terminates without cause, he receives no fee.⁸³

4.7 MISCELLANEOUS COUNTRIES⁸⁴

Scotland has long permitted lawyers to act on a “speculative” basis.⁸⁵ In Northern Ireland, speculative fee arrangements have operated unofficially for many years.⁸⁶ In the Irish Republic, barristers take cases on a “no goal, no fee” basis.⁸⁷ In New Zealand, both barristers and solicitors may charge on a “speculative basis”.⁸⁸ In France, major Paris law firms are using contingency fees increasingly,⁸⁹ and they are now being permitted to base fees in part on results achieved.⁹⁰ Greece permits percentage fees much like the American contingency fee, but with a limit of 20% of the amount recovered.⁹¹ Greece also allows lawyers to consider the result achieved in setting a fee.⁹² Several countries permit elements of contingency (fees based in part on results

81 Legal Profession Act 2004.

82 Law Society of Alberta *Code of Conduct* Feb 3 2017.

83 *Ibid.* Rule 3.7-1 has the effect that although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event that the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in rule 3.7-5 unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur. Rule 3.7-5 states that a lawyer must withdraw if he is discharged by a client; or a client persists in instructing the lawyer to act contrary to professional ethics; or the lawyer is not competent to continue to handle a matter.

84 Maurer *et al* “Attorney Fee Arrangements: The US and Western Perspectives” 1999 (19) 2 *Northwestern J of International Law & Business* 273.

85 Skordaki & Walker *Regulating and Charging for Legal Services: An International Comparison* Research Study No 12 (1994) 26.

86 *Idem* 29.

87 *Idem* 43.

88 *Idem* 33.

89 *Idem* 61.

90 Sheridan & Cameron *EU Legal Systems: An Introductory Guide* (1992) (Greece - 15).

91 Kritzer (2015) ch 12.

92 Sheridan & Cameron (Greece -10).

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achieved). In Italy this supplementary fee is called the *palamario*.⁹³ Other countries that permit this include Luxembourg⁹⁴ and Portugal.⁹⁵ Brazil allows fees that include a contingency/percentage element.⁹⁶

4.8 CONCLUSION

The types of contingency fee agreements vary from country to country, and even from state to state within a country. There are many types of agreements that can be adopted, all having differing risks, advantages and disadvantages and consequences for the attorney and his client. It would appear that the system adopted by South Africa is a compromise of the good and bad aspects of the countries, as whilst the client is protected against harmful practices, the attorney is rewarded for the risk which he has taken on a “no win, no fee” basis. The extent to which the reward is fair, remains debatable throughout all legal systems.

93 *Idem* (Italy - 20).

94 *Idem* (Luxembourg-12).

95 *Idem* (Portugal – 13).

96 Kritzer (2015) ch 12. Bermudes “Administration of Civil Justice in Brazil” Zuckerman A (Ed) *Civil Justice In Crisis: Comparative Perspectives Of Civil Procedure* (1999) 347.

CHAPTER FIVE

CONTINGENCY FEES ACT AND REGULATIONS

5.1 INTRODUCTION

This chapter contains a brief overview of the Act, and the Regulations that were passed in terms thereof. The differences between what the SA Law Commission proposed in its draft, and what was finally enacted, are also discussed. Detailed discussions of various issues arising from these provisions appear in Chapter Six.

5.2 THE ACT

5.2.1 Section 1 – Definitions

The following definitions are included:

- (a) contingency fee agreement
- (b) day
- (c) legal practitioner
- (d) normal fees
- (e) proceedings
- (f) professional controlling body.

Nothing appears contentious from these definitions, and a discussion of the normal fees, proceedings and professional controlling body appears in Chapter six hereunder.

5.2.2 Section 2 – Contingency fee agreements

This section is probably the most important, as it goes to the foundation of the Act, describing the circumstances under which contingency fee agreements can be entered into, and what the parameters and conditions thereof are. A number of important provisions arise:

- (a) The act supersedes the common law in respect of contingency fee agreements;
- (b) in order to enter into the agreement, there must be a reasonable prospect of success;
- (c) an agreement may be entered into on a “no win, no fee” basis;
- (d) practitioners shall be allowed fees higher than their normal fees in the event of success;
- (e) the higher than normal fees shall not exceed the defined normal fees by more than 100%;

- (f) in respect of claims sounding in money, the total of the success fee shall not exceed 25% of the total amount awarded; and
- (g) for the purpose of calculating the excess and hence the cap of 25%, costs shall not be included in the calculation.

5.2.3 Section 3 – Form and content of contingency fee agreement

Section 3 prescribes the details that must be contained in the contingency fee agreement. Having regard to the judgments of *Tjatji*,¹ *Thulo*,² *Masango*³ and *Mofokeng*,⁴ it is now clear that the requirements are peremptory and deviation from the prescribed details will result in the agreement being declared invalid. The requirements are discussed in detail in Chapter Six. Details include:

- (a) The agreement must be in writing and signed by the parties;
- (b) It shall state:
 - (1) the proceedings to which the agreement relates;
 - (2) that alternatives to financing litigation were discussed;
 - (3) that in the event of not being successful, the client may be liable for the opponent's cost;
 - (4) that the client will be liable to pay the success fee in the event of success, and under what circumstances;
 - (5) that the client understood the agreement;
 - (6) what the definitions of success and a trial success are;
 - (7) how disbursements are to be dealt with;
 - (8) how fees shall be dealt with on premature termination;
 - (9) the amounts or method used to calculate fees; and
 - (10) that the client shall have a 14-day cooling off period to consider and withdraw from the agreement;⁵
- (c) the client shall be given a copy of the agreement on the day that it was signed.

1 *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 (GSJ).

2 *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ).

3 *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ).

4 *Mofokeng v Road Accident Fund, Makhuvale v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012).

5 The Consumer Protection Act 68 of 2008 has a similar provision where a contract has been entered into as a result of 'direct marketing'. In terms of section 16(3) of that Act, a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days.

5.2.4 Section 4 – Settlement

Section 4 prescribes the procedure to be adopted and the requirements which are to be met once an offer to settle has been made in a matter where a contingency fee agreement has been signed. These requirements are also dealt with in detail in Chapter Six.

- (a) Prior to the client accepting a settlement offer, the attorney must file either with the court or with the relevant controlling body, affidavits deposed to by the client and himself.⁶
- (b) The affidavit by the attorneys shall state:
 - (1) The full terms of the settlement;
 - (2) an estimate of the amount of relief that will be obtained by taking the matter to trial;
 - (3) estimated chances of success;
 - (4) an outline of the attorney's fees if settled as opposed to proceeding to trial;
 - (5) reasons why settlement is recommended; and that
 - (6) the provisions have been explained to the client and that the client understands the terms of the settlement
- (c) The affidavit by the client must confirm:
 - (1) that the client was notified in writing of the terms of the settlement;
 - (2) that the terms were explained and understood; and
 - (3) the client's attitude to the settlement.

Any settlement where a contingency fee agreements was entered into, shall be made an order of court if the matter was before court.

5.2.5 Section 5 – Client may claim review of agreement or fees

Any client who feels aggrieved by any provision of the agreement or the fees, may refer the matter to the controlling body. The controlling body may review the agreement and set aside the agreement, or any fees, if the provisions thereof are unreasonable or unjust.

5.2.6 Section 6 – Rules

Any professional controlling body, or in its absence, the Rules Board for Courts of Law,⁷ may make rules deemed to be necessary in order to give effect to the Act.

6 In *Mofokeng* 28 the court dealt with these requirements individually.

7 Established in terms of s 2 of the Rules Board for Courts of Law Act 107 of 1985.

5.2.7 Section 7 – Regulations

The Minister may make regulations prescribing further steps to be taken for the purposes of implementing and monitoring the Act.

5.2.8 Section 8 – Short title and commencement

The Act shall be called the Contingency Fees Act, 1997 and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

5.3 THE REGULATIONS

5.3.1 Two regulations have been promulgated since the passing of the Act. The first lists which controlling bodies are applicable to advocates,⁸ and the second gives the form and content of the agreement, as prescribed by the Minister.⁹

5.3.2 Essentially, the bar council to which a member belongs shall have jurisdiction over him, and where an advocate is not a member of a bar council, the bodies listed in the Schedule in the area in which such a legal practitioner practises, shall have jurisdiction.

5.3.3 The form of the agreement is an embodiment of the requirements set out in section 3 of the Act, and lists in separate paragraphs, the matters that need to be detailed in terms of the section. In *Masango*, the court held that compliance must be substantial and not merely formal, and that failure to adhere thereto would result in the contingency fee agreement being declared invalid.¹⁰ In *Tjatji*, the court stressed that the provisions of section 2 and 3 of the Act are couched in peremptory language, and if deviated therefrom, will be invalid.¹¹

5.4 CONCLUSION

The Act and regulations thereto clearly set out in user-friendly form what is required by the parties who wish to enter into a contingency fee agreement. At face value, there appear to be few, if any, provisions of either the Act or the Regulations which are

8 S 1(vi)(b) and 5: Determination of Professional Controlling Body and designation of a body published in Government Notice No. R. 546 of 23 April 1999 (Government Gazette No. 20009) and amended by Government Notice No. R. 1110 of 3 November 2000 (Government Gazette No. 21719)

9 S 3(1)(a): Contingency Fees Agreement in terms of the Contingency Fees Act, 1997 (Act No. 66 of 1997) published in GN R547 of 23 April 1999 (GG 20009).

10 *Masango* 24.

11 *Tjatji* 12, 13.

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difficult to understand. It is, however, only once they are applied in practice that some difficulties and varying interpretations arise. Little complaint can be raised as to the form and content of the agreement, and it is probably only the difference in interpretations of section 2(2) that have resulted in a vast difference of opinions of the courts.¹²

12 *Masango and Tjatji vs Thulo*.

CHAPTER SIX

MATTERS ARISING FROM THE ACT

6.1 INTRODUCTION

Despite the courts having canvassed a few issues which have arisen from the interpretation of the Act,¹ there are still many issues which remain unclear and unresolved. The Act is relatively still in its infancy, having been in operation a little more than 16 years, and one can expect that the interpretations concerning many issues to still be developed over time. Judgments are only delivered in response to specific issues arising, and the whilst Courts may have made decisions on matters, such decisions would only have been made based on what was presented to and argued before the Court. As will appear hereafter, whilst many opportunities have arisen for wider issues to have been canvassed, many issues were not argued as they were not raised by litigants (or the courts), and so the final chapter appears to still be unwritten.

Issues that need to be raised and debated include (a) proceedings, pre-litigation and related proceedings and appeals; (b) the professional controlling body; (c) reasonable prospect of success; (d) the “success fee”; (e) uplift and non-uplift agreements; (f) claims sounding in money; (g) reasonableness of the caps; (h) the settlement procedure; (i) types of matter; (j) an attorney doing the work of an advocate; (k) both attorney and advocate entering into the agreement; (l) unsuccessful matters – liability for opponent’s costs; (m) at what stage can the agreement be entered into; (n) apportionments; (o) Value Added Tax; (p) unforeseen side issues arising; (q) costs relating to taxation of costs; and (r) costs relating to drawing the bill of cost.

6.2 PROCEEDINGS, PRE LITIGATION PROCEEDINGS AND APPEALS

The Act regulates the entitlement and limitation of the practitioner to charge fees² arising out of proceedings if the client “is successful in such proceedings”.³

1 *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ); *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 (GSJ); *Mofokeng v Road Accident Fund*, *Makhuvele v Road Accident Fund*, *Mokatse v Road Accident Fund*, *Komme v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012), *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ).

2 S 2.

3 S 1.

When has “success” been achieved? Is it once final judgment has been given on the quantum? Or when a settlement offer has been made, or made *and* accepted? Or when the capital, or capital *and* costs are paid? Or after appeal proceedings have been exhausted? The possibilities are endless. It is for this reason that the Act prescribes that the agreement must define what the parties have agreed will constitute “success”.⁴

The Act defines “proceedings” as any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity, and includes any professional services rendered by the legal practitioner concerned and any arbitration proceedings, but excludes any criminal proceedings or any proceedings in respect of any family law matter.

The definition implies that the agreement shall relate to specific proceedings instituted for a specific purpose, often easily identifiable under one case number. Section 3(3)(a) prescribes that the contingency fee agreement shall state the proceedings to which the agreement relates. It often happens in personal injury matters that applications to obtain medical records, have to be brought prior to the institution of the main damages action,⁵ and these proceedings are often launched against a party which ultimately is not the Defendant in the main action. Practitioners should thus be very careful to properly describe to which proceedings the agreement will relate. If it is their intention, then they should specify that all applications and services rendered prior to institution of the main action, even though not against the same Defendant but which may be necessary in the preparation for the institution of proceedings in the main action, shall also form part of (or not form part of) the definition of “proceedings” to which the contingency fee agreement refers.

To the contrary, it may be envisaged that part of the proceedings which fall under the same case number of certain proceedings, do not form part of the contingency fee agreement (such as proceedings relating to appeal or execution proceedings which arise after judgment). Similarly, practitioners should be mindful to clearly specify the details of which proceedings relate to the agreement.

4 S 3(3)(c).

5 In terms of the Promotion of Access to Information Act 2 of 2000.
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The courts have held that it is not lawful to enter into common law contingency fee agreements outside the parameters of the Act.⁶ It would seem that this would not prevent parties from concluding different types of contingency fee agreements relating to different portions of the same claim, as long as the nature of the proceedings to which the agreement relates,⁷ and the type of the agreement being entered into, is clearly specified.⁸

6.3 PROFESSIONAL CONTROLLING BODY

The Act⁹ distinguishes between the definition of the professional controlling bodies of attorneys and advocates. In respect of attorneys, the professional controlling body means any body established by or under any law for the purposes of exercising control over the carrying on of the business of the attorneys' profession, and of which such an attorney is a member. In respect of an advocate, it means any body which is determined by the Minister of Justice by notice in the *Gazette* for the purposes of this Act, and of which such an advocate is a member.

All attorneys are obliged to be members of a law society in the area of jurisdiction in which they practise, and so they are automatically subject to the body to which they belong.¹⁰ Advocates, however, are not so obliged and become members of bar associations on a voluntary basis.

The Minister determined¹¹ that:

- (a) the controlling bodies in respect of an advocate shall be the professional body bodies listed in the Schedule of which such an advocate is a member. Thirteen advocates' associations or societies are listed; and that
- (b) in the case of a legal practitioner who is not a member of a professional controlling body, the bodies in the Schedule in the area in which such a legal practitioner practises shall be applicable.

The controlling bodies have two main roles in terms of the Act:

6 *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) and *Tjatji supra*.

7 S(3)(a). In *Masango* para 61.1 it was held that in order to comply with s 3(3)(a), the contingency fee agreement has to specify in detail the particulars of the proceedings to which the agreement applies, otherwise it is open to abuse and the same agreement can be used in other matters.

8 Whether that part of the claim is regulated by s 2(1)(a) or 2(1)(b).

9 S 1.

10 S 57(1) of the Attorneys Act 53 of 1979.

11 GN R546 in GG 20009 of 23 April 1999.

- (a) In terms of section 4, any offer of settlement made to any party who has entered into a contingency fees agreement *and such matter is not before court*, may only be accepted after the legal practitioner has filed an affidavit with the professional controlling body / bodies.
- (b) In terms of section 5(1), a client who feels aggrieved by any provision contained in a contingency fee agreement, may refer such agreement or fees to the controlling body, or in the case of a legal practitioner who is not a member of a controlling body to such person or body as the Minister of Justice has designated.

In terms of section 5(2), such a controlling body may review any agreement and set aside any provision thereof or any fees claimable in terms thereof if in its opinion the provision or the fees are unreasonable or unjust. The professional controlling body only has jurisdiction over matters where *its members* are concerned. The manner or procedure as to how the controlling body may review or set aside any provision of a contingency fee agreement is not specified, and one would presumably expect that an enquiry be conducted in support of the *audi alteram partem* principle.¹² The Act prescribes that any professional controlling body may make rules to give effect to the provisions of the Act.¹³

The Rules for the Attorneys Profession were published by the Law Society of South Africa with effect from 1 March 2016. No provisions were contained therein regarding special rules applicable to contingency fee agreements. Similarly, whilst the General Council of the Bar did prescribe guidelines on contingency matters,¹⁴ no specific rules of application to the Act have been published to date.

