REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 14/27503

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

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SIGNATURE **DATE**

In the matter between:

STEVEN ZULLA LEVENSON Applicant

and

FLUXMANS INCORPORATED Respondent

J U D G M E N T

WINDELL J:

INTRODUCTION

[1] The applicant seeks an order against the respondent declaring a contingency fee agreement (the agreement) concluded between the parties invalid, void *ab initio* and of no force and effect. The agreement was entered into between the parties in respect of fees payable by the applicant to the respondent in respect of the applicant's claim against the Road Accident Fund. The applicant further seeks an order for the repayment of the fees paid to the respondent, in the sum of R844 994.57, together with interest thereon, from 1 September 2008 to date of payment, and costs on a punitive scale. In the alternative the applicant seeks an order directing the respondent to deliver a fully itemized and detailed accounting in the form of a bill of costs.

[2] The respondent conceded during the hearing of the application that although the substance of the agreement might be permitted by the Contingency Fees Act 66 of 1997 (the Act), that it did not comply with the formalities of the Act. The Constitutional Court declared common law contingency agreements invalid in *Ronald Bobroff & Partners v De La Guerre and Another* 2014 (3) SA 134 (CC). The agreement clearly does not comply with the formalities of the Act for the reasons set out in the founding affidavit. It is accordingly invalid.

[3] The respondent's opposition to the application is based on the contention that the applicant's claim for the repayment of the fees is based on the *condictio ob turpem vel iniustam causam*, and that motion proceedings are inappropriate for the relief claimed. The respondent secondly submits that even if the applicant's claim is legally sustainable that it has become prescribed.

BACKGROUND

[4] The applicant was involved in a motor vehicle collision on 8 October 2005. He instructed the respondent on 6 February 2006 to institute a damages claim on his behalf against the RAF. The respondent accepted the instruction on the basis that it would charge the applicant a fixed fee of 22.5% plus VAT of the amount recovered from the RAF.

[5] On 13 May 2008 the action was settled in the sum of R4 862 561.40, together with an undertaking from the RAF in respect of future medical and hospital expenses and party and party costs. The applicant subsequently received a statement of account from the respondent advising that the applicant would be paid the sum of R3 290 138.90, which was made up of R3 103 449.39 in respect of the capital and R186 689.51 being costs recovered from the RAF. The respondent's fees were R1 109 101.02 inclusive of VAT. The applicant immediately communicated his unhappiness to the respondent about the fees charged. The respondent responded that the fees were reasonable.

[6] On 9 April 2014, following media reports on the Constitutional Court's judgment, the applicant addressed a letter to the respondent in which he again challenged the reasonableness of the respondent's fees. The respondent responded in a letter dated 11 April 2014 and questioned, *inter alia*, in which respects the contingency fee agreement did not comply with the Act. On 20 May 2014 the applicant addressed a letter to the respondent in which he emphasised that the contingency fee agreement did not specify the limitation on contingency fees as required by Act, nor did the respondent at any stage bring those limitations to his attention. The applicant

requested the respondent to review the fees they had charged. In a letter dated 10 July 2014 the respondent impugned the applicant as *"being opportunistic and even if you had such a claim, it has prescribed"*. This prompted the applicant to launch the present application.

NATURE OF THE CLAIM

[7] The respondent contends that the basis of the applicant's claim, properly constructed, is enrichment. In order to succeed in such claim, the argument continued, the applicant will be required to satisfy the requirements of an enrichment action and, more specifically, the *condictio ob turpem vel iniustam causam*. Respondent submits that the applicant has failed to satisfy those requirements and, as the claim is for an unliquidated amount, the applicant should have instituted an action. The respondent contends that motion proceedings for the recovery of an unliquidated amount of enrichment are inappropriate.

8] The nature of the applicant's claim is primarily for a declaratory order. The facts are common cause and the illegality of the agreement has been shown. It is trite that motion proceedings are primarily intended for the resolution of legal issues. Factual disputes should be addressed in action procedure. Such factual dispute exists, but only in regard to the quantum of the applicant's claim. There is however no reason for this court not to separate the issues. That would ensure determination of the merits and a postponement of the quantum of the amount of the claim for later adjudication by way of a referral to trial. In *Cadac (Pty) Ltd v Weber Stephen Products Company and Others* 2011 1 All SA 343 (SCA), Harms DP held (par [13] and [14]):

> '[13] I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases albeit because of specific legislation but in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice – a power derived from common law and now entrenched in the Constitution (s 173) – I can see no justification for refusing to extend the practice to other cases. The plaintiff may run a risk if it decides to follow this route because of the court's discretion in relation to interest orders. It might find that interest is only to run from the date when the debtor was able to assess the quantum of the claim. Another risk is that a court may conclude that the issues of liability and quantum are so interlinked that it is unable to decide the one without the other.
> [14] Once the principle is accepted for trial actions there is no reason why it cannot apply to application proceeding….'

