

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 42125/2018  
A5096/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	NO
(2) OF INTEREST TO OTHER JUDGES	NO
(3) REVISED	
<u>25/4/2022</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between:

**JURGENS STEPHANUS BEKKER**

Applicant

and

**ALEXA DE AGRELA**

1<sup>st</sup> Respondent

**CARIEN VAN GREUNEN**

2<sup>nd</sup> Respondent

**SHERALYN PIETERSE**

3<sup>rd</sup> Respondent

**SHANNE DE KLERK**

4<sup>th</sup> Respondent

**GERT ABRAHAM VORSTER**

5<sup>th</sup> Respondent

**Summary:** Section 2(1)(a) of the Contingency Fees Act 66 of 1997 and section 92 of the Legal Practice Act 28 of 2014 (“the LPA”) discussed and distinguished – Section 92 of the LPA applies where there was an arrangement that counsel would only recover fees equal to the amount taxed and recovered from other party – Section 92 of the LPA is an exception to the indemnification principle in the field of costs – Breach of a Bar rule does not invalidate the fee arrangement.

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## J U D G M E N T

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### VAN DER BERG AJ

- [1] The applicant and the five respondents are all attorneys. The applicant previously brought an application (“*the first application*”) against the five respondents which was dismissed with costs in December 2018. The applicant thereafter lodged an appeal, but shortly before the appeal was heard he withdrew the appeal and tendered costs. In the bill of costs presented for taxation, the first and fourth respondents included the invoices of their counsel who was on brief in the first application and in the appeal.
- [2] This is an application to strike out those invoices from the bill of costs, and to declare the agreement which first and fourth respondents concluded with counsel as an invalid contingency fees agreement which does not comply with the provisions of the Contingency Fees Act 66 of 1997 (“*the CFA*”).
- [3] The first and fourth respondents (collectively “*the respondents*”) raise two defences (styled points *in limine* in the answering affidavit): Firstly, they deny that the agreement constitutes a contingency fees agreement as defined in the CFA and aver that the fee arrangement falls within the ambit of section 92

of the Legal Practice Act 28 of 2014 (*“the LPA”*). Secondly, the respondents contend that counsel is in any event entitled to charge a reasonable fee (even if it is found that the agreement was an unlawful or invalid contingency fees agreement).

- [4] Counsel only acted for the first, third and fourth respondents in the first application. The second and fifth respondents were represented by other counsel instructed by a different set of attorneys. Approximately two weeks prior to the appeal the second and third respondents settled with the applicant and abandoned their cost order against the applicant. This application is only against the first respondent and the fourth respondent.
- [5] The counsel whose invoices are in dispute in this application was a member of the Johannesburg Bar. He passed away during 2021. The executrix of his estate was not joined as a party, but she is aware of the application. She deposed to an affidavit that she intends to recover fees due to the estate, and that it has been agreed that the attorneys for first and fourth respondents would recover the fees on behalf of the estate. No point of non-joinder was taken.

## **EVIDENCE AND AFFIDAVITS**

### *Founding affidavit*

- [6] On 16 November 2021 the respondents delivered their notices of intention to tax two bill of costs, one in respect of the first application and one in respect

of the appeal. In respect of the first application, the respondents submitted two of counsel's invoices, and in respect of the appeal they submitted one of counsel's invoices.

- [7] On 29 November 2021 the applicant's cost consultant queried the accounts as no proof of payment accompanied the account. He was then advised by the respondents' cost consultant that counsel was briefed through a "*contingency fee agreement*" and on request the applicant's cost consultant was provided with counsel's brief cover which included the following endorsement:

*"MEMORANDUM: Special Fee Arrangement In Place – Fees to be recovered by successful conduct of matter and shall equal the amount taxed and allowed and bill of costs for counsel's accounts, as submitted to taxation, and as subsequently recovered from the opposing party."*

- [8] The applicant then filed notices to oppose both bill of costs and certain correspondence was exchanged between the applicant and the first and fourth respondents' attorney. The applicant *inter alia* averred that the fee agreement concluded with counsel was not compliant with the CFA and demanded that counsel's invoices be withdrawn.
- [9] The respondents' attorneys responded by suggesting that the matter be argued before a senior taxing master and should the applicant remain dissatisfied with the outcome, he was invited "*to approach the motion court for relief*".
- [10] On 7 March 2022 the applicant *inter alia* informed the respondents' attorney

that he intended to proceed to apply for a declaratory order.