Shields notes that the provision giving only the client a remedy, is one-sided and opens up scope for the client to sit back and watch the attorney spend time and money and take the risk, and then at an advanced stage declare himself (perhaps without reason) to be “aggrieved”.¹⁵ It is submitted that this concern indeed has merit and offers no protection for the attorney.

12 Literally translated to mean “let the other party be heard”.

13 S 6 (or in the absence of such body, the Rules Board for Courts of Law in terms of Act 107 of 1985).

14 General Council of the Bar: Uniform Rules of Professional Conduct Rule 7.3.

15 Shields H “Contingency Fees in South Africa – First Tastes of the Forbidden Fruit” 2000 IBA Conference Amsterdam.

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6.4 “REASONABLE PROSPECT OF SUCCESS” AND “SUCCESS”

It is a peremptory requirement in the Act that a contingency fee agreement can only be entered into if there is a *reasonable prospect* that the client may be *successful* in the proceedings.¹⁶ This requirement has two legs, namely, (a) there must be a *reasonable prospect* (of success); and (b) there must be *success*.

6.4.1 Reasonable prospect

The reason behind the first leg requirement is to ensure that contingency fee agreements will not be entered into on a speculative and/or reckless basis in matters where there is little chance of success. Unsuccessful matters have countless unfavourable economic, administrative and practical consequences, including: clogging up of the court roll; the incurring of excessive fees which may be irrecoverable; wastage of man hours and the time of the courts, practitioners, experts and the like. However, this requirement may not be as effective as the legislature had envisaged. The following examples illustrate what can rightfully be defined as “successful” proceedings which do not fall foul of the “reasonable prospect” proviso, albeit that they are in fact examples of the very situation which the legislature tried to discourage by the inclusion of the definition:

- (a) The plaintiff obtains a judgment against a defendant for monetary damages. From inception, the plaintiff knew that although the merits of his case were strong, the defendant was impecunious and that there was a great possibility that the monetary award might not be recovered. He is unable to recover any of the damages awarded from the defendant. Did the plaintiff have a reasonable prospect of success entitling him to enter into a contingency fee agreement? He may argue that he did indeed obtain a successful judgment against the debtor, and on the merits, he was entitled to enter into a contingency fee agreement as there was more than a reasonable prospect of success *on the merits* at the time of commencement of the action. The counter-argument may be that such an example is the very reason for the legislature to have included the requirement of reasonable prospect of success *as a whole*, to prevent reckless “hollow” litigation from ensuing.
- (b) A plaintiff in an MVA action has a *very weak* case on the merits – he does not have a reasonable prospect of success on the merits. However, his injuries are very serious and his potential damages are huge, running into tens of millions of Rands. A contingency fee agreement is entered into. He obtains a judgment of many millions of Rands in his favour. Did the plaintiff have a reasonable prospect of success which entitled him to enter into a contingency fee agreement? He may argue that he did indeed obtain a successful monetary award against the debtor – albeit it that at inception, the prospects on the merits were poor. On the other hand, would this too not be

16 S 2(1).

a classic example of a situation where the intention of the legislature to prevent risk-prone litigation was defeated?

In the first example, the reasonableness of the success hinges on the obtaining of the court order and not on the reasonableness of obtaining the monetary award, whereas in the second example, the reasonableness hinges on the ultimate monetary award and not the reasonableness of success on the merits. Both outcomes had favourable results, albeit largely academic. Both at face value appear to have fallen foul of the legislature's intention of preventing reckless litigation from ensuing, although in reality, it cannot be denied that in both instances there was a reasonable prospect of "success".

A further important consideration, is that the determination of what is deemed to be a "reasonable prospect of success", is dependent upon the definition of what is actually agreed upon between the parties as to what "success" is. In the second example above, if the attorney and client agree that their definition of "success" is that the client will obtain a 1% (apportioned) award, it would appear that they have a reasonable prospect of obtaining that success. On the other hand, if they deemed a successful result to be a 100% award, the prospect of success would be much more difficult to achieve and seemingly unreasonable. As the definition of "success" is determined by the parties themselves, it opens the door for the parties to manipulate the "reasonableness" requirement in their favour, to enable them to enter into contingency fee agreements, and at the end of the day, the requirement of "reasonable prospect" may not have the effect that the legislature intended it to have.

6.4.2 Success

The shortcoming of the "success" requirement, is that Act does not prescribe under what circumstances proceedings are deemed to be "successful". In terms of section 3(3)(c) of the Act, the definition of what is to be deemed a successful claim or not, is left to the parties to agree amongst themselves.

The Act prescribes that a written agreement shall be entered into,¹⁷ and shall contain certain provisions detailing what will be regarded by the parties to the agreement as constituting success or partial success.¹⁸

The requirement that the attorney and client are to determine the definition of success is further enforced by section 2(1)(a), which states that the legal practitioner shall not be entitled to any fees unless the client is successful in the proceedings “to the extent set out in the agreement”. In other words, the definition of success is not a statutory or legislative definition, but rather a contractual one determined by the parties to the agreement.

Specifically referring to personal injury matters, “success” can take various forms, such as a monetary award for damages, or by obtaining a mandamus or interdict order (for example to compel the RAF to honour a section 17 undertaking¹⁹). It must be kept in mind that the Act covers two different types of contingency agreements – one allowing a “no-win, no-fee” basis,²⁰ and a second separate and distinguishable instance, regulating an “uplift” fee.²¹ Taking the examples discussed above one step further, it would appear to be acceptable to enter into a contingency fee agreement on the basis that success is defined as a party obtaining any amount in monetary damages (no matter how small the sum may be), or obtaining a “hollow” award. Where the definition of success is left to the attorney and client, they can easily tailor, or even manipulate and engineer their definition of “success” so as to allow them to enter into valid contingency fee agreements. This would tend to defeat the entire safeguard which the legislature built into the section, in an attempt to prevent risky and

17 In terms of s 3(1)(a), the agreement must be in the form prescribed by the Minister of Justice, as published in the *Gazette*, after consultation with the attorneys’ and advocates’ professions. Such a prescribed agreement was published simultaneously with the Act in GN R546 of 23 April 1999 (GG 20009) and amended by GN R1110 of 3 November 2000 (GG 21719). In *Masango* para 57, the court held that a contingency fee agreement which does not comply strictly with the prescribed form of the agreement is invalid.

18 S 3(3)(b).

19 In terms of the Road Accident Fund Act, instead of paying the damages for future medical expenses upfront in terms of the “once and for all” rule, the RAF is entitled to issue a certificate of undertaking to pay for the future accident-related expenses as and when they are incurred, on reasonable proof being provided that such expenses were necessary. The claimant must first incur the expenses out of his pocket, and then motivate and claim back the cost from the RAF. However, it is common cause in the system that the RAF is notorious for not honouring the undertakings simply due to poor administration, alternatively by refusing refund for reasons that either the expense (say the treatment) was not necessary or was not accident-related, alternatively that the cost was not reasonable. The upshot is that claimants are forced to institute proceedings to obtain payment.

20 S 2(1)(a).

21 S 2(1)(b).

speculative litigation from being embarked upon. To use an example, assume that the parties enter into a section 2(1)(a) contingency fee agreement in terms of which the attorney will be entitled to his normal fees on success. Assume further that the chances of success are very slim, and the claim is worth R10 million. If the parties define success as being an award on the merits being made, no matter what percentage apportionment is allocated against the claimant (say 95%), then albeit that they have entered into an agreement where there is practically no reasonable prospect of success, they have complied with the requirement of the Act in that they have defined success, which 5% can be achieved – even if minimal and at a great risk. Here, R500 000 proceeds are at stake for the attorney and client to share.

The Act also requires the parties to define what is partial and complete success. What is considered to be a (complete) success as opposed to a partial success is unclear. One presumes that partial success would apply to matters where a certain order was requested, and where only parts of the order were granted; or whether a specific amount of damages was claimed and only a portion thereof was granted. The counterargument can be made that success is success, whether complete or partial, as long as some type of award is made in the client's favour. The importance of practitioners and clients carefully considering the wording of the definitions of "success" and "partial success" at the time of negotiating and drafting the agreement, cannot be emphasised strongly enough.

This lack of a statutory definition, or guidelines as to what can be considered to be "success" or "partial success", is open to abuse and interpretation as explained in the example above, and will no doubt be the subject of disputes in future.²²

6.5 "SUCCESS FEE"

Section 2(1)(b) read with section 2(2), seeks to regulate the computation of the amount of fees which an attorney can charge in a matter which is subject to a contingency fee agreement. Firstly the maximum that the fees can be higher than normal, is limited to double the normal fee, and secondly, in claims sounding in money, those fees are subject to a cap of 25%.

²² In 2000, Shields *supra* warned that the Act provides "scope for confusion, if not dissention, between attorney and client". 17 years later, it now appears that his predictions have merit.

The section reads 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. However, 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%: 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% 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.

The section makes reference to various words and phrases including “fees”, “normal fees”, “success fee”, “total amount awarded”, “any amount obtained by client in consequence of the proceedings concerned”, “which amount” and “excess”. Each of these differing definitions has a separate part to play in the determination of what fees and attorney would be entitled to charge the client. In *Masango*,²³ the court dealt extensively with the definitions of the aforementioned words and phrases. In order to meaningfully analyse this section, one would have to critically analyse these words and phrases individually.

6.5.1 Fees

The *Oxford English Dictionary*²⁴ defines “fee” as “a payment made to a professional person or to a professional or public body in exchange for advice or services”. The *Collins English Dictionary*²⁵ similarly defines “fee” as “the amount of money that a person or organization is paid for a particular job or service that they provide”. It can thus generally be accepted that a fee can be defined as a monetary payment received for the rendering of a professional service or the giving of advice.

6.5.2 Normal fees

The Act defines normal fees in relation to work performed by a legal practitioner in connection with proceedings, to be the reasonable fees which may be charged by

23 *Masango* para 13ff.

24 *Oxford Dictionary of English* (2010).

25 *Collins English Dictionary* (1998).

continued on next page

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.

In terms of this definition, the “normal fees” of an attorney would be those that would be allowed on taxation in a litigation matter governed by the Rules of Court²⁶ on an attorney and own client scale. Rule 70 deals with the taxation and tariff of fees of attorneys. Salient principles which are gleaned from the rule include:

- (a) The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work, in accordance with the provisions of the appended tariff.²⁷
- (b) 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 persons or by other unusual expenses.²⁸
- (c) Value added tax may be added to all costs, fees, disbursements and tariffs in respect of which value added tax is chargeable.²⁹
- (d) The taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of the tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.³⁰
- (e) In computing the fee allowed, the taxing master shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute and any other factors which he or she considers relevant.³¹

From these principles, it is evident that to be entitled to a normal fee on taxation

- (a) an attorney would have to actually have performed the services;
- (b) the fees set out on the Rule 70 tariff would have to be applied as a yardstick;

26 Uniform Rules of the High Court: Superior Court Act.

27 Rule 70(1)(a).

28 Rule 70(3).

29 Rule 70(3A).

30 Rule 70(5)(a).

31 Rule 70(5)(b).

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- (c) it must relate to a litigious matter;³²
- (d) all costs and charges which have reasonably been incurred in pursuance of the matter shall be allowed;
- (e) VAT may be charged on such fees where the attorney is registered as a vendor; and
- (f) importantly, the taxing master may depart from the tariff where strict adherence thereto will be unfair in the circumstances, having regard to the nature, complexities and extent of the matter at hand.³³

Ordinarily, an attorney is entitled to be paid his attorney and own client professional fees from his client, no matter what the outcome of the litigation is, and no matter whether the client has been successful in having been awarded (or ultimately paid) a costs contribution from the opponent or not.³⁴

The Act allows an attorney to charge a fee higher than his normal fee.³⁵ To determine the calculation of the higher fee, as a starting point, one needs to determine what the “normal fee” would be.

Practitioners usually agree on a basis for the charging of normal fees with clients. These fees are usually determined on a time based rate per hour/minute for services rendered. The Act prescribes that a contingency fee agreement shall state “either the amounts payable or the method to be used in calculating the amounts payable”.³⁶ It also states that the legal practitioner shall be entitled to fees equal to or higher than his or her normal fees, “set out in such agreement”.

32 This has been confirmed in *Nash and Another v Mostert and Others* 2017 (4) SA 80 (GP), where the court held that where a contingency fee agreement involving a non-litigious matter fell foul of the Act, for the same reasons that contingency fee agreements in respect of litigious matters are prohibited by common law, so too are those in respect of non-litigious matters as they are contrary to public policy and invalid.

33 Rule 70(5)(a) of the Uniform Rules of Court states that the taxing master shall be entitled, in his discretion, at any time to depart from any of the provisions of the tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable. In so doing, he shall take into account the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute and any other factors which he considers relevant (subsection 5(b)).

34 Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts & Supreme Court of Appeal of South Africa* (2009) Vol 1 953 Roos (assisted by Whiteside) *Taxation of Bills of Cost in the Superior Courts of South Africa* (1947) (with Supplement by Roos and Brink 1956) 8; Cilliers *Law of Costs* (2008) 4.02.

35 S 2(1)(b).

36 S 3 (3)(f).

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Because the higher fees permitted in terms of a valid contingency fee agreement would be dependent upon the definition of what the attorney's fee would normally be, it is logical that the basis of the charging of attorneys' normal fees needs be set out in detail in the agreement.

6.5.3 Success fee

Whilst reference thereto is made in the Act, the Act does not specifically define what a "success fee" is. The Act entitles a practitioner to charge a fee higher than the normal fee.³⁷ The higher fee is subject to two different caps:³⁸

- (a) The first cap relates to the permissible *percentage* increase on the attorney's normal fee (the "uplift" portion). The increase may only be to a maximum of 100% of the normal fee. A practitioner is quite entitled to have the increase lower than 100%, although it appears that most practitioners employ the 100% maximum.
- (b) The second cap regulates the *maximum monetary amount* of the total permissible fee (the "success fee") that the attorney can charge. In claims "sounding in money", the total of the normal fee together with the added "uplift" fee, shall not exceed 25% of the total amount awarded or obtained by the client in consequence of the proceedings.³⁹

There are varying judgments as to whether the success fee, and hence applying the 25% cap, constitutes (a) the capital and the "uplift" fee and costs; or (b) the capital and "uplift" fee only.

The problem arises from the somewhat unclear wording of the last phrase of section 2(2) of the Act, which prescribes 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% of the total amount awarded or any amount obtained by the client in consequence

37 S 2(1)(b).

38 S 2(2).

39 The Act states that the 25% cap is to be calculated on the amount of the award, excluding costs. There are varying judgments as to whether the interpretation of "excluding costs" means that the costs are to be included in determining the total amount of the award, or whether they are excluded (and hence the cap does not apply to the costs portion). Reference is had to the discussion in the paragraphs below.

of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

The reference to any costs being excluded from the calculation of the amount to be used when determining the cap, is logically a reference to any costs awarded to a successful litigant (such as party and party costs to be paid by the unsuccessful party) in addition to any capital that is awarded.⁴⁰ In *Thulo*,⁴¹ Morison J held that costs do not have anything to do with the calculation of the cap (as the Act specifically excludes them by direct reference thereto), and accordingly that part or all of the recovered costs could be retained by the attorney in addition to the success fee.⁴² A contrary view was held in *Mofokeng, Masango and Tjatji*,⁴³ where Mojapelo DJP and Boruchowitz J respectively held that the wording of the section which had reference to costs being excluded, only meant that one could not add the recovered costs to the capital amount to calculate what the 25% cap would be. The implications of the differing opinions can be seen by the examples below:

	SCENARIO 1 <i>Thulo</i>	SCENARIO 2 <i>Tjatji</i>
Capital awarded	100,000	100,000
Normal fee (say)	15,000	15,000
Uplift fee (say 100%)	15,000	15,000
Total fees before applying Act	30,000	30,000
Success fee allowed (lesser of 100% uplift or 25% cap)	25,000	25,000
Costs retained by attorney as they are not subject to cap calculation	10,000	0
Total fees to attorney	35,000	25,000

40 Whether on a party and party or attorney and client scale or on any other basis.

41 *Thulo supra*.

