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

Case No: 898/2020

In the matter between:

ROMARIO KYLE JOHANNES **Applicant**

And

FRANZ MARITZ ATTORNEYS **Respondent**

JUDGMENT

BESHE J:

[1] The applicant in this matter is a 22 year old male person. He was involved in a motor vehicle accident in 1999 when he was a year old as a result of which he sustained various serious injuries. The respondent is an attorney who practices as a sole proprietor of Franz Maritz Attorneys. He was instructed to pursue applicant's claim against the Road Accident Fund.

[2] The events that prompted the institution of these proceedings are largely common cause being that:

Respondent concluded two Contingency Fee Agreements, the first one with applicant's father **Mr Aubrey Johannes** and the second one with the applicant. Where the parties diverge is as regards the date on which the first Contingency Fee Agreement was concluded. According to the applicant, it was entered into on the 7 April 2016. Respondent denies this and puts applicant to proof thereof. He does not state categorically when the first Contingency Fee Agreement was concluded and suggests that because applicant was still a minor in 2015 his father acted on his behalf / as his guardian. Suggesting that the Contingency Fee Agreement was concluded in 2015. He states that he could not find the Contingency Fee Agreement,

blaming the disappearance thereof on a **Ms Jordaan** who he alleges has been absent from work without notice for some time. Respondent concluded the second Contingency Fee Agreement with the applicant on the 20 June 2017. Action was instituted against the Road Accident Fund during April 2017 with applicant's father being the plaintiff. Applicant was born on the 6 February 1998. He was nineteen (19) years old and a major at the time (April 2017). He was substituted as a plaintiff in the action against the Fund on or about 2 June 2017 whereafter as I indicated earlier, he concluded a Contingency Fee Agreement with the respondent on the 20 June 2017. Prior to being represented by the respondent, the matter was handled by *Mark Williams Attorneys*.

[3] On the 20 July 2017 the claim against the Road Accident Fund was settled by the acceptance of an offer that was received directly from the Road Accident Fund. The settlement amount was R1 435 895.00. After the settlement of the claim but before payment was effected, applicant required a loan of R200 000.00. Respondent offered to assist him to secure the loan saying he also required a loan in the same amount. A loan of R400 000.00 was obtained from Setsebi Financial Services. Applicant's father had undertaken to pay back the money when the Road Accident Fund effected payment in respect of applicant's claim to the respondent. Respondent retained R200 000.00 of the loan as arranged.

[4] During December of 2017 respondent paid R777 047.21 to applicant's father's bank account. A few days thereafter, respondent obtained a loan of R100 000.00 from applicant's father. The respondent has retained 25% of applicant's award. As well as R127 345.00 paid by the Road Accident Fund as party and party costs in the claim against the Fund.

[5] Applicant, unhappy with the amounts retained by the respondent, approached this court for an order in the following terms:

“1. The Contingency Fee Agreement entered into between AUBREY JOHANNES and the Respondent on 7 April 2016 is declared unenforceable against the Applicant, invalid and is set aside and of no force or effect.

2. The Contingency Fee Agreement entered into between the Applicant and the Respondent on 20 June 2017 is declared unlawful, invalid and is set aside and of no force and effect.

> 2.1 Alternatively to paragraph 2 above, and in the event of this Honourable Court finding that the Contingency Fee Agreement is valid, that the terms thereof are only applicable from 20 June 2017 until the finalisation of the action between the Applicant and the Road Accident Fund.

3. The Respondent shall disclose, and provide proof thereof, of all sums received by him from the Road Accident Fund in the action between the Applicant against the Road Accident Fund, to the Applicant’s attorneys within 7 days of the granting of this order.

4. The Respondent shall produce a bill of costs on the applicable High Court tariff at the time the fee was incurred, on an attorney and client basis, in the action between the Applicant and the Road Accident Fund, to the Applicant’s attorneys within 7 days of the granting of this order.

5. The Respondent shall produce and make available to the Applicant’s attorneys of record his file relating to the action between the Applicant and the Road Accident Fund within 10 days of the granting of this order.

6. The Respondent shall pay to the Applicant the sum of R150 000.00, as an interim payment, within 7 days of the granting of this order.