- [11] On 17 March 2022 the respondents' attorney responded and denied that there was an invalid contingency fee agreement and referred to the provisions of section 92 of the Legal Practice Act "*under which section the work was clearly rendered*".

*Answering affidavit*

- [12] In the answering affidavit the respondents raise the two points *in limine* referred to above.

- [13] The respondents state that the terms on which counsel accepted the brief was that he "would accept the instruction and would not raise fees, subject however to his right to recover fees on taxation." They further state that the brief cover was merely an attempt to record's counsel's right to recover taxed fees in appropriate circumstances. The respondents say that it was never the intention to enter into a contingency fee agreement.

*Replying affidavit*

- [14] In the replying affidavit the applicant states that he (as attorney) briefed the same counsel during the same period as when the first application was heard (in 2018) on unrelated matters. The applicant attaches certain of counsel's invoices for those unrelated briefs. A comparison of the invoices shows that the invoices submitted in this matter are based on a substantially higher fee rate (some 50% higher) than that was charged by counsel in the other

(unrelated) matters.

## **APPLICATION TO STRIKE**

[15] The applicant has brought an application in terms of rule 6(15) to strike out large portions of the respondents' answering affidavit as being irrelevant, scandalous and vexatious.

[16] In paragraphs 43 and 44 of the answering affidavit it is explained that the second and third respondents settled the cost order with the applicant. This is clearly relevant to explain why they are not before court, and ought to have been dealt with in the founding affidavit. These paragraphs are not irrelevant.

[17] In the remaining parts of the answering affidavit sought to be struck out the second and fourth respondents:

1. make allegations of alleged threats made to the respondents by the applicant prior to the institution of the first application;
2. revisit the first application;
3. deal with the events between the first application and the withdrawal of the appeal;
4. make numerous defamatory statements of the applicant;
5. even allege that applicant's conduct constitutes criminal extortion;
6. allege that counsel agreed to assist the first, third and fourth respondents because he considered the applicant to be a bully who conducted himself in a manner unbecoming of an attorney

- [18] As appears below in this judgment, none of these allegations are relevant to any of the issues in this application. Many of these statements are clearly vexatious and scandalous.<sup>1</sup>
- [19] Rule 6(15) provides that the court “*shall not grant the application unless it is satisfied that the applicant will be prejudiced in its case if it be not granted*”. However, it has been held that the word “*case*” in rule 6(15) should not be narrowly interpreted so as to enable a party freely to make irrelevant allegations. Scandalous, vexatious or irrelevant matter may be defamatory of the other party, and the retention in such matter will therefore be prejudicial to such party.<sup>2</sup>
- [20] Apart from paragraphs 43 and 44 of the answering affidavit the application to strike out must succeed. The applicant is also entitled to the costs of the striking-out application.

## **CONTINGENCY FEES ACT**

### *Provisions of Contingency Fees Act*

- [21] Section 1 of the CFA defines a “*contingency fees agreement*” as any agreement referred to in section 2(1). Section 2(1) in turn provides:

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<sup>1</sup> Erasmus, Superior Court Practice, D1-90 (and cases referred to therein)

<sup>2</sup> Erasmus, Superior Court Practice, D1-92 (and cases referred to therein)

## 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.”*

[22] Section 3(1) of the CFA provides that the contingency fees agreement shall be in writing and in the form prescribed. Section 3(2) provides that the contingency fees agreement “shall” be signed by the client, and section 3(3) sets out what the agreement must contain. It is common cause that in this instance client (i.e. first and fourth respondents) did not sign any agreement, and there is no allegation that section 3(3) was complied with.<sup>3</sup>

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<sup>3</sup> Counsel must sign any contingency fee agreement which is subject to the CFA. It is common cause that in this case counsel did not do so. In light of the view I take of this case, it is not necessary to determine whether he concluded an agreement with the respondents or the instructing attorneys, and whether the instructing attorneys were the agents of either the respondents or counsel.