42 *Thulo* 451C.

43 *Mofokeng, Masango and Tjatji supra*.

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Essentially, the three judges all agree that the costs cannot be added to the capital to determine the level of the cap (that is to say, the costs do not form part of the definition of “the total amount awarded”).⁴⁴ Their difference, however, lies in the interpretation as to what happens to those costs – can they be retained in addition to the cap or not? If one has regard to the wording of the recommendations of the SA Law Commission, it would appear quite clear that it too had in mind that the costs should not be regarded as “proceeds” for purposes of determining the 25% cap.⁴⁵ Their recommendation reads as follows:⁴⁶

“In the case of claims sounding in money, lawyer’s uplift fees should not exceed 25% of the proceeds of an action thus conducted, and that costs awards not be regarded as proceeds for the purposes of calculating the 25% portion.”

This sentiment was echoed in the Commission’s recommendations relating to the right of advocates to enter into contingency fee agreements, where it too made it very clear that the 25% cap “should not include any awards as to costs”.⁴⁷

It is noted that the draft Bill contained in Working Paper 63 provided for a maximum of 25% of the total amount awarded, and the Cape Law Society had requested that this be amended to read that the attorney should be entitled to the full amount of party and party costs awarded together with the uplift fee, provided that the total did not exceed 25% of the amount awarded. It is submitted that this is a fair compromise.

It is interesting to note that Morison J made the proviso to his aforementioned finding, that if the other side were not to pay the taxed costs for some reason, the legal practitioner would not be permitted by the Act to recover those from his or her own client if the effect was to leave the client out of pocket to the extent of more than double the legal practitioner's normal fees or resulted in the client receiving less than 75% of the amount awarded in the judgment. Whilst the Act is silent on that aspect, this proviso is not agreed with. Nowhere from a reading of the Act (or from the Commission’s investigations or findings) does it appear that the Act will guarantee the client 75% of the proceeds (especially where there is a shortage of disbursement recovered versus actual disbursements incurred).

44 By way of example: if capital is R100 000 and costs of R20 000 are awarded, then 25% of R100 000 (only) will yield a lower fee than 25% of R100 000 + R20 000 = R30 000, ie to include costs in the calculation of the cap will yield higher fees.

45 In its submissions, the Cape Law Society similarly contended that the 25% cap must not include costs.

46 SALC Report 62.

47 *Idem* 78.

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There was for years a misconception amongst the profession that the implication of the second cap was that attorneys could charge a flat percentage-based maximum fee of 25% of the capital awarded.⁴⁸ This is not so. This misconception arose largely due to the failure by practitioners to read the Act properly. A flat-rate percentage charged on a capital award would amount to a damage-based fee or a contingency-based fee, as is allowed in the USA. The 25% cap mentioned in the Act simply prescribes the maximum which can be charged at the end of the day once the total “success fee” has been calculated. Our courts have accepted that the “success fee” refers to the *combined* total of the normal fee plus the “uplift” portion,⁴⁹ and that a flat percentage fee is not permissible at all and such practice should be stopped.⁵⁰

To summarise:

- (a) Where claims sounding in money are concerned, a practitioner can charge a maximum of
 - (1) double his normal fees (referred to as the “success fee”),⁵¹
 - (2) *but* on the proviso that such success fee shall be limited to a maximum of no more than 25% of the award.⁵²
- (b) Where claims do not sound in money, a practitioner can charge a maximum of double the normal fee, which total fee is subject to no limitation.⁵³

In other words, where claims sounding in money are concerned, the fees are limited to (maximum) double the normal fees, or 25% of the claim, whichever is the *lesser*.

The following example illustrates this:

	SCENARIO 1 - success fee not reaching 25% cap	SCENARIO 2 - success fee exceeding 25% cap
Capital awarded	100,000	100,000
Normal fee (say)	10,000	20,000
Uplift fee' (say 100%)	10,000	20,000
Fees before cap	20,000	40,000

48 *Masango and Thulo supra.*

49 *Mofokeng, Masango and Tjatji supra.*

50 *Masango* para 20.

51 S 2(1)(b).

52 S 2(2).

53 S 2(1)(b).

Total fees limited to double normal fee	20,000	Total fees limited to 25% cap	25,000
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For sake of completeness, it is apt to mention that in the early days after the Act was passed, there were varying views amongst members of the profession as to the interpretation of what constituted the “success fee” as mentioned in the subsection.⁵⁴ Some were of the view that the definition of “success fee” referred only to the “uplift” portion of fees,⁵⁵ whilst others were of the view that “success fee” referred to the entire fee (that is, normal fees and “uplift” calculated together).

If the former view is taken, the practitioner’s limitation to the 25% cap would be restricted only to the extent of the uplift portion. If the latter view is taken, (as has now been accepted by the courts)⁵⁶ the entire fee (normal and uplift) is subject to the 25% cap. The following example illustrates the financial implications of the differing views:

	SCENARIO 1 - combined fees limited by 25% cap		SCENARIO 2 - only uplift limited by 25% cap
Capital awarded	100,000		100,000
Normal fee (say)	30,000		30,000
Uplift fee (say 100%)	30,000		30,000
Total fees before cap	60,000	Uplift fee limited to cap	25,000
Total combined fees limited by cap	25,000	Total fee where only uplift portion limited	55,000

6.6 UPLIFT AND NON-UPLIFT AGREEMENTS

There are four variations of contingency fees envisaged in terms of the Act:

54 S 2(2).

55 KZN Law Society obtained such an opinion from senior counsel on the report on Speculative and Contingency Fees by the SA Law Commission.

56 *Mofokeng, Masango and Tjatji supra.*
continued on next page

- (a) a basic “no win, no fee” agreement, in terms of which the attorney is entitled to charge his *normal* fees only in the event of him being successful, in respect of matters *not* “sounding in money”;⁵⁷ or
- (b) a basic “no win, no fee” agreement, in terms of which the attorney is entitled to charge his *normal* fees only in the event of him being successful, in respect of matters sounding in money;⁵⁸ or
- (c) a “no win, no fee” agreement in respect of claims not “sounding in money” in terms of which the attorney is entitled to charge an “uplift”/“success fee” to a maximum of 100% of the normal fee in the event of him being successful, but which total fees are not subject to a maximum cap;⁵⁹ or
- (d) a “no win, no fee” agreement in respect of claims “sounding in money” in terms of which the attorney is entitled to charge an “uplift”/“success fee” to a maximum of 100% of the normal fee in the event of him being successful;⁶⁰ but which is subject to a cap of 25% of the total amount awarded if the claim “sounds in money”.

The first type of contingency fee agreement does not envisage the attorney charging an uplift fee over and above his normal fee. He takes the matter on at risk, and at the conclusion, if successful, charges his normal fees. The purpose of this type of agreement now being allowed, is to remedy the old common-law provisions that agreements entered into on a “risk” basis, were *contra bona mores*. Prior to the passing of the Act, the attorney was obliged to charge for his professional services irrespective of whether he was successful in obtaining an order or not. The attorney’s fees are not limited by any statutory cap whatsoever.⁶¹ An example of the type of agreement envisaged herein, would be that concerning *mandamus*⁶² or interdict proceedings. On successful finalisation of the matter, the attorney is entitled to charge his normal fees, and these fees are subject to no cap whatsoever. An example would be where the attorney successfully institutes action or application proceedings for the

57 This type of agreement was referred to in the SALC Report as a “speculative fee”. S 2(1)(a) now enables parties to enter into “no win, no fee” agreements, which agreements were previously not allowed.

58 S 2(1)(a).

59 S 2(2) read with s 2(1)(b).

60 S 2(2) read with s 2(1)(b).

61 Attorneys’ fees are always subject to reasonableness in accordance with the professional and ethical guidelines and rules of the various Law Societies.

62 A writ or order that is issued from a court that commands a body or individual to perform a particular act, the performance of which is required by law as an obligation.

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return of a motor vehicle. Assuming that the value of the car recovered was R100 000,⁶³ and the attorney's normal fee was R50 000, he would be entitled to charge this R50 000 fee, albeit that it was equal to 50% of the deemed value of the car.

The second type of contingency fee agreement similarly does not envisage the attorney charging an "uplift" fee over and above his normal fee, but unlike the first type, the claim "sounds in money". A classic example would be in a case where the attorney wishes to assist an indigent client by writing a letter of demand on his behalf for a small debt due to him. Again, prior to the passing of the Act, the attorney was obliged to charge for his professional services irrespective of whether he was successful in obtaining payment for her or not. In this example, if he is successful in recovering her debt, he is quite entitled to charge his normal fee, and if he is not successful he cannot raise a fee.

It is only in respect of agreements where an "uplift" fee in terms of section 2(1)(b) is applicable, that the attorney's fee is limited to 100% of his normal fee (and furthermore to the 25% cap where claims "sound in money"). This means that in terms of the first and second type of agreement, whether the claim "sounds in money" or not, and as long as the attorney is not charging an "uplift" fee, the attorney's normal fee is subject to no cap whatsoever. Another example is where the attorney proceeds to recover a large debt of say R1 million on behalf of a corporation. At the successful conclusion of the matter, the attorney charges his normal fees, which say ultimately equate to R400 000 or 40% of the amount recovered on the client's behalf. Because his agreement was not subject to an "uplift" fee in terms of section 2(1)(b), his fees, albeit limited to his normal fees, are subject to no cap whatsoever.⁶⁴ However, had he entered into an uplift fee agreement, his normal fee could have been doubled to a maximum of R800 000, although the fee would have been capped to R250 000 in terms of section 2(2).

The third type of agreement permits matters to be conducted on risk, yet affords the attorney the opportunity to be compensated for taking the risk by allowing him to charge the "uplift" fee to a maximum of 100% of his normal fee, where matters *not*

63 The value of the car must not be misinterpreted to equate to a claim sounding in money, and is simply used for illustrative purposes to show the differences in fees outcome in litigation matters embarked upon with similar value.

64 In terms of s 2(2), the maximum 100% and 25% caps respectively only relate to claims which are *subject to an uplift fee* in terms of s 2(1)(b).

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“sounding in money” are concerned. Here, the combined normal and “uplift” fee is subject to cap of a maximum of 100% of normal fees, but because the claim was not one “sounding in money”, the increased success fee may indeed exceed the monetary cap of 25% of the capital.⁶⁵ If one uses the same example concerning the repossession of the car used above, if the value of the car was R100 000 and the normal fee was R50 000, then in terms of his section 2(1)(b) read with section 2(2) of the Contingency Fee Agreement, the attorney would be entitled to charge a fee of double the R50 000 which equates to R100 000.

In the fourth type of arrangement, the attorney has the advantage of increasing his normal fee by an additional maximum of 100% of the normal fee, but the downside is that he is limited by the maximum 25% cap on the total amount of his fees, where claims “sounding in money” are concerned.

The anomaly is thus created in situations where although the value of the subjects at issue in two different actions are similar, and although the same amount of services has been performed and the same amount of normal fees has been raised, because the one involves a claim for money and the other not, a totally different fee entitlement results.

The following examples summarise and illustrate the financial implications of the differences:

Scenario 1		Scenario 2		Scenario 3		Scenario 4	
<i>non - uplift agreement - not sounding in money</i>		<i>non -uplift agreement - sounding in money</i>		<i>uplift agreement - not sounding in money</i>		<i>uplift agreement - sounding in money</i>	
value of vehicle	100,000	value of claim	100,000	value of vehicle	100,000	value of claim	100,000
normal fee	35,000	normal fee	35,000	normal fee	35,000	normal fee	35,000
				Uplift fee' (say 100%)	35,000	Uplift fee' (say 100%)	35,000
Total fee	35,000	Total fee	35,000	Total fee	70,000	Total fee	70,000

⁶⁵ In terms of s 2(2), the 25% cap is only applicable to claims where the parties have agreed to apply the “uplift” fee arrangement in respect of “claims sounding in money”.

Fee allowed - no limitation by caps	35,000	Fee allowed - no limitation by caps	35,000	Fee allowed - not limited by 25% cap	70,000	Fee allowed - limited by 25% cap	25,000
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6.7 CLAIMS SOUNDING IN MONEY

As discussed above, the cap limiting the total amount of fees to a maximum of 25% of the award only applies to “claims sounding in money” and where an uplift contingency fee agreement has been entered into.⁶⁶

The Act does not define what a “claim sounding in money” entails. In the broader sense, one can easily presume these claims to be those including *mandamus* and interdict orders where the prayer is not for payment of money, but rather for specific performance, contempt orders, repossession orders, spoliation orders, and the like.

One must question why the distinction regarding the cap was made by the legislature between claims sounding in money and other claims. In considering which types of law should be applicable to contingency fee agreements, the SA Law Commission did express its concerns that it was conceivable that if not limited, uplift fees may pose the danger that the entire proceeds of a successful litigation action could be swallowed up in attorneys’ and counsel’s fees, to the detriment of the client. The report similarly noted that the same concern had been expressed by the Chief Justice.⁶⁷ Whilst it is acknowledged that the majority of contingency fee agreements do relate to personal injury, and particularly road accident fund claims,⁶⁸ and that these concerns indeed have merit, it still does not explain why *only* clients who have claims sounding in money should receive this protection. One may argue that where clients have claims sounding in money, they at least will be guaranteed a large monetary payout after deduction of fees, whilst those who need legal protection in other matters not sounding in money, may be faced with a huge legal bill – and have no funds from the

66 S 2(2).

67 SALC Report 37.

68 Per Mojapelo DJP in *Mofokeng* 4.
continued on next page

proceeds of a claim at their disposal to pay for these bills. There is no detailed discussion and the reasoning behind this provision being included does not specifically appear in the SA Law Commission Report.⁶⁹ All that appears is the recommendation that contingency fee agreements should not be limited to claims sounding in money, and that the controlling bodies governing the legal professions should devise guidelines with regard to the nature and form of the agreements in cases where the claim involved does not sound in money.⁷⁰ The Commission consequently recommended that the application of contingency fee agreements should not be limited to claims sounding in money and that the controlling bodies governing the legal professions should devise guidelines with regard to the nature and form of the agreements in cases where the claim involved does not sound in money.

To date, none of the Law Societies have published any such guidelines regulating contingency fee agreements involving claims not sounding in money.

The Act similarly does not define what a “claim” entails. Various definitions are, however, available from other sources:

- (a) a demand for something due or believed to be due;⁷¹
- (b) a right to something; specifically a title to a debt, privilege, or other thing in the possession of another;⁷²
- (c) a demand for something that you think you have a right to.⁷³

From the nature of these definitions, it seems that a “claim” can only be defined as a “claim”, up until it is granted or satisfied. Once granted (say by court order), is it no longer a claim, but is satisfied. Is a warrant of execution deemed to be a “claim”? Where an attorney receives instructions to enforce a warrant of execution for payment by a debtor of a specific sum of money for which has already been claimed and for which judgment has already been granted, can it be said that the enforcement of a warrant, is a “claim sounding in money”? The following example is illustrative of the point:

Attorney A enters into a contingency fee agreement with client C, in terms of which A is to proceed with a claim for damages on behalf of C arising from medical negligence of Hospital H. In terms of section 3(3)(c), A and C agree that A shall have been successful once he obtains a judgment for the payment of at

69 SALC Report 54.

70 *Idem* 56.

71 *Merriam Webster's Dictionary of Law* (1996).

72 *Ibid.*

73 *Collins English Dictionary supra.*

least R100 000 damages against H. A trial is conducted and judgment is awarded in C's favour for an amount of R200 000. In terms of the contingency fee agreement, A has fulfilled his mandate to C, and is entitled to his fees. His normal fee is R30 000, and in terms of their 100% "uplift" agreement, it is common cause that A's success fees are limited to 25%, or R50 000. Having fulfilled his mandate, A falls out of the picture. C then enters into a contingency fee agreement and instructs attorney D to recover the damages from H via execution proceedings. Payment is not forthcoming and lengthy proceedings in terms of the State Liability Act are commenced. Payment of the R200 000 capital is eventually received, and D's normal fees also amount to R30 000. Whilst it not difficult to accept the basis for the cap on A's fees, a question arises as to which provisions of the Act will regulate D's basis of charging fees. Are the execution proceedings deemed to be a claim sounding in money? If so, his fee is limited to 25%. If not, his fee will be double the R30 000, or R60 000, equating to an effective 30%.