[9] I accordingly propose to order a separation of the issues as will appear at the end of this judgment and I will now turn to consider the merits of the applicant's claim.

[10] The right to seek a declaratory order is a debt for purposes of the Prescription Act, Act 68 of 1969 ('the Prescription Act'). The only real issue between the parties concerns prescription.

PRESCRIPTION

[11] The respondent contends that the applicant's claim has been extinguished by prescription since the applicant failed to take action before 30 August 2011, which is three years after the applicant received his statement of account and payment from the respondent. The prescriptive period in this instance is three years. It is trite that a debt, whether contractual, delictual or arising otherwise, is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt (s 12(3) of the Act). It is well-established that the respondent bears the onus

of proving when the plaintiff acquired, or should reasonably be deemed to have acquired the knowledge in question.

[12] The question thus is whether the plaintiff had 'knowledge' of the facts from which 'the debt' arose at the time he received the account from the respondent. In *Truter and Another v Deysel* 2006 (4) SA 168 (SCA), Van Heerden JA, held (para [16]):

> '[16] ... For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

[13] It is not disputed that the applicant only became aware of the legal position with regards to contingency fee agreements in April 2014. The respondent submits that the applicant has confused knowledge of the facts, on the one hand, with knowledge of legal position, on the other. With reference to *Claasen v Bester* 2012 (2) SA 404 (SCA), it is submitted that the applicant cannot rely upon his ignorance of the legal invalidity of the agreement, as it was held in par [15] that '*... knowledge of legal conclusions is not required before prescription begins to run.'* The respondent further contends that the applicant, on his own version, was aware of the respondent's identity and of the facts from which the alleged debt arose already in 2008, and the claim has therefore become prescribed.

[14] The facts in *Claasen* were the following: The parties were farmers and erstwhile friends. When the respondent ran into financial difficulty, the appellant offered to prevent foreclosure of the respondent's farm and bought the farm from him at a price that approximated the debt to the Land Bank. In the deed of sale the respondent was

afforded the rights of lifelong use and occupation. He also agreed that the respondent could buy the farm back, but no price for this 'right' was reflected in the deed of sale. When the respondent obtained a copy of the deed of sale two years later he realised that such a provision had been omitted. The buy-back was unenforceable because of the requirement of s 2(1) of the Alienation of Land Act 68 of 1981 in that the provision in the deed did not determine the price, or set out a means for determining the price. The respondent issued summons four years later claiming a declaration that the sale was void. The court of appeal found that the invalidity of the provision was a conclusion of law, and not a fact and that prescription began to run when the respondent came to know that no price had been determined in the provision.

[15] The invalidity of a common law contingency fee agreement is a fact and not a legal conclusion. The applicant *in casu* was not aware that an Act, prohibiting the agreement existed and that he was overcharged. The applicant was initially unhappy when he received the account and noticed that the respondent charged an amount of R1 109 101.02 in respect of legal fees. He wrote a letter wherein he expressed his unhappiness and also had a meeting with the attorney's firm. He was advised by his attorney that the fees were reasonable. The applicant merely suspected that the fees were not correct. Suspicion cannot be equated to knowledge. Suspicion is insufficient for the running of prescription to commence. For there to be knowledge, the belief must be justified (see *Minister of Finance v Gore* 2007 (1) SA 111 (SCA)). In *Claasen* the respondent was aware that no provision was made in the deed of sale for a price at which he could buy back the farm. The facts in *Claasen* are therefore distinguishable from the facts *in casu*.