*Practitioner entitled to reasonable fee*

[23] It is now trite that if there is not compliance with section 3 in respect of a contingency fees agreement, the agreement is invalid.<sup>4</sup>

[24] However, a legal practitioner, even in circumstances of an unlawful contingency fee agreement is entitled to his or her reasonable fee.<sup>5</sup>

*Who may challenge contingency fee agreement*

[25] In *Theodosiou*<sup>6</sup> the court dealt with a challenge to the validity of a contingency fees agreement and held (reference to authorities omitted):

*“[36] There is no legal principle in which third parties have a more substantial right than the contracting parties to enforce the cancellation of an effective agreement. A third party cannot challenge an agreement implemented and persisted in by the parties...So, the excipients had no right to inquire into the validity of the contingency fee agreement when the settlements were concluded.*

and

*“[56] Excipients had no locus standi to enquire into the validity of contingency fee agreement when the settlements were concluded.”*

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<sup>4</sup> *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ)

<sup>5</sup> *Theodosiou and Other v Schindlers Attorneys and Others* 2022 (4) SA 617 (GJ), paragraphs 9-11

<sup>6</sup> *Theodosiou (supra)*

## **ALLEGED INVALID CONTINGENCY AGREEMENT: NO CAUSE OF ACTION**

[26] I understand the applicant's cause of action to be that counsel's invoices are to be struck out as they were issued in terms of an invalid contingency fees agreement. If so, the application is misguided:

1. A third party (the applicant) will not be affected by the terms of any contingency fees agreement, as the legal practitioner is in any event able to charge a reasonable fee. On taxation, the client can only have a reasonable fee taxed, regardless of the terms of any alleged contingency fees agreement.
2. Even assuming that the agreement with counsel was an agreement as contemplated in section 2(1)(a) of the CFA, the applicant does not have standing to have the agreement set aside.

[27] The applicant's remedy was to challenge the reasonableness of counsel's invoices on taxation. It is for the taxing master to decide whether the fact that counsel raised other invoices during the same period based on a substantially lower rate is a factor to take into account in determining whether the invoices were reasonable.

[28] The applicant has therefore not proved his cause of action as pleaded.

## **SECTION 92 OF THE LPA**

[29] It is therefore not strictly necessary for the adjudication of this application to

determine whether section 92 applies or not. I shall however do so for reasons referred to below.

[30] Section 92 of the LPA reads:

**92 Recovery of costs by legal practitioners rendering free legal services**

*(1) Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other person by a legal practitioner or law clinic, and costs become payable to that litigant or other person in terms of a judgment of the court or a settlement, or otherwise, that litigant or other person must be deemed to have ceded his or her rights to the costs to that legal practitioner, law clinic or practice.*

*(2) (a) A litigant or person referred to in subsection (1) or the legal practitioner or law clinic concerned may, at any time before payment of the costs referred to in subsection (1), give notice in writing to-*

*(i) the person liable for those costs; and*

*(ii) the registrar or clerk of the court concerned,*

*that the legal services are being or have been rendered for free by that legal practitioner, law clinic or practice.*

*(b) Where notice has been given as provided for in paragraph (a), the legal practitioner, law clinic or practice concerned may proceed in his or her or its own name, or the name of his or her practice, to have those costs taxed, where appropriate, and to recover them, without being formally substituted for the litigant or person referred to in subsection (1).*

*(3) The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the litigant or person to whom the legal services were rendered by the legal practitioner, law clinic or practice actually incurred the costs of obtaining the services of the legal practitioner, law clinic or practice acting on his or her or its behalf in the proceedings or dispute concerned.*

## **SECTION 2(1) OF CFA AND SECTION 92 OF LPA DISTINGUISHED**

[31] In *Masango*<sup>7</sup> Mojapelo DJP explained the two different contingency fees agreements in section 2(1) of the CFA as follows:<sup>8</sup>

*“The section provides for two kinds of contingency fees agreement. 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. The higher fee is also referred to as the success fee. Only the second type of agreement is subject to the statutory caps.”*

[32] The applicant’s case is that the agreement which counsel concluded is a contingency agreement as contemplated in section 2(1)(a) of the CFA.<sup>9</sup>

[33] So what is the difference between an agreement referred to in section 2(1)(a) of the CFA (i.e. a “no win, no fee agreement”) and an arrangement in terms of section 92 of the LPA?