Following on therefrom, as the absolute majority of matters utilising contingency fee agreements are those involving road accident claims, one must question the status of a certificate of undertaking issued by the Road Accident Fund in terms of section 17(4) of the Road Accident Fund Act.⁷⁴

The legislation provides that where a claim for compensation includes a claim for the costs of the future accommodation in a hospital or treatment of or rendering of a service or supplying of goods to the claimant, the Road Accident Fund shall be entitled to furnish the claimant with a certificate of "undertaking" to compensate the claimant in respect of the reasonable costs thereof, after the costs have been incurred ("the undertaking").⁷⁵ The undertaking is limited by no specified monetary amount, and the liability of the RAF is only restricted by the condition that the costs must be accident-related and reasonable. Its value is open ended. It is made in response to a *monetary claim* for damages against it in respect of future medical and associated damages.⁷⁶

The plaintiff is not entitled to claim the award of an undertaking. The option to award an undertaking instead of cash lies with the RAF. The RAF is entitled to rather choose to pay the claimant his damages in the form of a cash payment. The first problem that arises with the undertaking, is that whilst the client's claim is one sounding in money (and is quantifiable in a monetary sum), the award of the undertaking is not one sounding in money. This difference creates a strange anomaly when applying section

74 Road Accident Fund Act 56 of 1996.

75 S 17(4) of the Road Accident Fund Amendment Act 56 of 2005.

76 In terms of Rule 18(10) of the Uniform Rules, the plaintiff suing for damages shall set them out in a manner as will enable the defendant to assess the quantum thereof. The summons shall set out separately what amount is claimed for medical costs and hospital and similar expenses and how these expenses are made up. The claimant must set out the amount of his damages in monetary form and cannot by right claim the award of a certificate.

2(2). The claim indeed sounds in money, and seemingly would be subject to the 25% cap. However, in determining “the total amount awarded or any amount obtained”, the undertaking does not sound in a monetary value and so cannot be taken into account in determining the “total amount awarded or any amount obtained” in determining the cap. An ironic situation arises in circumstances where the claimant only claims damages for future medical expenses, and is then awarded an undertaking to satisfy that claim. What would the value of the award be for purposes of calculating the 25% cap? An example illustrates the quandary:

Scenario	
<i>uplift agreement - sounding in money</i>	
medicals claimed	100,000
undertaking awarded	
normal fee	20,000
Uplift fee (say 100%)	20,000
Total potential fee	40,000
Is there a cap / what is the cap?	

On the other hand, if the damages are paid in cash rather than awarding an undertaking, the determination as to whether the cap applies or not, will be applicable and be capable of being assessed.

Finally, a complaint often raised by attorneys conducting RAF work and defendants in other personal injury matters, is the plaintiff’s attorney’s entitlement to fees on future medical expenses where plaintiffs are awarded cash lump sums for such future medical expenses (due to the fact that undertakings are not permissible in terms of the common law in such claims)⁷⁷ whereas RAF claimants are subject to the undertaking and cannot benefit from the award thereof.

6.8 REASONABLENESS OF THE CAPS

There are two caps in terms of the Act, namely:⁷⁸

(a) The “uplift” fee is limited to a maximum of 100% of the normal fee; and

⁷⁷ As confirmed by Rogers J in *Du Toit v MEC for Health and Social Development, Western Cape Provincial Government* (27427/10) [2017] ZAWCHC 17 (1 March 2017).

⁷⁸ S 2(1)(b) read with s 2(2).

(b) the total award is limited to a maximum of 25% in claims “sounding in money”.

The issue was considered by the SA Law Commission after having considered the systems of various countries. In England, Wales, and South Australia, 100% “uplift” arrangements were allowed,⁷⁹ whilst in New South Wales a cap of 25% is permitted.⁸⁰ In the USA, the system varies from state to state with *percentage* fee arrangements of up to 50% of the award being permitted.⁸¹ Having regard thereto, the Commission recommended that a maximum “uplift” fee of 100% on the normal fee be permitted.⁸² It must be mentioned that some of the parties providing comment on and feedback to the Commission had felt that an uplift fee of 100% of the normal fee would not be sufficient incentive to induce practitioners to undertake litigation.⁸³

In respect of the maximum cap on the total amount of fees, the Commission in Working Paper 63 proposed that a lawyers’ uplift fee should not exceed 25% of the proceeds of an action.⁸⁴ England and Wales had the same 25% cap.⁸⁵ At the time that the SALC called for proposals to Working Paper 63, the judges of the Appellate Division agreed that the total fees should not exceed 25% of the amount awarded to the client, “including interest”. What is, however, interesting, is the fact that they did acknowledge that this would create the situation where an attorney would be prevented from recovering even his normal attorney and client fee to the extent that it exceeded 25% of the amount awarded. Whilst they had no objection to the 25% cap, they noted that practitioners may well feel that they should at least be entitled to their normal fee even if it does exceed 25 of the award.

It is submitted that one “across the board” percentage is not fair in all cases, and that various features relating to the nature and complexity of the type of matter involved, should be considered. No research or case studies were ever presented to or considered by the Commission as to why the particular 25 percentage was acceptable (whether by the Commission or in any other country). However, the amount of neither of the caps has been challenged in court, and in *Masango*, Mojapelo DJP even went so far as to say:

79 SALC Report 15, 17, 37.

80 *Idem* 18, 37.

81 *Idem* 14.

82 *Idem* 50.

83 *Idem* 49.

84 *Idem* 58.

85 *Idem* 37.

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“A double fee is more than sufficient incentive to the legal practitioner to pursue litigation on a contingency basis. One cannot therefore not understand the ever increasing rampant and persistent attempt by legal practitioners (especially attorneys) to provide for and recover more than the legitimate and legalised success fee.”⁸⁶

Mojapelo DJP went on to say that if the problem lies in the fact that the normal fees are inadequate, then the problem lies elsewhere and not in the Contingency Fees Act, because normal fees are neither defined nor regulated by the Contingency Fees Act, and that the Contingency Fees Act, through its two caps, only regulates success fees.⁸⁷ Whilst it may be true that the basis for the adjudication of the normal fee rests in the hands of the Law Societies and Rules of Court via the accepted tariffs of fees due to attorneys, the issue as to whether *the caps* are fair or not, is something different. The judge’s comments are true when one has regard to the maximum 100% “uplift”, however it is submitted that whether the cap of 25% is reasonable or not, is a different issue and needs to be considered against facts. Druker⁸⁸ points out that huge awards are exceptional and that one should be cautious before permitting these exceptions to unduly influence the arguments that, as a rule, lawyers receive disproportionate fees. To this I agree.

To consider whether one “across the board” 25% percent cap is reasonable in *all* personal injury matters, an in-depth study should be conducted to determine and compare *inter alia*

- (a) the nature of the matter (an MVA matter is vastly different to a medical malpractice claim);
- (b) the nature of the merits (an MVA matter involving a rear-end collision is different to an MVA matter involving the typical “right turn”-collision)
- (c) the risks involved in proving the merits (a complex matter involving a brain injury incurred during the birth process is vastly different to an MVA rear-end collision);
- (d) the amount of time that will be spent by the attorney (the rear-end collision versus the complex birth-injury claim);

86 516. *Quaere*: is it perhaps for the very reason that the fees are iniquitous that there is the ever-increasing attempt by legal practitioners to recover increased fees? The examples appearing in the tables below, may well illustrate the point that it may be a misconception that attorneys ordinarily earn double the normal fee.

87 *Masango* 517.

88 Druker *The Law of Contingency Fees in South Africa* (2007) 63.
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- (e) the amount of the disbursements that will be incurred and paid on behalf of the client in respect of the *merits* (a “slip and trip” matter where say one expert is required versus a complex medical claim where many experts are required);
- (f) the amount of the disbursements that will be incurred and paid on behalf of the client in respect of the quantum (in MVA matters, section 17 undertakings⁸⁹ are invariably awarded and so it is not necessary to quantify each and every cent in respect of future medical expense by calling experts as would be required in a medical negligence claim where expert evidence must be obtained to prove every expense); and
- (g) whether the merits of the matter (or quantum) will be defended or not.

From the examples below, it can be seen that double the normal fee, or 25% of the capital awarded, is not always fair compensation. This is especially so in circumstances where the application of the Act, because of the cap, results in the same fee being earned by one attorney who has had to work many more hours for his fee than his colleague, albeit for the same result.

The comparative example below illustrates the unfair situation:

<i>Claim 1 - lengthily merits and quantum trial</i>			<i>Claim 2 - lengthily merits trial - quantum settled without trial</i>		
	<i>hours worked @ R2000/hr</i>	<i>R</i>		<i>hours worked @ R2000/hr</i>	<i>R</i>
capital awarded		1,600,000	capital awarded		1,600,000
normal fee - merits trial	100	200,000	normal fee - merits trial	100	200,000
normal fee - quantum trial	100	200,000	normal fee quantum settlement	25	50,000
Total normal fee		400,000	Total fee		250,000
Double normal fee		800 000	Double normal fee		500,000
Fee allowed - limited by 25% cap	200	400,000	Fee allowed - limited by 25% cap	125	400,000
Effective rate per hour charged	R2000 (= 0% uplift)		Effective rate per hour charged	R3200 (= 60% uplift)	

89 Chapter 5 where such “undertakings” are explained and discussed.

Effective gross proceeds to client		1,200,000	Effective gross proceeds to client		1,200,000
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This example emphasises the following iniquities:

- although the clients receive the same gross proceeds, and although the attorneys get the same fee, the result of the cap is that “attorney 1” has had to work 75 hours more than “attorney 2”, for the same fee;
- the cap has resulted in “attorney 1” not benefitting by the “uplift” fee agreement whatsoever, as his “uplift” fee has been eroded by the 25% cap, and his “uplift” fee is no more than his normal fee. “Attorney 1” has taken all the risks yet is no better off than had he passed the risk on to the client and charged normal fees. The “uplift” opportunity has proved to be totally academic.
- Although both agreements contained a 100% uplift clause, in neither instance did the attorney get a 100% uplift.

To take the above example further: assume that after 150 hours of work and shortly before the trial, a tender for R1 400 000 was made. If the attorney rejects the tender and proceeds to trial, although his client will benefit by an extra R150 000, attorney 1’s fee would be no more than had he accepted the tender – and he would have saved himself an effective 50 hours of billable time. The client has thus received an extra R150 000 at no cost to him (and rather at the attorney’s cost!). The following table illustrates the point:

<i>Claim - lengthily merits trial - quantum settled without trial</i>		
	<i>hours worked @ R2000/hr</i>	
capital awarded		1 400,000
normal fee - merits trial	100	200,000
normal fee quantum settlement	50	100,000
Total fee		300,000
Double normal fee		600,000
Fee allowed - limited by 25% cap	150	350,000

Effective rate per hour charged	R2,333 (= 16% uplift)	
Effective gross proceeds to client		1,050,000

The above example again illustrates that to automatically accept that attorneys earn up to “double” their normal fee when utilising “uplift” contingency fee agreements, is indeed not always the case.

One may ask why attorneys do not take matters on, on different terms whereby they would not be limited by a cap if they are aware that the hours worked will not be commensurate with the fee earned.⁹⁰ The answer is quite simply that in most cases, one has little foresight as to how the matter will ultimately proceed. There are many unknown factors which will influence the course and finality of a matter, such as the question as to whether

- (a) the action will be defended, and if so;
- (b) both the merits and quantum will be defended;
- (c) side issues such as statutory compliance will be raised;⁹¹
- (d) pre litigation medical records will be received with the cooperation of the medical fraternity or whether applications in terms of the Promotion of Access to Information Act will have to be instituted;
- (e) constitutional or side issues will be raised; and whether
- (f) the matter will be appealed.

Some matters which a practitioner would assume will run without hitches will not, and *vice versa*.

The grave effects of the aforementioned problem must not be overlooked. When the threshold of the maximum fees allowable has been reached, the attorney is thereafter effectively working for no extra fees and has the double disadvantage of still having to incur the usual administrative expenses⁹² of running the matter at his cost, whilst not being able to charge further fees. One then wonders what would incentivise

90 Such as an agreement in terms of s 2(1)(a).

91 Such as non-compliance with the provisions of s 3 of the Legal Proceedings Against Certain Organs of State Act 40 of 2002, which prescribes that a claimant intending to institute action against a state entity is required to give statutory notice of such intention to the designated authority within 6 months of the cause of action arising.

92 Referring to (office) expenses not recoverable from the defendant (or the plaintiff because of the cap).

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the attorney to act in the client's best interests and "give it his all" under such circumstances where he has taken, and continues to take, all the risks.

This situation arose in the matter of *Ngqase v MEC Western Cape Provincial Government*.⁹³ After extensive litigation over a number of years, the merits and quantum were settled. At that point in time, it was common cause between the plaintiff and defendant that the threshold of the attorney's fees of 25% had been reached. Whilst finalising the terms of payment and the provision which were to be included in a trust deed, the defendant then sought to amend its pleadings to plead side issues such as the terms of a trust; the choice of trustees; that an *amicus curiae* needs be appointed for the protection of the plaintiff; a "reversionary clause" in terms of which it was claimed that the common law should be developed so that the balance of damages remaining would have to be repaid in the event of the death of the plaintiff; and that the damages awarded should not form part of the defendant's estate at the time of his death. Litigation on these side issues lasted for more than a year *after the threshold had been reached* and it was only after the matter was set down for trial that the issues were withdrawn on the morning of the trial. The attorney had effectively worked extensively on a matter for a year for no compensation whatsoever.⁹⁴

It is concerning that whilst the legislature and courts have gone to extreme lengths to ensure that there are safeguards built in to protect the client,⁹⁵ it would appear that the interests of the attorneys may have been overlooked. When one considers that the legislature has sought to regulate the attorney's fees, yet the public are entitled to enter into champertous agreements where their fees are subject to no limitation or control whatsoever, one begins to wonder how our courts really view the members of the attorneys' profession.⁹⁶ In *Masango*, the court emphasised that in order to be entitled to a fee, the fee earned must "relate to actual professional services rendered" and that it would be unfair for an attorney to charge fees for which he did not render services.⁹⁷ This principle cannot be faulted, but it would seem very unfair that it should apply against the attorney to ensure that he does not receive any extra fees to which he is not entitled, yet to the contrary, he is denied fees for all work duly performed once the threshold of the cap has been reached. It cannot automatically be assumed

93 Unreported WCHC case no 2009/5077, finalised February 2015.

94 Counsel's fees on only the belatedly raised side issues amounted to approximately R2 million.

95 The s 2 caps, the s 3 Form and Content, the s 4 affidavits and the s 5 review.

96 De Broglio "Contingency Fees – Quo Vadis" May 2014 *De Rebus* 52.

97 *Masango* para 21.

that the attorney has been duly compensated by the “uplift” fee, and reference should be had to the examples discussed above where the threshold has been reached and the uplift fee is no more than the normal fee. The table below illustrates how the 100% “uplift” fee diminishes percentage-wise:

Hours spent at rate per hour (Rand) R578 ⁹⁸	Total normal fee	Normal + Uplift	Allowed fee having regard to 100% vs 25% (R12,5k) cap	Amount of 'uplift' allowed more than normal fee	Percentage uplift (allowed) of normal fee earned	Allowed success fee rate per hour
10	5,780	11,560	11,560	5,780	100%	1,156
11	6,358	12,716	12,500	6,142	97%	1,136
20	11,560	23,120	12,500	940	8%	625
30	17,340	34,680	12,500	-4,840	-28%	417
40	23,120	46,240	12,500	-10,620	-46%	313
50	28,900	57,800	12,500	-16,400	-57%	250

In this example, one can see that after 20 hours of work, there is in effect no uplift. Thereafter, the fees diminish to such an extent that after between 20 and 30 hours of work, a stage is reached where the attorney’s fees are actually lower than the normal party and party fees per hour.