[16] In *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) the plaintiff instituted action against the attorney who had settled an insurance claim on her behalf when she was still a minor. She alleged that she first became aware that the defendant had possibly acted negligently, when she consulted with her current attorneys on a different matter eleven years later. In para [12] and [13] of the judgment, Tshiqi JA summarized the facts and legal position as follows:

> '[12] Her contention amounts to this. She needed more than just the knowledge that her claim had been settled to be able to appreciate the alleged negligence. She at least needed to appreciate that there was a substantial under-recovery. That appreciation entailed not only knowledge of the minimal facts of the claim but also an appreciation that those facts afforded her a claim against the appellant.
>
> [13] It is the negligent and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself. In MEC for Education, KwaZulu-Natal v Shange 2012 (5) SA 313 (SCA) para 11 this court had to consider whether a 15-year-old learner who had been hit with a belt on the side of his eye by his teacher acted reasonably in waiting more than five years to institute action against the teacher's employer. As in the present matter, the plaintiff became aware of the possibility of a claim by chance. He had initially accepted the teacher's explanation that it was an accident. A family friend noticed that he was wearing an eye patch and suggested that he should approach the Public Protector. An advocate in that office advised him of the possibility of a claim against the teacher. Snyders JA held that the delay was innocent, not negligent. She stated: 'He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act.'

The learned Judge continues in par [14] and held as follows:

> '[14] Similarly, in this matter the respondent visited the offices of the appellant merely because she had a dispute with her mother pertaining to the occupancy of the house

> which had been bought with some of the money that had been received as the settlement amount. The visit did not concern the details of the settlement amount. There is no suggestion that at that stage she was concerned about the quantum at all. The version of the appellant confirms that there was no discussion pertaining to the quantum of the claim, the cost of the house and the amount given to her mother. There is no basis to conclude that she should have appreciated that there was something wrong with the quantum of the claim nor with any other aspect of the claim at that stage. More importantly, there is no basis to conclude that she must have realised that there was an under-recovery nor that there was a possible claim for negligence against the appellant. She probably believed, innocently, that the settlement amount was the best under the circumstances. It was not unreasonable of her to trust her mother and the appellant's judgment. In all probability she thought that they had acted in her best interests.'

[17] The applicant only acquired knowledge of the facts from which the debt arose when the Constitutional court's judgment on contingency fee agreements was delivered in 2014. Section 12(3) of the Prescription Act provides that a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to such debt, provided that a creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge.

[18] In *Drennan Maud and Partners vs Pennington Town Board* 1998 (3) SA 200 (SCA) Olivier JA stated (209 F-G):

> 'In my view, the requirement "exercising reasonable care" requires diligence not only in the ascertainment of the facts underline the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.'

[19] The respondent acted as the applicant's attorneys. They were duty bound to properly represent and advise the applicant. They failed to advise the applicant that the contingency fee agreement was illegal, invalid and unenforceable. The fact that the

applicant may have believed that the fees charged by the respondent were excessive and immediately raised his concerns after receiving the statement of account is irrelevant. The date of acquiring the requisite knowledge, as I have alluded to, is 2014 when the minimum facts necessary to launch the present application came to his knowledge.

[20] For all these reasons I have come to the conclusion that the applicant's claim has not become prescribed.

[21] In the result the following order is made:

1. The quantum of the applicant's claim is referred for trial, in respect of which:

1.1 The notice of motion is to stand as the simple summons and the respondent's notice of opposition as notice of intention to defend.

1.2 The applicant as plaintiff is to file a declaration within 30 days of the date of this order.

1.3 Thereafter the normal rules relating to the filing of pleadings and preparation for trial will apply.

2. The Percentage Contingency Fee Agreement entered into between the applicant and the respondent, in respect of fees payable by the applicant to the respondent in pursuance of the applicant's claim against the Road Accident Fund in respect of the accident in which the applicant was involved on 8

October 2005 is declared invalid, void and of no force or effect.

3. The respondent is ordered to deliver to the applicant, within 20 days of the date of this order a fully itemized and detailed statement of account in the form of a bill of costs, duly supported where necessary by vouchers, reflecting the fees of the respondent (disbursements excluded) in the action instituted on behalf of the applicant in the South Gauteng High Court between the applicant and the Road Accident Fund.

4. Respondent is ordered to pay the costs of this application.

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LWINDELL
JUDGE OF THE HIGH COURT

Counsel for applicant: ***Adv JJ Bitter***

Counsel for respondent: ***Adv A Subel SC***

Date of hearing: ***29 January 2015***

Date of judgment ***27 March 2015***