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<sup>7</sup> *Masango v Road Accident Fund* 2016 (6) 508 (GJ) at paragraph 10

<sup>8</sup> See also: *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA)

<sup>9</sup> It was not submitted by the applicant that the fact that counsel may have charged higher rates indicates that the agreement was an agreement as contemplated in section 2(1)(b). The fact that these invoices were only raised in reply is but one reason why the applicant would not have been able to raise such an argument.

[34] Before analysing the difference, the following should be borne in mind: Subject to certain specified exceptions, rule 70(3) of the Uniform Rules of Court<sup>10</sup> is intended to give to the successful party a full indemnity for all costs reasonably incurred in relation to any legal proceedings. However, owing to the operation of taxation such an award of costs is seldom a complete indemnity.<sup>11</sup> In practice (where a court has ordered that party-party costs are to be paid by the losing party) it invariably means that the successful party would receive less on taxation than his or her actual legal fees expenditure.

[35] Applying the principles applicable to contingency fee agreements in terms of the CFA referred to above, the following applies to a “no win, no fee” agreement in terms of section 2(1)(a) of the CFA:

1. The legal practitioner becomes entitled to legal fees if the litigation is “successful”, which is determined with reference to the contingency fees agreement. It is conceivable that “success” as defined in the agreement is achieved without a cost order in favour client having been made.
2. Should the client achieve success in the litigation:

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<sup>10</sup> Rule 70(3) provides in part:

*“(3) With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, 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...”*

<sup>11</sup> *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Bowman NO v Avraamides* 1991 (1) SA 92 (W) at 94G

- (a) The legal practitioner will be able to charge the client his or her “normal” fee. (If the agreement entails that the legal practitioner will be able to charge more than his or her normal fee, the agreement will fall within the ambit of section 2(1)(b) of the CFA).
  - (b) The client will be liable for legal fees towards his or her legal representative, regardless of whether anything is recovered from the other party to the litigation. It is possible that nothing or less than the legal practitioner’s normal fee is recovered from the other party to the litigation. The client will remain liable to his legal representative for the whole of his or her “normal fee”.
- 3. The agreement will have to comply with the requirements of section 3 of the CFA in order for it to be valid.

[36] Section 92 contemplates something very different:

- 1. The legal practitioner’s entitlement to legal fees is triggered when “*costs become payable to that litigant or other person in terms of a judgment of the court or a settlement*”. Cost orders are sometimes granted in circumstance where litigation may not be considered by the client to have been otherwise “successful.”
- 2. If “costs become payable”:
  - (a) The cost order is ceded to the legal practitioner who will only be paid such amount which is allowed on taxation and which is actually recovered from the other party.

- (b) The amount taxed could well be considerably less than his or her “normal” fee.
  - (c) If nothing can be recovered from the opposing party (i.e. because of its insolvency), the legal practitioner will receive no payment.
  - (d) Client will never be liable for any costs of his or her legal representative.
3. The agreement between client and his or legal representative does not have to comply with any statutory formalities in order to be valid.

[37] In other words: In a section 2(1)(a) “no win, no fee” agreement the legal practitioner says to his or her client: “If you lose, you will owe me nothing. If you win, you will have to pay me my normal fee. You can tax your costs, but you may get nothing or get less than you pay me.” In a section 92 arrangement the legal practitioner says to his or her client: “Win or lose, the litigation will cost you nothing. If you get a cost order in your favour, it will be ceded to me, and I will receive any money which can be recovered from the other side”.