7. The Respondent shall pay to the Applicant the sum of R74 000.00 together with interest thereon at the rate of 4% per month from 14 June

2018 until the date of final payment, within 14 days of granting of this order.

8. After the taxation of the Respondent's bill of costs in the action between the Plaintiff and the Road Accident Fund, alternatively agreement between the Applicant and Respondent, the Respondent shall pay to the Applicant the difference between the sum paid to the Applicant and the sum which should have been paid by the Respondent to the Plaintiff less the Respondent's attorney and client fee, taking into account the interim payment referred to above.

9. The payments referred to in paragraphs 6, 7 and 8 above shall be paid by the Respondent into the trust banking account of the Applicant's attorneys.

10. The Respondent shall pay the costs of this application on an attorney and client scale."

[6] The basis for seeking the setting aside of the first Contingency Fee Agreement concluded with applicant's father is that there was no basis for his father to conclude the Contingency Fee Agreement on his behalf because he was already a major at the time of the conclusion of the agreement. Earlier, I alluded to dispute between the parties as to when the Contingency Fee Agreement in question was concluded. In his answering affidavit, respondent does not state the date when the Contingency Fee Agreement was concluded. The respondent is quite coy about when this Contingency Fee Agreement was concluded. The following factors however point to this Contingency Fee Agreement having been concluded on the date suggested by the applicant:

Applicant was previously represented by *Mark Williams Attorneys*. Respondent states that he assisted the applicant's family to terminate their mandate to *Mark Williams Attorneys*. In a letter annexed to his answer marked

FM3[1] which was apparently a response to the termination of their mandate and request for applicant's file, with applicant's father being the plaintiff at the time, *Mark Williams Attorneys* refer to respondent's correspondence dated 12 April 2016 (my emphasis). The second Contingency Fee Agreement that was concluded with the applicant on the 20 June 2017. It records that it *"substitutes a previous agreement signed on the 7 April 2016"*.[2] According to the "*statement of balance*" that was furnished to the applicant by the respondent[3], the first entry records a fee of R1 000.00 for consultation and perusal of documents. The date given in respect of this entry is the 7 April 2016. Based on this, it is clear that the suggestion that the first Contingency Fee Agreement was concluded during April 2015 does not accord with evidence and is therefore untrue. It is also telling that respondent is unable to produce this Contingency Fee Agreement.

[7] Applicant attained the age of majority on the 2 February 2016. The Contingency Fee Agreement entered into with his father when he was already a major is not enforceable against him and respondent cannot rely thereon.

[8] Applicant's claim was settled exactly one month after the signing of the second Contingency Fee Agreement. It is common cause that he retained 25% of applicant's capital award based on the Contingency Fee Agreement. Applicant contends that since respondent had only been acting in terms of this Contingency Fee Agreement for a short time before the settlement of the claim, he is not entitled to enforce the Contingency Fee Agreement. That he is only entitled to taxed attorney and client fees. Reliance for this contention is placed on the decision that emanates from this division – ***Nomala v Road Accident Fund***[4]. In that matter an attorney had been substituted as plaintiff's attorney in her claim against the Road Accident Fund one week prior to the trial date. This is the date on which the matter was settled. In that matter,

[1] Page 84 of the indexed papers.
[2] Annexure "RJ1" to the Founding Affidavit page 24 of the indexed papers.
[3] "RJ9" page 41 of the indexed papers.
[4] 2014 JDR 2214 (ECG).

Pickering J expressed the view that the attorney in question had taken advantage of the plaintiff by seeking to extract from her a fee that is "*unconscionable, excessive and extortionate*". He accordingly set the Contingency Fee Agreement aside as being unconscionable. In yet another matter that emanates from this division, also involving a Contingency Fee Agreement – ***Johannes Mathys Erasmus v Mark Williams***[5], *Plasket J* as he then was, pointed out that *Section 2*[6] *of the Contingency Fee Act* "*is not intended to be a licence to plunder up to 25% of any award paid to a client who has entered into a Contingency Fee Agreement (and who is usually indigent). All that Section 2 does is to allow an attorney who is a 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 maximum of twice his or her usual fee*". Most recently in a Full Bench decision from this division[7] the following observations are made regarding the *Contingency Fee Agreement Act*:

[5] Case 3364/16.