A further point is that instances will arise where the party and party costs recoverable from the unsuccessful opponent will be more than the fees allowed to the attorney. In its submissions to the Commission, the Cape Town Attorney Association pointed this problem out.⁹⁹ The following example highlights the problem:

	R	R
Capital awarded		50000
Party and party costs recovered		15000
Proceeds to client		65000
Attorneys normal fee	20000	
Uplift (100%)	20000	
Success fee	40000	
Attorney's fee limited by cap on R50 000		12500
Client gets		52500

98 The average party and party fee per hour in terms of Annexure II Scale B to the Magistrates’ Courts Rules (claims up to and including R50 000) has been used.

99 SALC Report 59.

The effect of this is that the client actually receives more money than his claim was worth in the first place. To the contrary, the attorney does not even recover his normal fee. It is understandable that in the majority of claims where small quantum amounts are involved attorneys will only enter into section 2(1)(a) agreements where they will be entitled to a higher fee (in this example R40 000), instead of the R12 500 where an uplift and cap are involved if a section 2(1)(b) contingency fee agreement is entered into. The question then arises as to whether the client is really protected by the Act. It is submitted that the client is not protected and that the good intentions of the Act ironically become meaningless.

The protection which the client has in his favour, is that the assessment of the normal fee (and hence the “uplift” fee) are subject to and dependent upon recognised rules of taxation and the Rules of the Law Societies to ensure that the total fee is reasonable. Why should the attorney not be entitled to fees for all the work he has duly done? If he has performed any undue or excessive work, the fees associated therewith will not be allowed on taxation in any event. If it turns out that the assessed success fee equates to an amount of more than 25%, why should the attorney not be entitled to that fee? Why should the client gain the advantage of receiving an increased award at the expense of the attorney? There is a direct correlation between the taxed normal fee and the amount of work done. If, because a matter was of such a complex nature, and of which the taxation has justified that such work needed to be performed, why should the reasonable taxed fee not be considered – even if it ultimately equates to a success fee of more than 25%? Without those services having been duly performed in the first place, the result would not have been achieved and the client would not even have had the benefit of the balance of the award, or maybe none of the award whatsoever. The concerns of the Commission and the courts¹⁰⁰ that fees may be swallowed up if a cap is not introduced, weighs only in favour of the interests of the client. Whilst the swallowing-up of fees is a reality, because the amount of the fee is regulated by taxation, it can never be said that the attorney has unduly gained any fee at the expense of the client.

That having been said, one can understand that in the majority of matters involving smaller quantum amounts, especially MVA claims, there is great risk that the ultimate taxed success fee would exceed the capital awarded. The problem which is

100 *Idem* 37.

exacerbated, is that it is common cause that in the absolute majority of MVA matters, the RAF defends most cases and only settles same on the morning of trial, thus running up the costs unnecessarily and thereby placing the practitioner at the disadvantage of litigating when he will receive no compensation after the cap has been reached.¹⁰¹ This has caused many attorneys to resort to entering into agreements in terms of section 2(1)(a), in terms of which they are entitled to normal fees without an uplift fee, and which fees are subject to no cap whatsoever. The result is that in many cases, the fees swallow up the proceeds in any event and the entire reason for these caps being introduced is thwarted.

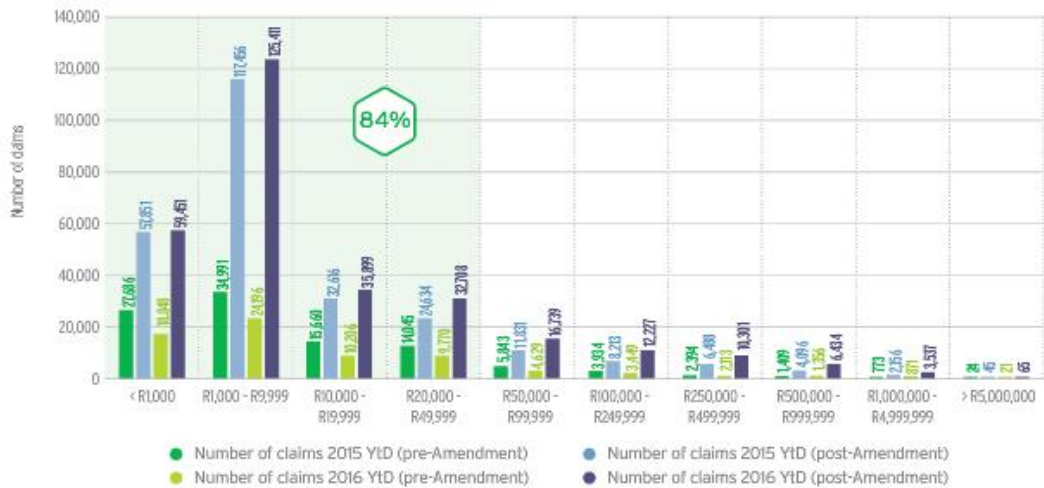
According to the RAF Annual Report for the 2015/2016 year, the average value of claims paid out was the sum of R271 793, and the costs paid out to attorneys and experts amounted to an average of R120 385 per claim.¹⁰² Whilst no breakdown is given as to what portion of the costs related to attorneys' fees and what portion was for experts' fees, it can be accepted that in the majority of matters the attorneys would have exposed themselves to that total risk of R120 385 per claim to that total value, whether it be for their services, or whether they had incurred the obligation to pay the experts. Such value of risk constitutes a proportion of 44,28% of the value of the claim, whereas their fee would be limited to a maximum of 25%.¹⁰³ The reward versus the investment of monies together with the risk appears not to be justified. It must also be considered that these figures quoted would refer to party and party costs, and if one takes the attorney and client costs into consideration, the profitability of the attorney's fees dwindles as the cap is reached and then passed.¹⁰⁴ As alarming are the statistics appearing in the same report which show that the majority of claims are of lesser value, which ordinarily means that the attorney will probably always reach the 25% cap and seldom even recover his normal fee, let alone an "uplift":

101 The fact that a large majority of the cases on the court roll are usually matters involving contingency fee agreements which are presented to the court on the morning of the trial, was raised by Mojapelo DJP in *Mofokeng supra* who stated that 70% of the 80 matters on the roll were so affected (at 5).

102 RAF Annual Report 2015/2016 at 48.

103 It must also be considered that this figure represents party and party costs.

104 A large majority of these costs would presumably be on a party and party scale, albeit that it is common cause in the profession that the award of costs on an attorney and client scale is on the increase due to non-compliance with court procedure.



Graph 1 - Average size of claims paid

Graphic credit: RAF 2015/2016 Financial Report

The table below illustrates the point. Assume that an attorney is mandated to proceed with an MVA claim to the value of R50 000. Even if he only charges party and party rates and no attorney and own client fee, he will reach the threshold before a mere 11 hours of work. Charging attorney and client rates will have the result that the threshold is reached even quicker.

Hours spent at rate per hour (Rand) R578 ¹⁰⁵	Total normal fee	Normal + Uplift	Allowed fee having regard to 100% vs 25% (R12,5k) cap	Percentage uplift of normal fee earned	Success fee rate per hour
10	5,780	11,560	11,560	100%	1,156
11	6,358	12,716	12,500	98%	1,136
20	11,560	23,120	12,500	54%	625
30	17,340	34,680	12,500	36%	417
40	23,120	46,240	12,500	27%	313
50	28,900	57,800	12,500	22%	250

The consequences of this are conceivably:

- (a) attorneys will not take on matters on an “uplift” arrangement in terms of section 2(1)(b) and clients will not have attorneys to assist them in proceeding with claims, thus forfeiting their right to claim *in toto*; or
- (b) the attorney will be forced to take on the matter in terms of section 2(1)(a) without any cap being applicable, and the capital could very well be swallowed up by fees,

105 This is the average party and party hourly rate for a matter on Scale B in terms of Annexure 2 to the Magistrates’ Courts Rules.

thus defeating the very cardinal intention of the legislature to avoid this from happening.

Either way, it is submitted that in these circumstances, the Act has not afforded the claimant an opportunity to have access to justice and have his claim pursued, alternatively, has not provided the protection against fees exceeding the costs. Alternatively, the attorney may well be out of pocket where his fees exceed the cap. The USA system addresses this problem by having a varying scale of fees being applicable to different stages of litigation.¹⁰⁶

6.9 SETTLEMENT PROCEDURE, “AFFIDAVITS” AND SAFEGUARDS

In terms of section 4 of the Act, any offer of *settlement* made to any party who has entered into a contingency fees agreement may only be accepted “after” the legal practitioner has filed affidavits deposed to by both the practitioner and the client.¹⁰⁷

The wording of the Act specifies that the filing of affidavits only relates to matters where “offers of settlement” are made, and by exclusion of the wording, seemingly does not apply where a judgment is granted by a court.¹⁰⁸ The need for compliance with section 4 was raised by the South Gauteng High Court (as it was known then) on 23 July 2012,¹⁰⁹ and was dealt with in detail in the matters of *Tjatji* and *Mofokeng*.

The Act prescribes that the affidavit by the attorney must state the following:¹¹⁰

- (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 attorney’s fees if the matter is settled as compared to taking the matter to trial;

106 Kritzer *Seven Dogged Myths Concerning Contingency Fees* 757 where the scale ranges from a charge of 25% of the recovery if the case does not go to trial or does not involve substantial trial preparations; 33% if the case goes beyond that point, and 40% to 50% if the case results in an appeal. This is of course acknowledging that the USA system is based on flat percentage agreements.

107 The affidavit must be filed with the court if the matter is before court, or with the professional controlling body if the matter is not before court.

108 However, see a differing view of Mojapelo DJP in *Mofokeng* as discussed below.

109 See *Mofokeng* 5 where it was said that compliance concerned 70% of the 80 matters on the civil roll every day.

110 S 4(1).

continued on next page

- (e) the reasons why the settlement is recommended;
- (f) that the matters referred to above were explained to the client, and an explanation as to the steps taken to ensure that the client understands the explanation; and
- (g) that the client has informed the attorney that he or she understands and accepts the terms of the settlement.

The affidavit by the attorney must be accompanied by an affidavit by the client in which the client must state the following:¹¹¹

- (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.

There is no provision that the services of an interpreter be made available to explain the agreement to the client in his home language, and it is suggested, that due to the complexity of personal injury matters, coupled with the fact that the population of the country is composed of many cultures having different languages, that the Act be amended¹¹² to make it an obligatory requirement that the client has been offered the services of an interpreter to go through and explain the contents of the affidavit before signing it. ¹¹³

The chronological sequence of events once an offer of settlement has been made, is thus as follows:

- (a) An offer of settlement is made;
- (b) the client must be consulted and the offer explained to him or her;
- (c) affidavits must be drafted and signed by the client and attorney;
- (d) the affidavits must be filed at court or with the controlling body;
- (e) the offer can only then be accepted; and
- (f) the offer must thereafter be made an order of court if the matter was before court.¹¹⁴

111 S 4(2).

112 Recommendations for consideration of amendment to the Act are discussed in Chapter 7.

113 In *Mofokeng* 30 this was raised as part of the requirement that the settlement was explained to the client and that client understood them.

114 S 4(3).

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The provisions of section 4 seem contradictory within themselves. On the one hand, the settlement offer may only be accepted “after” affidavits have been filed,¹¹⁵ whilst to the contrary, it is a requirement that the affidavit has to contain a clause that the client “accepts” the terms of the settlement.¹¹⁶ Surely, in terms of the law, once “accepted”, a settlement offer cannot be reneged upon. It would perhaps have been preferable for the wording to read

“that the legal practitioner was informed by the client that he or she understands the proposed terms of settlement and is satisfied to accept the offer after the filing of the affidavits and the sanction of the court or professional controlling body in terms of section 4”.

In *Mofokeng*, the court held that if the affidavit is not filed before accepting the offer, it at least has to be filed before the court makes the settlement an order of court.¹¹⁷

Many other issues have arisen in connection with this section:

- (a) Does the court have an obligation and right to scrutinise and approve the content of the contingency fee agreement?
- (b) Can “out of court settlements” be made where matters are subject to contingency fee agreements?
- (c) Does the contingency fee agreement itself have to be presented to court?
- (d) Is the defendant entitled to consider and peruse the contingency fee agreements?
- (e) Are the monitoring powers of the court only applicable to settlements, or does the court have the power to conduct an enquiry and monitoring function at the end of the trial?

In *Mofokeng*, Mojapelo DJP dealt with these issues in his judgment as follows:

- (a) The legislature was of the clear intention that contingency fee agreements be carefully controlled, and that courts have an obligation to ensure that affidavits are filed, that the court has sight thereof, and that they be scrutinised to ensure that they comply with the Act.¹¹⁸
- (b) The Act makes it obligatory for settlement agreements to be made orders of court where the matter is before court. Thus there cannot be out of court settlements where litigation is pending.¹¹⁹ The interesting point arising therefrom, (which was

115 S 4(1).

116 S 4(g).

117 *Mofokeng* 6; 26.

118 *Idem* 15; 27; 33.

119 *Idem* 27.

not dealt with) is whether the requirements will then be applicable if the action is withdrawn before settlement is reached.

- (c) Whilst the Act does not make it obligatory for the contingency fee agreement to be handed in with the affidavits, the court, as part of its monitoring function, is entitled to call for an examination thereof.¹²⁰
- (d) The law of privilege protects the relationship between the client and the legal practitioner and third parties. Such privilege does not operate against disclosure as is required in terms of the Act (for example, certain aspects such as details of the fees arrangements which are to be disclosed in terms of section 4(2)(d)).¹²¹ It would be understandable that the agreement only be disclosed to court and not to any other party.¹²²
- (e) If the contingency fee agreement is applicable to an action, no matter whether it be settled or has run through a trial to judgment stage, the court is entitled to exercise its monitoring powers even at the end of matters running to trial.¹²³

6.10 TYPES OF MATTER

The amount of work required to finalise a claim depends on the particular circumstances of each and every matter. A large majority of third party matters involve passenger claims where the attorney needs to prove only 1% negligence on the part of the driver of the vehicle in which the passenger was not, in order for his client to be awarded 100% damages. On the other hand, for example in medical malpractice matters, a client only receives payment in accordance with the percentage proven. The burden of proof in proving the merits is thus usually higher across the board in medical malpractice matters than in MVA matters.

120 *Idem* 32, quoting Southwood J in *Mnisi v RAF* (NGHC case no 2009/37233) of 18 May 2010.

121 *Mofokeng* 32.

122 See below, where the situation regarding the losing claimant's liability to pay the successful defendant's costs is discussed. The point that is raised is that in such circumstances where the defendant is at risk of his costs not being paid, should he not be entitled to be informed that there is such a contingency fee agreement in place so that it can weigh up its options to perhaps bring an application for security for costs or consider early settlement proposals to avoid unnecessary and perhaps irrecoverable costs being run up. In *T v MEC Health Gauteng* unreported case no 28471/2010 of 16 July 2015, the court dismissed the defendant's attempts to interfere in this relationship by requesting an order that the future medical expenses be excluded from the contingency fee agreement.

123 *Mofokeng* 33. It is submitted that this finding is open to criticism in that s 4 specifically is headed "Settlement", and all references contained in the section refer to "settlements" and not judgments. If it were the intention of the legislature that such affidavits and scrutiny be applicable to judgments as well, it would have been easy to include wording to this effect.

When assessing the merits of a medical malpractice matter, because one person's physiological make up is different to that of another, each and every case has its own subjective intricacies. The facts of one client's medical history are not the same as that of another. On the contrary, there is a plethora of reported case law on the merits of motor vehicle accidents. Precedents are relied upon in matters where the circumstances surrounding similar accidents are involved, and reported judgments dealing with apportionments applicable to similar surrounding circumstances are consistently used as guidelines when assessing liability. It is for this reason that an absolute majority of MVA merits matters are settled having regard to precedents and never proceed to trial. Contrarily, almost every medical malpractice matter is approached subjectively and can be defended due to the differences in one matter from the other.