[38] In *Thusi v Minister of Home Affairs and Another and 71 Other Cases* (“*Thusi*”)<sup>12</sup> the fee arrangement between the attorneys and their clients was described as follows:

*“The bringing by such an Applicant of an application against the*

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<sup>12</sup> *Thusi v Minister of Home Affairs and Another and 71 Other Cases* 2011 (2) SA 561 (KZP), paragraph 95

*Respondents in the High Court is only made possible by the fact that Goodway & Buck are prepared, entirely at their own risk to:*

*without the expectation or requirement of payment by the indigent applicant, prepare and bring the application;*

*accept the fact that if the application is unsuccessful, not only will they forfeit any costs, but will also forfeit any and/or all disbursements incurred by them in pursuance of the unsuccessful matter;*

*accept as their payment for the bringing of such applications, only those fees which are recovered by way of taxation or agreement which fees...bears no resemblance whatsoever to the substantially increased fees which would in normal circumstances be charged by Goodway & Buck...for the rendering of such services..."*

[39] Wallis J (as he then was) said of this arrangement (own emphasis):

*"[103] It is perfectly clear that Goodway & Buck undertook this work in the hope (and the reasonable expectation) that costs orders would be obtained in sufficient cases to make the venture worthwhile. In that sense they are acting on a speculative or contingency basis although it is not one sanctioned by the Contingency Fees Act."*

and

*"[106] Whilst the Contingency Fees Act contemplates non-monetary litigation, its provisions are directed at the arrangements between the legal practitioner and the litigant, rather than recovery from the other party. They deal with 'no win, no fee' arrangements and the recovery of success fees. The underlying assumption is that when success is*



*achieved a liability to pay fees attaches to the successful litigant. That is not the case here.”*

[40] The arrangement in *Thusi* is for all intents and purposes the same as the arrangement made by counsel in this matter as described by the respondents. Accordingly, it is not a “no win, no fee” arrangement which is subject to the CFA. Counsel looked to the other party for payment, not to his clients. Section 92 of the LPA applies. (Judgment in *Thusi* was handed down before the LPA was passed and section 92 was therefore not considered.<sup>13</sup>)

[41] The *Plascon-Evans* rule applies. The respondents’ version as to the arrangement with counsel should therefore be accepted. The fact that the respondents’ cost consultant referred to it as a “contingency fee agreement” in is not relevant. As appears from *Thusi* an arrangement such as this or the arrangement that was in place in *Thusi* is also referred to as a “contingency fee agreement”, even though it does not fall within the ambit of the CFA.<sup>14</sup>

[42] Whether counsel or his executrix is obliged to give the notice in terms of section 92(2) in the light of the deemed cession in section 92, and whether the respondents or their attorneys can submit counsel’s fees on his behalf on taxation where a section 92 arrangement is in place, are not matters which I have to decide on. The fact that the respondents may up to now have followed an incorrect procedure on taxation is not relevant to the question as to what

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<sup>13</sup>Judgment was handed down on 23 December 2010. The LPA was published in the Government Gazette on 22 September 2014 and its commencement date was 1 November 2018.

<sup>14</sup> See for examples paragraphs 193, 105, 106 and 110 of the judgment in *Thusi*.

the fee arrangement was.

## INDEMNIFICATION PRINCIPLE

[43] It is trite that the purpose of a costs order is to indemnify a party who has incurred expenses in instituting or defending legal proceedings. In principle, a litigant who is not liable to his/her attorney for legal costs, is not entitled to tax legal costs. This is known as the indemnification principle.<sup>15</sup>

[44] It is common cause that counsel (or his executrix) has not been paid by the respondents. To my mind the applicant has not raised this as part of his cause of action. Reference is made to this fact in the founding affidavit, but it is not mentioned as a basis for seeking the relief in the notice of motion, and no reliance was placed in argument on the indemnification principle. I shall however deal with the indemnification principle in case I have interpreted the applicant's case too narrowly.

[45] In *Thusi* Wallis J explained the indemnity principle as follows:

*"[99] The indemnity principle is of general application in the field of costs. It has not become outdated. In Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa Howie JA said:*

*'A costs order - it is trite to say - is intended to indemnify the winner (subject to the limitation of the party and party costs scale) to the extent that it is out of pocket as a result of pursuing the litigation to a successful conclusion. It follows*

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<sup>15</sup> *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467, at 488-489 (per Innes CJ); *Botes v Road Accident Fund* 2020 JDR 2586, paragraphs 35 and 40.

