IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: 318/2019

In the matter between:

BULELANI MANYAKAMA **Applicant**

And

MAGQABI SETH ZITHA INC **Respondent**
(Registration Number: 2014/152515/21)
Duly represented by one of its Directors,
PYTHAGORAS VUYISILE MAGQABI

JUDGMENT

BESHE J:

[1] Applicant approached this court for an order in the following terms:

"(a) Directing the respondent to repay the sum of R100 000 to the applicant, as an interim payment pending the taxation of the bills of costs by depositing such amount into the trust account of the applicant's attorneys of record Messrs M A Fredericks and Associates, within 7 days of the granting of this Order, the trust account details being:

M A FREDERICKS & ASSOCIATES TRUST ACCOUNT

STANDARD BANK

ACCOUNT NO 241 […]

BRANCH CODE 053721

(b) Directing the respondent to produce a bill on the High Court Scale on an attorney and own client basis, as promulgated from time to time by the Tuled Board for Courts of Law, under Section 6 of the Rules Boards for Courts for Law Act 1985 (Act No 107 of 1985), as approved by the Minister of Justice and Constitutional Development, within seven (7) days of the granting of this Order.

(c) Directing the respondent to produce and make available the applicant's litigation file and to account fully to the applicant, within 7 days of the granting of this Order;

(d) Directing the respondent and the Registrar to tax the respondent's bill of costs, in terms of the rules of court, and as soon as practicably possible;

(e) Directing that the purported Contingency Fee Agreement entered into by the applicant and the respondent, be declared unlawful, invalid and of no force and effect;

(f) Directing that the respondent to pay/disclose all amounts paid to it by the Road Accident Fund for the party and party costs in the matter between the applicant and the Road Accident Fund within 7 days of the granting of this order;

(g) Directing the respondent to pay to the applicant the difference between the sum paid to the respondent, being the capital sum of R1 513 787.40, plus the party and party, less the sum of the respondent's attorney and client bill of costs relating to the

matter between the applicant and the Road Accident Fund within seven (7) days of agreement or taxation of the attorney and client bill;

(h) Ordering the respondent to pay the costs of this application on the attorney and client scale within fourteen (14) days of date of allocator, together with interest on the taxed costs within fourteen (14) days from date of allocator at the legal rate."

[2] At the centre of the dispute, is the contingency fee agreement that was concluded between the applicant and the respondent, a firm of attorneys.

[3] The following facts are common cause between the parties:

Applicant was involved in a motor vehicle collision on the 9 May 2014. As a result of the collision he sustained orthopaedic injuries. In his action against the Road Accident Fund in this regard, he was represented by the respondent. The parties entered into a Contingency Fee Agreement on the 19 June 2014. His claim was settled in the sum of R 1 513 787.40 in May 2017. On the 19 December 2017 applicant made a declaration waiving his right "to await the settlement of costs and whatever settlement that it comes with". The declaration also records the following:

"In terms of the Contingency Fee Agreement that I entered into with the said Attorney. When I instructed them, I would be entitled to 75% of the awarded amount alternatively Attorney/ Client costs plus 100% and that such determination can only be made after taxation and a payment of capital, costs so that the attorneys account once to me.

I am now advised by my attorney that Party/Party costs have not yet been finalized and settled, however I want settlement of the balance on the 75% of the CAPITAL.

In this regard, I have previously been, at my behest given advance payments amounting to R2 000.00 plus 25% contingency in the sum of R378 446.85.00, leaving a balance of R1 133 340.55."

19 December 2017 is the date that appears on the "WAIVER". A payment of R1 133 340.55 was paid to the applicant which represented 75% of the capital, on the 27 September 2017.[1]

[4] Applicant complains that respondent deducted the amount of R387 446.85 without representing him with a bill of costs in respect of the Road Accident Fund claim concerned. He also complains about respondent agreeing with him to charge 25% of the capital amount as this is not provided for by the Contingency Fee Act. Another complaint is that the respondent has not paid over to him the party and party costs of R112 841.07 received from the Road Accident Fund on the 7 March 2018. According to the applicant, he was not provided with a copy of the Contingency Fee Agreement. A number of other clauses of the Contingency Fee Agreement are impugned.