[6] Section 2 of the Contingency Fee Agreement Act provides:

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

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

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

(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."

[7] Mkuyana v Road Accident Fund – Case No. 4000/2017.

"The Act is therefore not intended to be a mechanism for a legal practitioner to charge fees that are unreasonable, and to justifiably increase his fees simply to place him in a position to recover the maximum of the success fees which the Act allows."[8]

Later at paragraph [21] the following is stated:

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

[9] Unfortunately, it is not as though the respondent is not aware of these concerns about Contingency Fee Agreements. He has previously been a party in litigation where the courts expressed themselves with regard to the provisions of the Contingency Fee Agreement and the fees charged. One such matter is ***Flavio E. Kailand v Franz Maritz***[9] (the respondent in this matter). In that matter the claim was settled two months after the respondent had taken over the matter. Respondent claimed entitlement to 25% of the plaintiff in the matter's award. *Msizi AJ* had this to say: "*it is clear that the respondent has taken advantage of a desperate legally illiterate litigant. The fee is unconscionable, excessive and extortionate. The conduct of the respondent in this case is predatory, rapacious and greedy. It is certainly to be frowned upon as it is actions like these that bring the profession and the administration of justice into disrepute*".

[10] It is clear that respondent believes that a Contingency Fee Agreement entitles him to 25% of a plaintiff's award, irrespective of the amount of work he has put into matter by way of legal services. This is clear from *inter alia*, paragraph 13.4 of answering affidavit:

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[8] Mkuyana v Road Accident Fund *supra* at paragraph [14].

[9] Case No. 1911/2017. See also Frans Maritz Attorneys v The Road Accident Fund + 3 Other Case no. EL 532/17 / ECD 1432/17

"My main concern and attention was to ascertain that we qualify to claim 25% of claimant's capital claim.

13.5 On perusal of the amounts and the calculation I was satisfied that I was entitled to 25% of the capital claim as my payment.

14.8 I had no doubt in my mind and still do not doubt that I was and is still entitled to 25% of the claimant's capital claim."

In my view, and on the authority of the decisions referred to hereinabove and the authorities cited therein, the second Contingency Fee Agreement also falls to be declared unenforceable and set aside in view of the fact that it had not been entered into at a sufficiently early stage of the litigation to entitle him to 25% of applicant's award. I have no difficulty in finding that by taking 25% of applicant's award, that the fee he claimed fits *Pickering J's* description in the ***Nomala*** matter, as being "*unconscionable, excessive and extortionate*".

[11] Respondent's integrity is questionable. He does not deny that he obtained loans from the applicant. The first one obviously pending payment of applicant's claim. The second, a payment of yet another client's claim. This is apparent from the acknowledgement of debt he signed in respect of the second loan that it would be paid upon receipt of payment from the Road Accident Fund in a matter before the High Court in Case Number 1038/2016. One wonders whether this is in keeping with the ethical and professional conduct that is required of legal practitioners. I do not wish to deal in any detail with the items that are reflected in his "*consolidated statement of account*" and the calculations therein which appear to be excessive. This will however be a matter for taxation. The respondent is adamant that he is entitled to 25% of applicant's award. This, despite several warnings by this court that the Contingency Fee Agreement "*is not a licence to plunder up to 25% of any award paid to a client who had entered into a Contingency Fee Agreement*". As I indicated even in matters that involved him as a litigant. He continues to

display extreme greed. Readiness to help himself to a huge chunk of a plaintiff's award for damages irrespective of the amount of work he had done

[12] I am satisfied that the applicant has made out a case for the relief he seeks, including the prayer that respondent should be ordered to pay costs at an attorney and client scale.

[13] Accordingly, there will be an order in terms of prayers 1, 2 (excluding prayer 2.1), 3, 4, 5, 6, 7 as amended to read R74 000.00 in the place of R90 000.00, 8, 9 and 10 of the Notice of Motion.

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NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: K L Watt
Instructed by	:	NN DULLABH 5 Bertram Street GRAHAMSTOWN Ref.: Mr N Dullabh Tel.: 046 0 622 6611
For the Respondent	:	Adv: M L Beard
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Date Heard	:	3 September 2020
Date Reserved	:	3 September 2020
Date Delivered	:	8 September 2020