*that what the winner has to show — and the Taxing Master has to be satisfied about — is that the items in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket.'*

*If the applicants are not out of pocket or at risk of being out of pocket as a consequence of bringing these applications, it would appear that, unless the indemnity principle can be circumvented, it operates to preclude them from obtaining a costs order in their favour.*

...

*[103] ... Applying the general rule in regard to the purpose of a costs order set out in the cases I have cited, the fact that the applicants incur no liability for costs disentitles them to orders for costs. As they have incurred no expenses in relation to the litigation and no liability for costs, there is no need for an indemnity and nothing to which a costs order could apply."*

[46] Wallis J then identified three exceptions to the indemnity principle in the High Court rules and in statutes: (1) rule 40(7) of the Uniform Rules of Court which deals with *in forma pauperis* proceedings; (2) section 8A of the Legal Aid Act 22 of 1969, and (3) section 79A of the Attorneys Act, 53 of 1979 (*"the Attorneys Act"*). The learned judge crafted out a further exception, which is not applicable in this case.

[47] Section 79A was inserted into the Attorneys Act in 2000.<sup>16</sup> The Attorneys Act

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<sup>16</sup> Section 79A reads:

**"79A Recovery of costs by law clinics**

(1) Notwithstanding the provisions of section 83 (6) of this Act and section 9 (2) of the Admission of Advocates Act, 1964 (Act 74 of 1964), whenever in any legal proceedings or any dispute in respect of which legal services are rendered to a litigant or other person by a law clinic, costs become payable to such litigant or other person in terms of a judgment of the court or a

was repealed by the LPA. Section 92 of the LPA is the successor to section 79A of the Attorneys Act. Section 92 and 79A are essentially the same, with one important difference: Section 79A was only available to law clinics, whilst section 92 applies to legal services rendered by a “legal practitioner or a law clinic.” Section 79A of the Attorneys Act therefore did not apply in *Thusi*.

[48] Section 92 of the LPA should now instead of section 79A of the Attorneys Act be accepted as a statutory exception to the indemnification principle. The wording of section 92 clearly allows a bill to be taxed without client having made payment to the legal practitioner.

[49] Accordingly, counsel’s arrangement is covered by section 92 of the LPA, and the indemnification principle does not apply.

## CODE OF CONDUCT AND BAR RULES

[50] I was referred to section 32 of the Code of Conduct issued in terms section 36

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settlement, or otherwise, it shall be deemed that such litigant or other person has ceded his or her rights to such costs to the law clinic.

(2) (a) A litigant or person referred to in subsection (1) or the law clinic rendering legal services to such litigant or person may, at any time before payment of the costs referred to in subsection (1), give notice in writing to-

- (i) the person liable for such costs; and
- (ii) the registrar or clerk of the court concerned,

that the legal services concerned are being or have been rendered by that law clinic.

(b) Where notice has been given as contemplated in paragraph (a), the law clinic concerned may proceed in its own name to have such costs taxed, where appropriate, and to recover them, without being substituted on the record of the legal proceedings concerned, if any, for the litigant or person referred to in subsection (1).

(3) The costs referred to in subsection (1) shall be calculated and the bill of costs concerned, if any, shall be taxed as if the litigant or person to whom legal services were rendered by the law clinic, actually incurred the costs of obtaining the services of the attorney or advocate acting on his or her behalf in the proceedings or dispute concerned.”

of the LPA<sup>17</sup> which provides:

**“32 Prohibited fee agreements**

32.1 *Counsel shall not agree to charge on results or agree to reduce or waive fees if a positive result is not achieved, except in a matter taken on contingency in terms of the Contingency Fees Act 66 of 1997 and/or save as contemplated in section 92 of the Act.*

32.2 *Counsel shall not agree to charge a fee as allowed on taxation except in a matter undertaken on contingency, or as permitted in terms of section 92 of the Act.”*

[51] In light of my finding above that section 92 applies, the fee arrangement in this case is not prohibited by section 32 of the Code of Conduct.