[5] In his answering affidavit, respondent confirms that 75% of the capital sum was paid to the applicant. He also states that the party and party costs have been since been paid. The attorney and client bill of costs has not been taxed as a result respondent is not in a position to account in full. It is denied on behalf of the respondent that a case has been made for the setting aside of the Contingency Fee Agreement entered into between respondent and the applicant. It is asserted that the applicant did not request that he be furnished with a copy of the Contingency Fee Agreement. The Contingency Fee Agreement in question is annexed to the answering affidavit. Applicant's claim that the contingency fee agreement does not comply with the provisions of the Act is based on the following clauses of the agreement:

Clause 12 which reads:

[1] Answering affidavit paragraph [11] page 25 of the record.

“12 HEREBY GIVING AND GRANTING to my attorneys power to appoint a correspondent/subcontracting attorney from other firms, a substitute or substitutes, and the same at pleasure to displace or remove and appoint another or others, hereby ratifying and agreeing to ratify whatsoever shall be done or suffered by virtue of these presents. In event that my attorneys appoint correspondents of other attorneys as subcontractors or agents, I authorizes my attorneys to also negotiate and pay such attorneys or agents’ costs and to enter into fee agreements with them including contingency fee agreements. These costs and disbursements shall be deemed to be part of my attorneys’ disbursements and shall be payable in addition to my attorneys costs as set out herein.”

Clause 14:

“14. My attorney will be entitled to, apart from the fees referred to above, all monies for which expenditure has been incurred and/or indebted to on behalf of myself for example advocates’ fees, expert witnesses, medical records, etc.”

Clause 19 which records:

“19 If my attorney elects to charge a percentage of a capital amount awarded and not a fee calculated on an attorney and client basis as set out above, my attorneys shall then be entitled to render an account for 25% of the capital amount awarded to me plus VAT and expenses/disbursements (such as counsel fees) as a success fee. The capital amount awarded will exclude any party and party cost contribution made to my attorney.”

Clauses 21 and *22* which provide:

“21. My attorneys shall be entitled to any cost contribution made for expenses incurred on my behalf, in addition to the percentage or attorney and own client fee charge, which cost allocation my attorneys do not need to account to me. In the event of circumstances warranting an increase in hourly charge or tariffs this will be subject to my confirmation. In view of the fact that my attorneys will incur certain disbursements and fees on my behalf, I hereby irrevocably and in rem suam

authorise them to recover and receive on my behalf the capital and party and party or other costs from any institution, person or company and to deduct fees and disbursements from the capital amount before payment of the balance of it to me. I confirm that a copy hereof was handed to me; and

22. It shall not be necessary for my attorneys to present any of their bills of costs for taxation. Should this however be decided upon for whatever reason, I authorise my attorneys to appoint a cost consultant of their choice to draft such bills of cost and to attend to the taxation thereof and my attorneys shall be entitled to charge the fees of the consultant in addition to any other fees or expenses that might be payable by me to my attorney"

[6] It was submitted on behalf of the applicant that the contingency fee agreement exceeds what is provided for in the Act as it provides for the appointment of other attorneys as subcontracts or agents and the possibility of entering into contingency fee agreements with them and costs related thereto shall be payable in addition to the respondent's costs.