The differences in having to prove the merits in a medical malpractice matter versus a MVA matter are vast.

- (a) The merits of a MVA claim can be settled purely on the basis of factual witness evidence, either by laymen witnesses or by the claimant and defendant themselves. Expert witnesses such as accident reconstruction experts are sometimes used, but not as a norm, and very seldom where it will be sufficient to prove one's case only with the use of layman-witness evidence. Factual witnesses can be forced to appear in court at a minimal cost by way of subpoena. Because of the RAF's liability to pay 100% proven damages to passengers who are able to prove only 1% negligence on the part of the driver of a vehicle, and having the burden of proof heavily weighing against it, the RAF is inclined to settle such matters before trial. In fact, the absolute majority of MVA cases are settled without the necessity of having to go to trial.¹²⁴
- (b) However, in order to prove the merits of a medical malpractice claim it is not only necessary to lead the evidence of factual witnesses but also that of expert witnesses. A medical malpractice matter cannot be won on factual evidence alone. The necessity of expert evidence in matters which the court is not competent to decide due to its lack of knowledge on the subject at issue, has been recognised

124 It is common cause that of the approximate average of 80 MVA matters set down for trial in the North Gauteng Division of the High Court and South Gauteng Division of the High Court on a daily basis, a very minor proportion proceed to trial. See *Mofokeng* 5.
continued on next page

since the fourteenth century.¹²⁵ To retain the services of independent medical experts is a costly exercise. It is not uncommon for such medical experts to charge up to R50 000 per day for court appearances, in addition to the fees for the investigation and preparation of complex medico-legal reports. Unlike the factual witness, it is not possible to secure the attendance of expert witnesses by way of issuing a subpoena. A party to such a claim has to obtain the cooperation and consent of the expert witness in advance to appear on his behalf in support or in defence of his claim. The procedural rules of court oblige parties to file summaries of the expert evidence in advance of the trial.¹²⁶ Such a requirement necessitates extensive consultation and preparation of the summary, all at a cost. The absolute majority of medical malpractice matters are defended on the merits and lengthily trials are run.¹²⁷

When one comes to the quantum, the differences in having to prove the quantum in a medical malpractice matter versus an MVA matter are similarly vast. At common law, injured persons ordinarily have the right to claim the following damages, namely, (a) past medical expenses; (b) future estimated medical expenses; (c) past loss of earnings; (d) future loss of earnings; and (e) general damages.

In proving an MVA claim, the provisions of the RAF Act apply:

- (a) All proven reasonable past medical expenses are payable by the defendant RAF.¹²⁸
- (b) Future medical expenses are usually awarded in the form of an undertaking in terms of which all medical and related expenses to be incurred which arise from injuries suffered in the accident, will be refunded upon proof being furnished.¹²⁹ There is no need to obtain costly and lengthily medico legal reports to prove this head of damage, as the undertaking automatically covers all accident-related injuries. This obviates the need for the claimant firstly to prove in detail
 - (1) the *nature* of future treatment that will be required; and secondly
 - (2) the *quantification* of the monetary amount of those estimated future costs.

125 Schmidt and Rademeyer *Law of Evidence* (2007) 17-9.

126 Rule 36(9)(a) & (b) of the Uniform Rules of the High Court, and rule 24(9)(a)&(b) of the Magistrates' Courts Rules.

127 Carte Blanche *Haemorrhaging Gauteng Health* MNet aired 1 Nov 2015.

128 S 17 of the Road Accident Fund Act of 1996. Where emergency treatment is concerned, the expenses are paid according to a prescribed tariff.

129 *Ibid.* See discussion of s 17 certificates above.

- (c) The RAF's liability to compensate loss of earnings is limited to a prescribed cap which is adjusted quarterly to take inflation into account.
- (d) The RAF's liability to compensate for general damages where the claim arose on or after 1 August 2008 is limited to compensation for *serious injuries only*. The Act and the Road Accident Fund 2008 Regulations set out a procedure in terms of which the third party's injury must be assessed to determine whether the injury is considered serious for purposes of qualifying for general damages.

In a medical malpractice claim, the burden of proof is totally different. The common-law "once and for all principle" applies.¹³⁰ In terms thereof, the claimant has to prove each and every cent of damages which he claims, whether it be for past or future expenses. All damages are paid as a lump sum at the time that the matter is settled (or judgment is obtained). There is no second chance to claim any damages at a later stage. This means that comprehensive studies need to be undertaken by a variety of experts to determine what these damages in all likelihood will be in the future.

This is done by having the claimant examined by these experts and obtaining a multitude of medical reports to justify such expenses. In serious injury matters, such as those relating to brain injuries sustained during the birth process, reports will be obtained from experts in the fields of obstetrics, radiology, paediatrics, neonatology, neurology, psychiatry and psychology, occupational therapy and physiotherapy, orthotics, ophthalmics, dentistry, plastic surgery, and the like. At an average of approximately R20 000 per report to obtain the reports of these experts in order for a party to comply with the rules,¹³¹ (not including the costs of subsequent court preparation and appearance costs), one can see that it will cost hundreds of thousands of Rands to prove future medical expenses in a medical malpractice case, as opposed to a fraction of the cost to obtain a RAF undertaking.

If one has regard to the above procedural differences, it can logically be seen that it would usually take a lot more work and expense by the attorney to finalise the average medical malpractice claim as opposed to a MVA claim. Whilst one may argue

130 *Du Toit* 19 per Rogers J, who confirmed the common-law principle of delictual damages, that the person suing for damages must claim, by way of single proceedings, all damages to which he may be entitled, both past and prospective, and that the court is obliged to award these damages as a lump sum – the plaintiff is not entitled to claim and is not obliged to accept future damages by way of periodic payments.

131 Rule 36 of the Uniform Rules of Court prescribes that no expert evidence may be led at the trial unless a summary of the expert's findings, opinions and the reasons therefor have been filed at least 10 days before the trial.

that the attorneys in both fields are fairly compensated proportionately for their normal fees and the uplift by the amount of work put in, this does not address the situation where the 25% cap is reached where the attorney who has had to do a lot more work loses out.

The upshot hereof, is that it is common cause in the legal profession that from a time and cost perspective, the majority of medical malpractice trials usually cost hundreds of thousands of Rands, and take a lot more time to finalise, as opposed to the majority of MVA merits matters being settled before trials are proceeded with at all. As discussed above, it seems unfair that, due to no fault on his part, the attorney is not compensated for the hours of work which he has put in in order to obtain the same result for his client.

6.11 ATTORNEY DOING WORK OF ADVOCATE

Since 1995 attorneys have been granted an equal right of appearance with advocates in the High Courts.¹³² The attorney can choose either to make use of the services of an advocate to assist him or to attend to all the functions himself.

If counsel is used, counsel will be performing some of the functions that the attorney would ordinarily have done and the attorney would not be entitled to the fees therefor. The attorney is still entitled to a maximum of double his normal fees for the portion of the services rendered *by him* if a contingency fee agreement has been entered into. Similarly, if counsel is not employed, the attorney would be entitled to charge for all of the services rendered by him, including those that ordinarily would have been performed by counsel. In both instances, no matter whether he has employed counsel or not, his fees are limited by the caps prescribed in the Act. Where, in addition to his usual services, the attorney is performing the services which counsel usually would have, it is logical that his normal fee would be higher. At first glance, there would seem to be no problem with this, especially where his “uplift” fee has not reached the threshold of the 25% cap. The problem, however, arises in that because he is effectively performing the services of two practitioners, he will reach the 25% cap a lot

¹³² Rights of Appearance in Courts Act 62 of 1995.
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sooner, as opposed to in circumstances where he would not have, had he used counsel. Once he has reached the 25% cap, the attorney is exposed to the risk of having to perform his services effectively for no extra fee thereafter.¹³³

The table below illustrates the point that in a claim worth R1 million,¹³⁴ it will take only 63 hours of work for the attorney to reach the threshold, where after he is effectively working for no further fee. Where he is also performing the tasks of counsel, one can expect the threshold to be reached even quicker:

Hours spent at rate per hour (Rand) R2,000 ¹³⁵	Total normal fee	Normal + Uplift	Allowed fee having regard to 100% vs 25% (R250k) cap	Percentage uplift of normal fee earned	Success fee rate per hour
10	20,000	40,000	40,000	100%	4,000
20	40,000	80,000	80,000	100%	4,000
40	80,000	160,000	160,000	100%	4,000
60	120,000	240,000	240,000	100%	4,000
63	125,000	250,000	250,000	100%	4,000
80	160,000	320,000	250,000	78%	3,125
120	240,000	480,000	250,000	52%	2,083
160	320,000	640,000	250,000	39%	1,563
200	400,000	800,000	250,000	31%	1,250
240	480,000	960,000	250,000	26%	1,042
250	500,000	1,000,000	250,000	25%	1,000
280	560,000	1,120,000	250,000	22%	893

The implication of this can be explained with the following comparative example:

- (a) Attorney A succeeds in a R2-million claim after conducting two highly technical merits and quantum trials, where he employed counsel. Counsel did not enter into a contingency fee agreement. At the conclusion of the matter, his taxed bills show that he spent 125 hours on the matter, and at his charge-out rate of R2 000 per hour, he takes his fee (his success fee of R500 000, being (equal to) the lesser of 25% and double his normal fee of R500 000). His counsel's bill shows that counsel spent 100 hours on the matter, totalling R250 000. After a costs contribution payable by the defendant, the total nett fees for which the client is liable thus amount to R362 500, leaving the client with a gross amount of R1 637 500 after deduction of legal practitioner's fees, and adding the defendant's cost contribution.

133 Refer to section 6.8 above.

134 Which claim can be considered to be a fairly substantial one involving a fairly serious injury.

135 The allowable party and party hourly rate in terms of the Uniform Rules of Court rule 70 tariff is R1 052, and for purposes of this example it is assumed that this is doubled to arrive at a reasonable attorney and client rate.

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- (b) Attorney B succeeds in exactly the same R2-million claim. However, he did not make use of the services of counsel at all. He drafted all pleadings and conducted the merits and quantum trials himself. At the conclusion of the matter, his taxed bills show that he spent 200 hours on the matter,¹³⁶ and at his charge-out rate of R2 000 per hour, he takes his 25% fee (his success fee of R500 000, being the lesser of 25% and double his normal fee of R800 000). After a costs contribution by the defendant, the total fees for which the client is liable, thus amounts to R180 000, leaving the client with a gross amount of R1 820 000 after deduction of legal practitioner's fees, and adding the defendant's cost contribution.

This example clearly illustrates a number issues in that, albeit the same result was achieved,

- (a) whilst attorney B worked 75 hours more than attorney A, he received the same fee as attorney A;
- (b) it did not make any difference to the attorney's fees whether counsel was used or not – the attorneys in both scenarios received the same fee;
- (c) the total nett legal practitioner's bill for which the client is liable, amounted to R362 500 where counsel was used, yet was only R180 000 where counsel was not used;
- (d) the *client benefitted* by a nett amount of R182 500 where his attorney B did not appoint counsel;
- (e) the *defendant benefitted* by an amount of R67 500 where the attorney did not use counsel;
- (f) the *counsel benefitted* by an amount of R250 000 where the attorney used counsel;
- (g) attorney B effectively forfeited fees in the sum of R300 000 where he conducted the matter himself, as opposed to using counsel;¹³⁷ and
- (h) by conducting the litigation himself, attorney B reached the threshold of the cap whereas where he employed counsel, he did not reach the cap.

The table below summarises the situation:

Attorney A using counsel		Attorney B <i>not</i> using counsel	
Capital received	2,000,000	Capital received	2,000,000

136 Some services of attorney and counsel are duplicated, hence the lesser amount of time spent where only one practitioner does all the work on his own.

137 Attorney A's fees (using counsel) = 125 hours x R2k/hr x double up = R500k, vs Attorney B's fees (not using counsel) = 200 hours x R2k/hr x double up = R800k.

Taxed costs paid by Defendant:		Taxed costs paid by Defendant:	
<i>Counsel (75% of R250k)</i>	187,500	<i>Counsel</i>	0
<i>Attorney A (80% of R250k)</i>	200,000	<i>Attorney A (80% of R400k)</i>	320,000
	387,500		320,000
Total gross proceeds		Total gross proceeds	
	2,387,500		2,320,000
less: Practitioners fees		less: Practitioners fees	
<i>Counsel</i>	250,000	<i>Counsel</i>	0
<i>Attorney A</i>	500,000	<i>Attorney A</i>	500,000
	750,000		500,000
Total received by client		Total received by client	
	1,637,500		1,820,000

Having regard thereto, it can be argued that there is no financial incentive for the attorney to do the work himself. Apart from the financial incentives, the opportunity for competent attorneys to broaden the scope of their services by venturing into litigation in the high courts (as was encouraged by the Right of Appearance in Courts Act) has been discouraged. The present legislation is stifling to the attorney's profession and is unfairly beneficial to the client, the defendant and to counsel, all at the expense of the attorney.

This situation was never raised or dealt with by the SA Law Commission, probably because of the fact that at the time that the Commission had completed its report on contingency fees in 1996, attorneys had barely been granted the right of appearance.¹³⁸ It is proposed that this *lacuna* should now be addressed.

6.12 BOTH ATTORNEY AND ADVOCATE ENTERING INTO AGREEMENT

138 Such right of appearance in the High Courts having only been granted the year before in terms of the Rights of Appearance in Courts Act 62 of 1995.
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The Act defines “legal practitioner” as an attorney or an advocate.¹³⁹ Section 2 allows for a legal practitioner to enter into a contingency fee agreement with the client. The prescribed agreement in the Regulations makes provision for the agreement to be entered into and signed by both an attorney and an advocate. It would appear that where an advocate is also appointed, he would be allowed to charge fees on the same basis as the attorney in accordance with the Contingency Fees Act.¹⁴⁰ Does this in effect mean that in certain circumstances, both attorney and advocate will each be able to charge up to double their normal fee subject to the 25% cap proviso, thus exposing the client to a 50% combined legal bill?

The General Council of the Bar allows advocates to enter into “uplift” fee agreements.¹⁴¹ At the time of submissions to the SA Law Commission, only speculative fee agreements and not “uplift” fee agreements were allowed. In terms of the rule, a member may take a brief subject to an agreement to charge no fees. No cap or percentage is specified, and in determining the success fee to be charged, counsel, *inter alia*, has to have regard to the following aspects: an estimate of the amount or other relief that may eventually be obtained by the client; an estimate of the eventual chances of success or failure; an estimate of the amount of work involved and the complexity of the case; and the percentage by which the success fee exceeds the normal fee of counsel.

The recommendation of the SA Law Commission was that in cases where an advocate is a party to the contingency fee arrangement, the total of the uplift fee portion payable to both attorney and advocate by the client, in claims sounding in money, should not exceed 25% of the proceeds of the action, which proceeds should not include any awards to costs.¹⁴² It is not clear as to whether the phrase “the total of the uplift fee portion payable to both attorney and advocate by the client . . . should not exceed 25% of the proceeds” refers to their fees individually or jointly. Had the word “jointly” been added between the words “not” and “exceed”, the position would have been clear that the cap would mean that the client would be exposed to a total of never more than 25% by advocate and attorney jointly.

139 S 1.

140 Clause 12 of the prescribed agreement.

141 General Council of the Bar Uniform Rules of Professional Conduct rule 7.3.

142 SALC Report 78.
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In *Van der Merwe v The Law Society of the Northern Provinces*,¹⁴³ Ramagaga AJ held that the 25% cap would apply to the total amount of fees of attorneys and advocates jointly. It is submitted that if it was the intention of the legislature to protect the client by limiting the amount of fees to a maximum of 25% where one practitioner was involved, it is logically accepted that its intention would not be to allow 50% – otherwise the cap for the practitioner would have been set at 50% where only an attorney was involved in such a contingency fee agreement.