[52] I was also referred to rule 7 of the Uniform Rules of Professional Conduct of the General Council of the Bar of South Africa (“*the GCB Rules*”). The General Council of the Bar of South Africa is an umbrella organisation of various constituent bars in South Africa, including the Johannesburg Bar.<sup>18</sup> Rule 7.2.4 of the GCB Rules reads:<sup>19</sup>

*“7.2.4 A brief may not be marked ‘at such fee as may be allowed on taxation.’”*

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<sup>17</sup>Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities  
Published under GenN 168 in GG 42337 of 29 March 2019

<sup>18</sup> *Solomon v Junkeepsad* 2022 (3) SA 526 (GJ)

<sup>19</sup> I refer to the rules as published on the GCB website at <https://gcbsa.co.za/>

- [53] This rule has obviously been breached.
- [54] On the face of it, a member of one of the constituent bars cannot conclude a section 92 arrangement, whilst other legal practitioners (including advocates) may do so. The question is whether a member's breach of GCB rule 7.2.4 renders the section 92 arrangement or contract unenforceable and/or disentitles the member to his or her fee.
- [55] Bar rules are recognised by the courts and are enforced by the courts.<sup>20</sup> The court, however, is not bound by these rules.<sup>21</sup> In none of the cases which I could find was it held that a fee agreement was void or invalid or unenforceable because of a breach of bar rules. In some cases the courts have relied on bar rules in dealing with allegations of overreaching or professional misconduct, but other considerations apply in such cases.
- [56] GCB rule 7.2.4 reflects the traditional view that an advocate should not have a financial interest in the outcome of litigation as it may cause the advocate to lose his or her independence.<sup>22</sup> Such contracts were treated as contracts contrary to public policy and void, but it is now appreciated that they may promote access to justice.<sup>23</sup> (A contract of this nature is called a

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<sup>20</sup> *Society of Advocates of SA (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 354A-G; *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 1)* 2015 (2) SA 295 (GJ), paragraph 79

<sup>21</sup> *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) at 593F

<sup>22</sup> See: GB Bradfield *Christie's Law of Contract in South Africa* 7 ed ("Christie") p 411 paragraph 10.3.2(c)

<sup>23</sup> *Ibid*; Van Huyssteen, Lubbe & Reinecke *Contract General Principles* 6 ed p 218 paragraph 7.22

*pactum de quota litis* or champerty agreement.)

[57] A contract which contravenes some provision of a statute is not necessarily void or unenforceable.<sup>24</sup> The breach of a bar rule cannot *per se* render a contract concluded by the member/advocate unenforceable. Public policy also does not require that the breach of this particular bar rule be visited with invalidity or unenforceability.<sup>25</sup>

[58] Section 92 of the LPA is therefore applicable in this case, in spite of the breach of GCB rule 7.2.4.

## **COSTS**

[59] Costs should follow the result. The respondents sought costs on the attorney and client scale, but the facts of this matter do not warrant such an order. The applicant is entitled to the costs of the striking-out application.<sup>26</sup>

## **ORDER**

[60] The following order is made:

1. Paragraphs 19 to 43, 46 to 61 and 68.3 of the first and fourth respondents' answering affidavit are struck out.

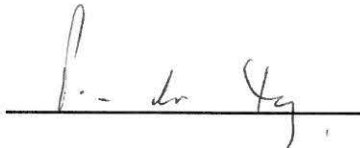
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<sup>24</sup> Christie, p 393ff

<sup>25</sup> A contract which is against public policy may be void or unenforceable. See in general: Christie, p 392ff; Van Huyssteen, Lubbe & Reinecke (*supra*), chapter 7

<sup>26</sup> If the parties cannot come to an agreement, the taxing master will have two conflicting cost orders to deal with. At the hearing the argument took some two hours in total, of which only a few minutes were spent on the application to strike out.

2. First and second respondents are ordered to pay the costs of the striking-out application.
3. The main application is dismissed.
4. The applicant is ordered to pay the costs of the main application.



**VAN DER BERG AJ**

#### **APPEARANCES**

**For the applicant:**

Adv B D Stevens  
Instructed by:  
Jurgens Bekker Attorneys

**For the first and fourth respondents:**

Adv L C M Morland  
Instructed by:  
Warrener De Agrela & Associates

Date of hearing: 20 October 2022  
Date of judgment: 25 November 2022