[7] It was submitted that the impugned clauses are designed to prejudice the applicant financially and are terms that are contrary to public policy and offend society's good morals. That therefore the agreement is unenforceable. It is also suggested that the agreement takes advantage of applicant. It was also argued that the respondent deducted 25% of the settlement amount without considering which amount will be lesser between his attorney / client fee plus 100% and the 25%. It being suggested also that clearly this comparison could not have taken place because no attorney / client bill existed as the time. That it is impossible that a bill of costs would be equal to 25% of the capital to the last cent. That the bill of costs is only meant to justify the deduction by respondent of 25% of the amount of settlement. Especially in view that the bill of costs was not available when the amount was deducted from the settlement. That due to other questionable items appearing on the bill of costs, the applicant is entitled to an order prayed for in b – g of the notice of motion.

[8] It was submitted on behalf of the applicant that the respondent cannot rely on the Contingency Fee Agreement being substantially in compliance with the Act. In

this regard, I was referred to a Full Bench decision of this division in ***Mathimba v Nonxuba***[2].

[9] The respondent denies that the applicant is entitled to the relief he seeks. Respondent argues that the agreement is substantially in compliance with the Act, that the intention of parties was entirely within the spirit and purport of the Act. That the agreement is capable of rectification to the extent that it is necessary to express the parties' intention and accord with the letter of the Act. It was further argued that failure to dot the 'i''s and cross the 't''s cannot render the agreement invalid. Respondent insists that 75% of the capital sum was paid to the applicant, paid out to him before the bill of costs could be taxed based on the waiver he signed in this regard. And that therefore this litigation is premature by virtue of the fact that the bill has not yet been taxed. Also respondent is unable to account to the applicant until the bill has been taxed. It was further argued that the applicant failed to make out a case in the founding affidavit in that nowhere does he allege that the contingency fee agreement is invalid because it exceeds what is provided for in the Act. That only emerged in the replying affidavit.

[10] Granted that the words the agreement "exceeds that which o provided in the Contingency Fee Agreement" were not used by the applicant. But in paragraph 16 of the founding affidavit the following allegation is made:

"I am advised that there is no basis for an attorney to charge as his/her fees a percentage of the amount awarded to his/her client. The Contingency Fees Act certainly does not provide for such a basis. I am advised that an attorney cannot agree with his client to charge 25% or 20% of the capital amount. His/her charge in neither percentage commission, nor a share in the injuries of the damages suffered by his/her client."

So, respondent's submission in this regard lacks merit.

[11] The following are provisions of the *Contingency Fee Act* that are applicable to this application:

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[2] 2019 (1) SA 550.

““**2 Contingency fees agreements**

(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed–

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

(2) Any fees referred to in subsection (1) *(b)* which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs."

Section 3 of the Act lays out the form and content of a Contingency Fee Agreement. A summation of what the *Contingency Fee Act* provides appears from what was set out in ***Price Waterhouse Coopers v National Potato Co-op Ltd***[3] as follows:

"[41] The Contingency Fee Agreement Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a 'no win, no fees' agreement (s 2(1)*(a)*)" and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s

[3] 2004 (6) SA 66 SCA at 78 paragraph [41].

2(1)*(b)*). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, including costs (s 2(2)). The Act has detailed requirements for the agreement (2 3), the procedure to be followed when a matter is settled (s 6) and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal. What is of significance, however, is that by permitting 'no win, no fees' agreements the Legislature has made speculative litigation possible. And by permitting increased fee agreements the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action."

[12] It was also re-iterated in a full bench decision of this division in ***Mathimba v Nonxuba*** *supra*[4] that, absence compliance with the Act, a contingency fee agreement is void. In the same matter *Lowe J* also makes the following points:[5]

"[118.4] What is contemplated by s 2 of the Act is a single contingency agreement for a single matter to which all the relevant legal practitioners (attorneys and advocates) are party, and not separate agreements for each practitioner (such as each is, or is not, on contingency).

[118.5] It is only one agreement with all legal practitioners involved on contingency that is contemplated in the Act, but subject to the provisions of the Act and the

[4] 2019 (1) SA 550 at 591 ECG.
[5] Paragraph [118.4] and [118.5].

constraints as set out in Section 2 thereof, particularly the limitation as to the amount of the success. There is a globular limitation applying to the entire body of costs to which the client is liable, the 25% statutory cap in respect of legal practitioners on contingency."