6.13 UNSUCCESSFUL MATTERS – LIABILITY FOR OPPONENT’S COSTS

In the normal course of litigation, the general rule is that the unsuccessful party is liable for the taxed party and party costs of the successful party.¹⁴⁴ Section 3(b)(2) of the Act requires that before the agreement is entered into, the client must be informed of this fact by the attorney. The requirement is also embodied in the agreement prescribed by the Regulations.¹⁴⁵

A main motivation for the Act being passed, was to assist the larger population, who did not have money to pay for legal services, either up front or at all, in having access to affordable litigation. The question therefore arises: if the client did not have money to litigate in the first place, where will he get the money from to pay for the opponent’s costs if the claim is unsuccessful?

Most attorneys advertise their services on a “no win, no fee” basis and guarantee that the attorney will bear all the risks. This can be misleading.¹⁴⁶ It would be reasonable to assume that any impecunious litigant who is faced with the potential opportunity to gain handsomely from a claim, and who does not have to pay for the attorney’s fees unless he wins, will probably disregard or downplay his potential liability of having to pay anything towards the successful opponent’s costs if he loses – he

143 *Van der Merwe v The Law Society of the Northern Provinces* (unreported case no 36216/2006 of 26 June 2008) 16.

144 Van Loggerenberg and Farlam *Erasmus Superior Court Practice* Service 45 (2104) E12-5. The American system lacks the “costs follow the result” principle with the result that clients are not exposed to the successful parties’ costs. England and Australia have the same system as RSA.

145 In Clause 2 – GN R546 of 23 April 1999 (GG 20009) and amended by GN R1110 of 3 November 2000 (GG 21719).

146 A South African Google search over the internet using the keywords “no win no fees” “personal injury” yielded a result of more than 20 attorneys firms advertising the fact that they work on a “no win, no fee” basis, and although some did conscientiously state that the provisions of the Act would be applied, not one mentioned the liability for opponents’ costs in the event of not being successful, thus creating the impression that no liability whatsoever would attach to the client.

literally has nothing to lose. Similarly, it is also reasonable to assume that the possibility exists that the attorney will not emphasise this potential liability for fear of losing the potential client and claim.

A danger thus created, is that litigation may be recklessly embarked upon, with the successful party being left high and dry with no prospects of recovering the costs from the unsuccessful client. However, the dangers are not limited to recklessness. Practitioners may have claims where, although there is sufficient evidence that there may be reasonable prospects of success, they are ultimately not successful due to no foreseeable reasons or fault on their part whatsoever. The very nature of litigation is that opinions of highly qualified and experienced lawyers differ on a variety of issues – illustrated by the very fact that we have appeal courts which frequently override the judgments of senior and learned judges. No factual or legal position is cast in stone and the client is always at risk to pay the costs of the successful party.

Under these circumstances, the question arises as to whether the opponent should not be advised of the existence of a contingency fee agreement having been entered into between the attorney and his client, in order for the defendant to consider its options such as requesting that the impecunious claimant furnish security for costs, or to consider making early settlement proposals to avoid the running-up of unnecessary and perhaps irrecoverable costs.¹⁴⁷

6.14 STAGE AT WHICH AGREEMENT CAN BE ENTERED INTO

The Act does not specify whether a contingency fee agreement *must* be entered into prior to the proceedings commencing, or whether it can be entered into thereafter, and if after commencement, at what stage. The issue was considered in *Tjajji*, where, after having entered into invalid agreements at the commencement of the matter, when the illegality was drawn to their attention the claimants entered into new agreements which complied with the Act shortly before the trial. In arriving at his decision to declare the agreements invalid, Boruchowitz J had regard to textual indications in the wording of the Act which *inter alia* mentioned that such agreements may only be entered into if there were reasonable prospect of success;¹⁴⁸ that the agreement must be in

147 See *Mofokeng* 32 where Mojapelo DJP held that the existence of such an agreement was confidential between attorney and client.

148 S 2(1).

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writing;¹⁴⁹ that the agreement must be in a certain form;¹⁵⁰ that the client had a proper understanding of the agreement;¹⁵¹ and that the client was afforded a 14-day cooling-off period to reconsider the agreement.¹⁵² In this matter, the new agreements sought to validate the old invalid agreements, and¹⁵³ the court held that whilst the new agreements were formally in order, in substance they were invalid.

This judgment concerned specific circumstances which must be distinguished from other situations where the need to enter into an agreement only arises at a later stage after commencement of the litigation. To use a simple example, assume that an attorney has entered into a normal (non-contingency) fee agreement where he was to simply charge normal fees on a time basis as and when the fees are incurred. It was agreed that the attorney's bill would be settled by the client at the end of each month. At some point during the litigation, and perhaps even as late as a few weeks before trial when the costs are mounting and the client can no longer afford to pay the monthly fees, they agree to enter into a contingency fee agreement. As long as the client has the 14-day cooling off opportunity available to him, there would seem to be no reason as to why such an agreement cannot be entered into.

It is evident from the case law,¹⁵⁴ that the Act has not been well understood by all practitioners (and probably even more so by clients), perhaps because it is relatively in its infancy, and needs time to be well interpreted and deliberated upon. It is quite conceivable that there are thousands of parties who have entered into contingency fee agreements in a *bona fide* manner, yet have only realised the shortcomings of their agreements once the issues have been canvassed and reported by the courts, thus necessitating that new agreements be entered into in order to cure the deficiencies of the old invalid ones. In those instances, it is submitted that new agreements, or agreements entered into after the commencement of litigation, be allowed.¹⁵⁵

6.15 APPORTIONMENTS

149 S 3(2) and 3(4).

150 S 3.

151 S 3(3)(b)(iv).

152 S 3(3)(h).

153 Having regard to the judgment in *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997(3) SA 1004 (SCA) 1010D–H.

154 *Tjatji, Mofokeng, Masango, De la Guerre and Van der Merwe supra*.

155 This is discussed in Chapter 7.

It is a principle of the South African law of delict that where a person occasions his own damages, either wholly or partly, he should not be entitled to recover from another party the portion which he has occasioned.

Apportionments are readily applied in damages claims. These could be applied as a result of contributory factors in respect of the merits such as contributory negligent driving, excessive ingestion of alcohol which caused the problem, failure to wear a seatbelt and not taking prescribed medication. Alternatively, an apportionment could also be applied based on quantum calculations, for example, if injuries were exacerbated because a seatbelt was not worn, or if there were pre-existing injuries and conditions which would have resulted in or contributed to the damage occurring anyway. The result of an apportionment is that the claimant cannot be awarded damages for that portion of the damage which has been occasioned by his own negligence, or which have not been caused by the defendant's actions or omissions.

The right to have damages apportioned arises from the Apportionment of Damages Act.¹⁵⁶ Chapter 1 of the Act regulates the reduction of damages and prescribes that where a person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.¹⁵⁷ The section further provides that damage shall be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.¹⁵⁸

In personal injury matters, merits and quantum trials are usually separated and heard on different occasions with the merits trial being disposed of before the quantum trial.¹⁵⁹ This results in two totally separate trials being run, each requiring its own preparation and attendance, thus effectively doubling the amount of hours worked and costs associated with running a trial. Apportionments are largely applied more in the

156 Act 34 of 1956.

157 S 1(1)(a).

158 S 1(1)(b).

159 This is done in terms of Uniform Rules: Rule 33(4) which allows for any issue of law or fact to be decided separately from other issues, so as to prevent unnecessary trials being run on the quantum where the merits have not first been proved. In terms of directive 6.13 – 3.5.3 of the *Practice Manual of the Gauteng North High Court*, there shall be an automatic separation of merits and quantum in accordance with rule 33(4) unless the parties agree that there shall be no separation.

merits than the quantum stage of the trial, due to the nature of contributory actions of drivers being more likely to arise in motor vehicle accidents, rather than to injuries.

It takes exactly the same amount of work to achieve a judgment, irrespective of whether an apportionment is ordered or not. Where an apportionment is ordered, the quantum awarded after applying the apportionment will obviously be lower than had the apportionment not been applied, and this will have the result that the threshold of the section 2(2) 25% cap will come into effect earlier, the lower the award is. The attorney who thus conducts a case where an apportionment is awarded, is at risk of having a lower fee than his counterpart who has no apportionment applicable. As discussed above,¹⁶⁰ this is another example of the attorney being deprived of his fee, albeit that he has rendered the relevant services. The question which arises, is that where the reduction in damages was due to the clients fault, should it not be fair that the client should bear the shortage occasioned by the apportionment?

Where there is a possibility that an apportionment may be applied, attorneys may be loath to take these on as the risk is not compensated by the reward. The effect could be that in matters where potential apportionments are at stake, the claimant may be precluded from the benefit of the services of attorneys due to financial considerations, thereby denying the client access to the very justice which was a cardinal purpose of the Act.

The following table, illustrates the deficiency:

	NO APPORTIONMENT	APPORTIONMENT		
		10%	25%	50%
value of claim	100,000	100,000	100,000	100,000
	nil	10,000	25,000	50,000
nett proceeds	100,000	90,000	75,000	50,000
normal fee	20,000	20,000	20,000	20,000
uplift fee	20,000	20,000	20,000	20,000
total success fee	40,000	40,000	40,000	40,000
25% cap	25,000	22,500	18,750	12,500

¹⁶⁰ In section 6.8.

s 2(2) fee allowed	25,000	22,500	18,750	12,500
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In the above example where the 50% apportionment was applied, if the risk is shifted to the client, the R12 500 “loss” occasioned by the client’s negligence could be borne by the client out of his award of R50 000, so that the attorney is not out of pocket and received his R25 000 fee.

6.16 VALUE ADDED TAX

The Act is silent as to whether the success fee is inclusive or exclusive of VAT. The matter finally came before the court in 2016 in the matter of *Masango*.¹⁶¹ The issue before the court was whether a practitioner was entitled to charge a flat-rate 25% fee of the capital¹⁶² and whether value added tax could be charged in addition to the 25%.

Whilst finding that a practitioner was not entitled to charge a flat-rate 25% of the capital as a fee, Mojapelo DJP held that even if he was incorrect in arriving at this decision, the attorney was in any event not entitled to charge VAT in addition to the 25% cap.¹⁶³ It is interesting that Mojapelo DJP exercised his functions in the context of his supervisory powers and duties that rested on the court to ensure that the contingency fee agreements comply with the Act.¹⁶⁴

The court’s reasoning was that in terms of section 64(1) and 65 of the Value Added Tax Act,¹⁶⁵ any price charged by any vendor in respect of any taxable supply of goods or services, shall for the purposes of the Act be deemed to include any tax payable in terms of section 7(1)(a), whether or not the vendor has included tax in such price.¹⁶⁶ The cap was not to be regarded as a fee but merely a measure of a threshold at which fees should be capped. Referring to *Mofokeng*,¹⁶⁷ Mojapelo DJP confirmed that court’s view that attorney could only recover “out-of-pocket” expenses above and beyond the 25% cap, and held that the VAT was not to be seen as a cost which the attorney was

161 *Masango supra*.

162 This first issue is not of relevance to this section. The court found that such a provision was unlawful and therefore invalid.

163 *Masango* para 52. The view that an attorney was not entitled to charge a flat rate 25% fee was confirmed in *Mfengwana v Road Accident Fund* 2017 (5) SA (ECG) 445

164 *Masango* para 3.

165 89 of 1991.

166 *Masango* para 32ff.

167 *Mofokeng* para 50.

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entitled to recover from the client over and above his maximum fees, in that it is included in the maximum fees which the attorney is entitled to recover from the client.¹⁶⁸

Although this matter specifically dealt with a 25% capped fee, it is reasonable to assume that the same provisions would apply to any fees raised in terms of section 2 of the Act. It is emphasised that the 25% relates to the cap, and is not a fee.

6.17 UNFORESEEN SIDE ISSUES ARISING

The finalisation of the merits and quantum is usually carried out according to the accepted delictual principles relating to negligence and quantum. Traditionally, once the merits and quantum had been finalised, the matter had effectively been brought to fruition entitling the attorney to his fees. Since the coming into effect of the Constitution,¹⁶⁹ various constitutional issues have arisen in addition to those relating to merits and quantum, which have nothing to do with the finalisation of the claim in the traditional sense. The SA Law Commission understandably had never foreseen or raised the possibility of these extra constitutional issues being raised, as the Constitution had only come into being at around the same time that the Commission was conducting its investigations, and law usually develops over a number of years. The constitutional issues which have been raised of late, are highly technical and subject to lengthy and costly processes.

In the matters of *Du Toit*¹⁷⁰ and *Ngqase*,¹⁷¹ the defendants pleaded that the entire common-law principle of “the once and for all” rule should be amended *inter alia* as follows:

- (a) to allow the defendants the opportunity to be repaid any damages remaining after the death of the plaintiff (a “claw back” or “reversionary” provision);
- (b) to exclude from his estate, portions of the damages awarded to the plaintiff; and
- (c) provisions whereby the defendant was to continue paying for future medical expenses after the damages which had been awarded had been depleted (the “top up” provision).

168 *Masango* para 40.

169 Constitution of the Republic of South Africa, 1996.

170 *Du Toit v MEC for Health and Social Development, Western Cape Provincial Government* (27427/10) [2017] ZAWCHC 17.

171 *Ngqase v Premier Western Cape* unreported case no 5077/2009 (WCC).
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In *Zulu*,¹⁷² the defendant pleaded that the common law should be developed to allow a defendant the opportunity to pay damages only as and when they are incurred, rather than in a lump sum in terms of the “once and for all” rule. The defence was dismissed by the Supreme Court of Appeal and was later argued before the Constitutional Court on 17 August 2017.¹⁷³

In *T*,¹⁷⁴ the defendant raised the special defence that the future medical expenses should be excluded from any contingency fee agreement. For purposes of the discussion on this point, it suffices to state that these issues were ultimately dismissed by the courts, albeit at an enormous cost to the plaintiff.¹⁷⁵ In *Du Toit* and *Nggase*, the cap was reached early in the litigation stage, and for a lengthy period of time the attorneys effectively rendered their services for no remuneration whatsoever. It is submitted that the intention of the Act was to provide a claimant with a mechanism by which he could have a normal delictual claim finalised within an acceptable fees parameter and for the attorney to be fairly rewarded for his services. It is submitted that it would be unreasonable to expect the practitioner to render his services on all constitutional side issues which have nothing to do with the merits and quantum, as an inclusive of his normal fees allowed by the Act. As a result of these matters, attorneys may be compelled to redefine their definitions as to what proceedings the agreement relates to.

6.18 COSTS RELATING TO TAXATION OF COSTS

Is the practitioner entitled to any portion of the taxed costs, and/or how is the practitioner remunerated for attending to the taxation and recovery of costs? The Act is silent on this aspect and section 2(2)¹⁷⁶ can be interpreted in a number of ways. Firstly, the words “or any amount obtained by the client in consequence of the

172 *MEC for Health and Social Development for the Gauteng Provincial Government v Zulu* (case no 1020/2015) [2016] ZASCA 185 (judgment 30 November 2016).

173 At the time of writing, judgment had not yet been given.

174 *T v MEC Health Gauteng* unreported case no 28471/2010 of 16 July 2015.

175 In *Du Toit*, the quantum trial ran for 49 days. The transcript of oral evidence covered 4 880 pages; the plaintiffs’ expert reports 947 pages; the defendant’s expert reports 388 pages; joint minutes of experts 72 pages; the pleadings, further particulars, pre-trial minutes, amendment application and other court documents 775 pages and the documentary exhibits over 1100 pages. Nineteen experts testified.

176 S 2(2): “[T]he 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.”

proceedings concerned” could mean that taxed costs awarded (which have indeed been obtained in consequence of the proceedings) are to be taken into account in determining the cap. In other words, the practitioner is then entitled to 25% of the capital *plus* taxed costs awarded. The other interpretation is that the word “award” simply refers to capital, in which event the cap relates the capital only. These issues are discussed in the preceding paragraphs. A further problem arises with the words “which amount shall not, for purposes of calculating such excess, include any costs”. Does the word “amount” refer to the *fees* which are being discussed and capped or does it refer to the amount awarded? In *Thulo* it was held that the attorney was entitled to retain all taxed costs, as long as the client received a nett amount of 75% of the capital. A different view was held in *Tjatji* and *Mofokeng*, where the courts held that the attorney was not entitled to any portion of the costs awarded.

