In the matter between:

MASANGO MLUNGISI NELSON	Plaintiff
THE ROAD ACCIDENT FUND	Defendant
RENIER VAN RENSBURG INCORPORATED	Intervening Party
JOHANNESBURG SOCIETY OF ADVOCATES	1st *Amicus Curiae*
and	
LAW SOCIETY OF THE NORTHERN PROVINCES	2nd *Amicus Curiae*

SUMMARY

Contingency Fees Act – contingency fees agreement concluded between attorney and client – legal practitioner charging 25% of the capital award as fees – law on contingency fees explained and clarified – widespread practice by attorneys of charging 25% of client's capital award – no basis in the Act for the practitioner to charge 25% of client's capital as his or her fees – such practice to be weeded out – an agreement authorising this is *contra boni mores* and unlawful.

Value Added Tax Act – VAT – legal practitioner adding 14% VAT to 25% capital amount – whether this is lawful in terms of VAT Act – liability for payment of VAT lies with vendor (legal practitioner) and not consumer (client) – VAT therefore not recoverable above the 25% cap.

It is trite law that a contingency fee agreement which does not comply with the Contingency Fees Act 66 of 1997 ('the CFA') is invalid. The CFA regulates contingency fee arrangements between legal practitioners and their clients. It caps the fees that legal practitioners are allowed to charge their clients in terms of contingency fee agreements, and sets out requirements and a prescribed form for such agreements. The Act also stipulates requirements for any settlement entered into by a party to a contingency fee agreement. The court notes the increasingly rampant and persistent practice of attorneys attempting to recover more than the legitimate and legalised success fee. This practice must be weeded out.

In casu, the attorney (intervening party) concluded a contingency fee agreement with the plaintiff and represented him in his claim against the defendant leading to a settlement being reached between the parties. Upon presentation of the settlement agreement for certification as an order of court, the court, exercising its supervisory power and duty to ensure that contingency fees agreements comply with the Act raised certain concerns. These concerns were as follows:

- Can a legal practitioner charge 25% of the capital award as fees (the fee question); and
- Can 14% VAT be added to the 25% capital amount (the VAT question).

Essentially, the agreement concluded between the plaintiff and his attorney gave the legal practitioner the right to charge 25% of the amount awarded to the client as fees and then to impose VAT on top of the 25%.

The fee question was considered in the context of the provisions of the CFA while VAT question was considered in the light of the Value-Added Tax Act 89 of 1991 (the VAT Act) .

The court restated the law thus:

Section 2(2) of the CFA provides for two kinds of contingency fee agreements. The first is a “no win, no fee” agreement, and the second is an agreement whereby the legal practitioner may charge fees higher than the normal fee if the client is successful (success fees). The former arrangement is not applicable here. The latter type of agreement is subject to statutory caps under s 2(1)(b). The agreement concluded between the plaintiff and his attorney falls in the second category.

<u>Fee question</u>

In terms of s 2(1)(b) read with 2(2) of the CFA a (legal practitioner) is authorised, as an incentive, to charge a success fee which is higher than his or her normal fee subject to two caps. The normal fees of the attorney are taken as a base and the attorney is authorised to increase the normal or base fee by up to 100%. They cannot exceed 100%. A legal practitioner must first determine his normal fee, which he would have been entitled to charge without a contingency fee agreement, and then increases it in terms of the contingency fee agreement. This is the ordinary and only basis on which the practitioner may increase fees.

The determination of the validity of the agreement necessitates an enquiry into the meaning of “fees”; “normal fees”; and “success fees” which the CFA does not define. The ordinary meaning

of these concepts must be resorted to. As regard the meaning of “normal fees” guidance is sought from the rules on taxation. A “fee” may be defined as a payment due to a professional person or body for services rendered, or advice given. “Normal fees” of an attorney for litigious work are fees or charges that would ordinarily be allowed on taxation. On taxation an attorney is allowed to tax a bill of costs “*for services actually rendered*”. The meaning is clear: charges for work not actually done cannot be allowed on taxation. The practitioner’s statement for fees must therefore be specific in respect of the particular work done for which a fee is charged.
“Success fees” are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in the litigation to the extent set out in the agreement concluded in term of the CFA.

An attorney renders professional services and therefore charges professional fees for such services. An attorney cannot charge for anything other than the services he has actually rendered. There is therefore no basis in law for a practitioner to charge 25% of client’s capital award as his fees. An attorney’s charge is neither a percentage commission nor a share in the injuries or damages suffered by his client. An agreement or practice that makes an attorney a partner in the injuries suffered by his client is *contra bones mores* and is therefore unlawful and illegal at common law and under the CFA.

Outside the strict confines of the CFA there is no basis for a legal practitioner to share in the capital of his or her client’s claim.

VAT question

In terms of s 7(1)(a) of the VAT Act, VAT is levied on the supply by a vendor (in this case the legal practitioner) and not the consumer (in this case the client) of services. Similarly, in terms of s 7(2) VAT is paid by the vendor. VAT is therefore a tax on the legal practitioner and not on the client. Section 64(1) stipulates that prices are deemed to include VAT, whether the vendor has in fact included the tax in the price or not.
What the client pays to the legal practitioner (vendor) is the “price” (fee). The client does not pay VAT, although the price may be structured to account for the VAT payable by the legal practitioner (vendor) to SARS. Regardless of how the price is structured or quoted, the final price charged by a vendor is inclusive of VAT.
The manner in which the VAT payable by the vendor is computed and paid to SARS reinforces the fact that VAT is a tax levied on the supplier and payable by him. Section 16(3) provides for

computation of VAT payable by the vendor. It authorises the vendor (legal practitioner), when completing his VAT returns, to deduct input tax (the amount of VAT which the practitioner paid to his suppliers) from the total of output tax (the amount of VAT which he charged to his clients on his services) and any tax refunds, and to pay the balance over to SARS. The legal practitioner therefore only pays to SARS the difference between output tax and input tax where output tax is greater than input tax. This is a benefit that accrues to the vendor and not the client.

Therefore, it is the legal practitioner (the vendor) who owes the VAT to SARS and not his client. VAT is therefore not recoverable above the 25% cap imposed by section 2(2) of the CFA.

The other grounds on which the contingency fee agreement in this case did not comply with the CFA are the following:

1. The agreement did not describe “the proceedings to which the agreement relates” as required by section 3(3) (a). The agreement simply referred to “the relevant proceedings”. This clearly lacks the level of detail contemplated by the prescribed form of contingency fees agreements, which is plainly designed to clearly identify the proceedings.
2. The agreement did not define “partial success” as is required by section 3(3) (c) of the CFA and Regulation 4.2 of the prescribed form.
3. The agreement did not explain the amount that would be due, and the consequences which would follow in the event of partial success in the proceedings, as required by section 3(3) (e) and Regulation 7 of the prescribed form.
4. The agreement provided for an alternative fees agreement in the event that the main agreement is found to be invalid. Such an agreement is not authorised under the CFA. The alternative agreement in itself was based on an inflated fee because the quoted fee was R2000.00 per hour, regardless of whether the work is performed by an attorney or any other staff member. The provision is unreasonable.