Similarly in ***Mfengwana v RAF***[6] *Plasket J* stated:

"[12] It is apparent from the case law that contingency fee agreements that do not comply with the provisions of the Act are invalid. Strict compliance with the Act is necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients–a phenomenon that is, in my experience, unfortunately all too common,"

Fees charged in terms of the contingency fee agreement are therefore subject to two caps:

(1) An attorney may charge double his normal fee or in the case of a claim sounding in money, his success fee must not exceed 25% of the award, excluding cost.

[13] In paragraph [21] of the ***Mfengwana*** judgment referred to above, as to the meaning of *Section 2 (2) of the act Plasket J* had this to say:

"[21] In less eloquent terms, in *Erasmus v Williams*, I said the following of the meaning of s 2(2) in circumstances in which an attorney had claimed to be entitled to 25% of the damages awarded to his client:

'It is clear that the respondent's understanding of s 2 of the Act is erroneous. It is not intended to be a licence to plunder up to 25 percent of any award paid to a client who has entered a contingency fee agreement (and who is usually indigent). All that s 2 does is to allow an attorney who is party to a contingency fee agreement to recover from an award to his or her client a success fee based on the work done at a

[6] 2017 (5) SA 445 ECG [12].

maximum of twice his or her usual fee. That amount may not, however, exceed 25 percent of the award, no matter how much work the attorney has done. What an attorney is certainly not entitled to is 25 percent of the client's award.'"

[14] Respondent seems to appreciate this interpretation. He however asserts that it is wrong to interpret *clause 13* and *19* to mean that the success fee which the respondent intended to charge was a percentage of the capital award.

[15] Unfortunately this is what the clauses in question suggest – it is from the clauses that the intention of the parties can be ascertained. The applicant has demonstrated that indeed the respondent allocated itself exactly 25% of the capital award – to the very last cent. Without the bill of costs being available / taxed.

[16] I my view the concessions made by the respondent are an indication that there is an appreciation or acknowledgement that the agreement is not in line with the Act. For example, the assertion by respondent that the agreement is substantially in compliance with the Act. That it is capable of being rectified to reflect the intention of parties and observe the letter of the Act. Unfortunately – absent compliance with the Act, a contingency agreement is void. There can be no scope for the rectification thereof. Even *clause 12* by permitting the entering into contingency agreements with other subcontractors / practitioners falls foul of the Act.

[17] I am of the view that based also on the authorities referred to above, that the applicant has made out a case for the setting aside of the contingency fee agreement entered into between him and the respondent in respect of this matter.

[18] Respondent has tendered the relief tendered in prayers (a) and (g) in the notice of motion.

[19] Accordingly, the following order will issue:

19.1 The contingency fee agreement entered into between the parties in this matter is declared unlawful and of no force and effect.

19.2 The respondent is ordered to make an interim payment to the applicant's attorney pending taxation of the bill of costs in the sum of R100 000.00.

19.3 The respondent is ordered to produce a bill of costs on the High Court Scale of attorney and client basis and to attend to the taxation thereof.

19.4 The respondent is ordered to pay any balance due to the applicant.

19.5 The respondents is ordered to pay the costs of this application.

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NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants	:	Adv: S H Cole
Instructed by	:	WHEELDON RUSHMERE & COLE 119 High Street GRAHAMSTOWN Ref: Mr Brody Tel.: 046 – 622 7005
For the Respondent	:	Adv: N Gqamana SC & Adv: V Jozi
Instructed by	:	NETTLETONS ATTORNEYS 118A High Street GRAHAMSTOWN Ref: Mr Hart Tel.: 046 – 622 7149

Date Heard	:	14 November 2019
Date Reserved	:	14 November 2019
Date Delivered	:	17 December 2019