6.19 COSTS RELATING TO DRAWING BILL OF COST

“Normal fees” are defined in the Act as “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”.¹⁷⁷ The determination and assessment as to what is considered to be a “normal” fee is thus cardinal to the Act, as it determines the amount of the 100% uplift, and whether the 25% cap has been reached or not.

The taxation of the attorney’s bill in respect of the services rendered to a client is not a prerequisite for payment¹⁷⁸ and the parties can agree on a sum owing by the client to the attorney if they are both satisfied that the fees are in accordance with the provisions of the Act. However, where there is not agreement, the parties can resort to taxation in terms of Rule 70.¹⁷⁹

The taxing master shall be competent to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work.¹⁸⁰ Resorting to taxation, however, carries a cost and the question arises as to who is to bear this cost. In terms of Rule 70, in addition to the reasonable fees for the attorney’s services which are allowed on taxation, the attorney shall be entitled to charge a fee

177 S 1 of the Act.

178 *Benson v Walters* 1981 (4) SA 42 (C) 86B–C.

179 Rule 70 of the Uniform Rules of Court. A corresponding provision appears in rule 33 of the Magistrates’ Courts Rules, and for purposes of this discussion, reference will only be had to the High Court rules.

180 Rule 70(1)(a) of the Uniform Rules of Court.

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in connection with drawing the bill of costs.¹⁸¹ If recourse is had to taxation of that bill of costs, further additional fees can be charged by the attorney for attending to the taxation.¹⁸² Value added tax may be added to all costs, fees, disbursements and tariffs in respect of which value added tax is chargeable.¹⁸³ The combination of the basic attorney's fee, the drawing fee, the attending fee on taxation, and VAT, can thus be regarded to comprise the attorney's "normal fee" on taxation,¹⁸⁴ in terms of the Act.

Where the taxation of a party and party bill is concerned, there is a safeguard built into the rules to protect a party against an unreasonable bill being presented against him for taxation.¹⁸⁵ The rule specifically makes the safeguard provision applicable to party and party bills only, and leaves open the question as to whether such disallowance would be applicable in situations where attorney and client bills are concerned.¹⁸⁶ It is submitted that there would be no reason to distinguish, and that all provisions should apply to both party and party and attorney and own client bills respectively, thus granting the contingency-fee-agreement client the relief to have the fee for drawing and taxation disallowed where the attorney has presented an excessive bill.

6.20 CONCLUSION

181 Rule 70 of the Uniform Rules of Court: Tariff of fees of attorneys – Part E (1). For drawing the bill of costs, making the necessary copies and attending settlement, 10.60 per cent of the attorney's fees, either as charged in the bill, if not taxed, or as allowed on taxation.

182 Rule 70 of the Uniform Rules of Court: Tariff of fees of attorneys – Part E (2). For arranging and attending taxation and obtaining consent to taxation, 10.60 per cent on the first R1 000.00 or portion thereof, 5.10 per cent on the next R10 000.00 or portion thereof and 2.12 per cent on the balance of the total amount of the bill.

183 Rule 70(3A) of the Uniform Rules of Court. One must have regard to the way in which the fee was quoted in the contingency fee agreement. Fees are deemed to be inclusive of value added tax unless specifically quoted otherwise in terms of s 65 of the Value Added Tax Act 89 of 1991. See *Masango* para 32ff.

184 See *Masango* para 40 where the court held that the fee is inclusive of VAT.

185 Rule 70 of the Uniform Rules of Court: Tariff of fees of attorneys – Part E 3(b)(ii). In a party and party bill, if more than 20% of the claimed amount is taxed off, then the party presenting the bill shall not be entitled to the fees for drawing and attending to the taxation.

186 The Latin maxim *inclusio unius est exclusio alterius* is relevant. In terms hereof, the specific expression of one thing is the exclusion of the other. This maxim has been described as "a valuable servant, but a dangerous master" – see *Colquhoun v Brooks* (1888) 21 QB 52 65; *National Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC) 17C. In *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 27G–H Hoexter JA described the maxim as "that last refuge" and said that it is not a rigid rule of statutory constructions and that it must at all times be applied with great caution.

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Whilst the Act has cleared up a number of matters which were previously misunderstood by the profession,¹⁸⁷ it has also caused a number of questions regarding the interpretation of the Act.

Most of the problems arise as a result of the 25% cap. Whilst clients are protected by a maximum fee chargeable as a result of the cap, an attorney may be expected to perform his services effectively for no remuneration after the cap is reached. The same applies to apportionments which are applied due to the client's own negligence (and which ultimately reduce the threshold of the cap) thereby exposing the attorney to the lower cap (and hence a limitation of fees). The question that is asked, is why attorneys, who are members of a noble profession and who are in any event subject to the rules of the controlling bodies, should be subjected to all these regulations and safeguards when the champerty funder is not subject to any sanctions. Other issues such as whether the attorney is entitled to retain the taxed party and party costs recovered, and what would happen in circumstances where the attorney performs the services of both attorney and counsel, remain unresolved.

It is submitted that where the balance between the attorney's right to fair compensation is far outweighed by the risks to which the practitioner is exposed, attorneys will shy away from utilising agreements under the Act or will simply not take on risky matters.¹⁸⁸ This will ultimately have the effect of denying clients the very opportunity to have their claims pursued, which was a cardinal object of the Act.

187 That common-law contingency fee agreements are not permissible; that a flat rate of 25% is not allowed; and that the provisions of the Act require that agreements should be strictly complied with.

188 Especially in cases where the quantum is lower, and in which according to the RAF (see table *supra*) the majority of claims are under R10 000.

CHAPTER SEVEN

RECOMMENDATIONS AND CONCLUSION

7.1 INTRODUCTION

The law relating to contingency fees has had experienced a remarkable development over the last twenty years. From initially being unlawful, we now have a well-structured Act, backed up by case law, which allows such contingency fee agreements to be entered into, albeit subject to restrictions and safeguards, and yet it cannot be denied that the Act has shortcomings.

The system of only allowing “uplift” fees is in line with other legal systems,¹ although it differs from countries which allow a flat-rate percentage fee on the award ² It is submitted that a combination of the two systems would be ideal. In so doing, the problem of the present 25% cap being too low in cases involving smaller quantum amounts will be addressed.

7.2 RECOMMENDATIONS

The following issues should be considered and revised with a view to optimising the system of contingency fees in South Africa:

7.2.1 Definitions

The following definitions should be added:

7.2.1.1 “costs” means the costs awarded, either by taxation or agreement, to a party.

7.2.1.2 “success fee” means the combined total of the normal fee plus the uplift fee.

7.2.1.3 “uplift fee” means the portion of fees higher than the normal fee.

7.2.2 Method of charging fees

7.2.2.1 The option of simply charging the normal fee in a “no win, no fee” case (without an uplift fee), as presently appears in section 2(1)(a), should be retained.

7.2.2.2 The method appearing in the present section 2(1)(b)³ (which allows an increased fee), should be amended to include a provision that the litigants have the option to choose either one of the following methods:

1 For example England and Wales.

2 Some states in the USA.

3 Read with s 2(2).

7.2.2.2.1 A flat-rate damages-based percentage on the amount of the award, but with the percentage being subject to a sliding scale.⁴ However, this fee will be reduced by 50% where *litis contestatio* has not yet been reached in proceedings.⁵ Using this method, the attorney is fairly compensated for all services performed. Although there is a percentage limit, the percentage will apply on the full amount awarded, and unlike the present system, the fees will not reach a cap where no fees are earned once the cap has been reached.⁶ The client is protected by knowing what the calculable, yet limited, fee will be.⁷

7.2.2.2.2 A fee such as that envisaged by section 2(1)(b) (lower of double the normal fee or a cap), but with the limit of the cap being subject to a sliding scale where the lower awards are subject to a higher cap and *vice versa*.⁸

7.2.2.3 In calculating whether any costs awarded shall either be included or not included in determining the monetary amount of the cap, one should simultaneously consider what the arrangement will be as to who is entitled to retain the costs.⁹ The following is recommended:

7.2.2.3.1 In respect of matters subject to the provisions of section 2(1)(a), the parties can decide and agree between themselves as to what arrangement will be applicable as to who is entitled to the costs.¹⁰

7.2.2.3.2 In respect of other matters, the parties have the choice to either include or exclude the costs in the calculation of the cap:

4 As is frequent practice in the USA. For example, the states of California and Nevada have a sliding scale where the fees are not to exceed 40% of the first \$50 000, 33,33% of the next \$50 000, 25% of the next \$500 000, and 15 % of the damages exceeding \$600 000. Other states such as New York, New Jersey, Connecticut, Delaware and Main have differing sliding scales.

5 In modern practice, this is synonymous with the close of pleadings, when the issue is crystallised and joined: *Milne v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) 358C.

6 This method is supported by Shields "Contingency Fees in South Africa – First Tastes of the Forbidden Fruit" 2000 IBA Conference.

7 A system such as this eliminates the necessity to have bills of cost taxed to determine what the normal fee, and hence the uplift, should be.

8 The problem with the present cap of 25% is that the smaller the quantum, the quicker the cap is reached. This affects the majority of RAF claims (cf table to RAF Annual Report in Chapter 6 *supra*). By having a higher cap for the lower awards, attorneys will have an incentive to make use of the system, whilst the client is protected at the same time by the higher the award, the less will be the percentage.

9 Note the distinction between the issue of the costs being used as a measure to determine the level of the cap, as opposed to a practical arrangement as to who is entitled to retain the costs.

10 Although there is no uplift fee, the advantage is that there is no cap on the normal fee.

- (a) If costs are included in the determination of the cap, the client will retain the costs recovered. The attorney has the advantage that because the threshold of the cap is higher, there is more scope for his uplift fee to be higher. In instances where the cap is not reached, the attorney is effectively compensated by receiving an uplift in respect of the portion of the taxed costs being included in the uplift calculation. The client has the advantage of receiving either all or portion of the recovered costs, depending on whether the cap is reached or not.
- (b) If the costs are not included in the determination of the cap, the attorney may retain the costs recovered, but on the proviso that the client shall receive no less than an effective 75% of the capital awarded.¹¹ this has the effect that whilst the attorney is entitled to receive the costs, the threshold of his fees cap will be lower. The client on the other hand has the protection of receiving at least 75% of the award.

7.2.3 Attorney performing work of advocate

Where the attorney performs services which are traditionally performed by advocates, the attorney's normal fee, and hence the uplift fee, will be higher, and this results in the threshold cap being reached quicker than in circumstances where the attorney had employed the services of an advocate to do the work. To cater for such situations, it is recommended that the Act be amended to read that where an attorney has performed services without the use of counsel in:

- (a) drafting of pleadings;
- (b) appearance in any proceedings; and
- (c) attendance at pre-trial conferences in terms of Rule 37;

the percentages referred to in paragraph 7.2.2.2 above shall be increased by 10%, on successful application to the court if the matter is before court, or to the professional controlling body if the matter is not before court, and upon proof of such compliance being furnished. For purposes of implementation hereof, if the matter concerns a settlement subject to the provisions of section 4 of the Act, such application shall be

¹¹ This was held by Morison J in *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) and this view is supported by the author hereof.

made to the court or professional controlling body simultaneously with the filing of the prescribed affidavits. If the matter is subject to a judgment, such application should be made at the conclusion of the matter before judgment is given.

Further, where the attorney who performed the services of counsel was assisted by an attorney to perform services normally performed by an instructing attorney to counsel (“the instructing attorney”), the claimant shall be entitled to such taxed costs as would normally be allowed in respect of an instructing attorney.

7.2.4 Interpreter

Sections 3 and 4 of the Act should be amended respectively, to include a clause that the services of an interpreter have been offered to the client to have the terms of the agreement and/or the contents of the affidavit explained to him in his language of choice. The costs of employing an interpreter shall form part of the attorney and own client cost and be borne equally by the parties.

7.2.1 Time of entering into agreement

Circumstances do change which cause agreements to be entered into or to be amended after instructions are given to an attorney to proceed with a matter.¹² It is recommended that a clause be inserted in section 5 to specify that the agreement may be entered into or amended at any time, on condition that where the agreement or amendment was entered into after the issuing of summons, the full disclosure is made either in the section 4 affidavit, or to the court prior to judgment being given if the matter was not settled, of the full details explaining the reason for the agreement being entered into or being amended after the summons was issued.

7.2.6 Apportionments

Where an apportionment has been applied to the capital amount awarded, the client should bear the effect of the apportionment, or at least a part thereof, so that the attorney is not prejudiced by having his fees reduced as a result thereof. The Act should be amended to provide that in such circumstances, on successful application to the court if the matter is before court, or to the professional controlling body if the matter is not before court, that either the total percentage of the apportionment, or a

12 These are discussed in Chapter 6 above, but include changes of fact or law which may have arisen after instructions were taken and which affect the entire viability and approach to the matter and/or the choice as to which type of agreement should have been entered into had these facts been known.

part thereof having regard to the circumstances, must not be applied to the attorney's fees, so as to give effect to the attorney being entitled to the full fee which he would have earned "but for" the apportionment. It is recommended that if the matter concerns a settlement subject to the provisions of section 4 of the Act, such application shall be made to the court or professional controlling body simultaneously with the filing of the prescribed affidavits. If the matter is subject to a judgment, such application should be made at the conclusion of the matter before judgment is given.

7.3 CONCLUSION

Whilst contingency fees were traditionally illegal and considered to be *contra bona mores* at common law, the trend which has been arising throughout the world to allow some sort of "no win, no fee" basis, came to the fore in South Africa when the SA Law Commission proposed that such arrangements be allowed in a controlled form. The Act was subsequently passed, but has presented the profession with some challenges, both advantageous and disadvantageous to both attorney and client.

During the eighteen years since the promulgation of the Act, the courts and practitioners have had an opportunity to see the strengths and weaknesses of the Act. The section 2 caps, whilst based on good intentions to give the public access to have their matters heard before a court, may indeed be having the opposite effect in that attorneys are not prepared to take these matters on where the cap will be easily reached, to an extent that their fees will be lower than even their normal fees, and to take on such matters may not be viable. The entire principle of the lawyer receiving no remuneration or compensation for the work being done after the cap has been reached, is also of concern.

An issue which has been raised but not yet formalised, is the seemingly unfairness of lawyers being regulated in the charging of their fees in contingency matters, whereas laymen who are subject to no professional controlling body or rules, have no restrictions as to what they can charge in champertous matters. The aim of legislation would be to provide a fair system to balance the interests of both lawyers and clients. However, it is submitted that in some respects the Act seemingly provides over-protection to the client, at the expense of the attorney, and requires a revisit on many of the issues discussed herein.

The recommendations made herein largely relate to the method of calculating a fee which is fair to both attorney and the client. Raising the existing section 2(1)(b) cap,

and introducing the further option of a damages-based fee percentage, where both methods are subject to maximum percentages, should ensure a balance between the interests of the attorney and the client. Transferring the risk of a client's own apportionment to the client is also a step in the direction of reasonableness. Further safeguards such as having the services of an interpreter offered to the client at the time of entering into the agreement and at the time of settlement, will ensure transparency and eliminate misunderstandings amongst a third-world population who may not have the required language skills and education levels which are reasonably required to comprehend what is involved in such complex legal matters.

The aim of the Act was largely to afford the population access to the courts via a system which is fair to the attorney and client. Because of deficiencies in the Act, many attorneys have been loathe to make use of the provisions of the Act, and thereby the clients who require a system to assist them, have effectively been let down.¹³ Having gone through the teething period of twenty years, the problems which have come to the fore over that period have necessitated that certain provisions of the Act be revisited. I believe that with the recommended amendments, the purposes of the Act will be achieved.

13 My view is supported by Druker *The Law of Contingency Fees in South Africa* (2007) 103, and the editorial of the October 2000 *De Rebus* 4, that the present system is not working effectively to deliver justice to those that cannot afford it. In 2011, Wallis JA wrote in the August issue of *Advocate* 33, that “[w]hilst we have a statute that regulates this topic, it is badly drafted and generally ignored by attorneys who act on contingency”.

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