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OPINION

TO: MR R M BRINK
ROOTH & WESSELS

LAW SOCIETY OF THE NORTHERN PROVINCES: CONTINGENCY FEE AGREEMENTS

1.

I am requested to advise on whether attorneys would be entitled to enter into valid contingency fee agreements in terms of the Common Law despite the coming into operation of the Contingency Fees Act, Act 66 of 1997. This Act came into operation by proclamation on 23 April 1999.

2.

In terms of the aforesaid Contingency Fees Act, Act 66 of 1997 [hereafter referred to as "the Act"] a legal practitioner may enter into a contingency fee agreement if he believes that there are reasonable prospects that his client may be successful in any proceedings. S2(1) of the Act reads as follows:

"(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,*

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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."*

3.

Clause 2(2) of the Act introduces statutory limits. The success fee may not exceed the attorney's normal fees by more than 100% and, in respect of claims sounding in money, the total of the success fee payable may not be more than 25% of the total amount ordered or amount obtained by the client [excluding the costs].

4.

In terms of s6 of the Act, any professional body may make rules that such

body deems necessary in order to give effect to the Act. A similar power is given to the Rules Board in so far as a professional body may not exist.

5.

From the aforesaid Act it is apparent that the enforcement of the Act is left to the professional body or to the Rules Board.

6.

No particular sanction is included in the Act for non-compliance with the Act and, in particular, the Act does not in itself explain to what extent it amends the Common Law.

7.

I am unaware of any rules issued by the Law Society regarding the enforcement of the Act. Advocates have only been allowed to act on a contingency basis with the approval of the Bar Council and this nowadays requires the approval of a specifically concluded and signed agreement containing the contingency provisions envisaged by this Act.

8.

In order to ascertain what the Common Law position was, it becomes necessary to refer to certain authorities.

9.

In **Lekeur v Santam**, 1969(3) SA 1 (C) the Cape High Court [per Corbett J as he then was] had reference to certain old authorities and summarised the position as follows at p. 6C-D:

> *"It is to be noted that in all these cases the champertous agreement did not found the plaintiff's cause of action but was merely an ancillary matter. Had it been otherwise there would have been no problem because such an agreement is unenforceable and could not possibly sustain a cause of action. It is also to be noted that, in all of the above cited cases where the champertous agreement was held to non suit the plaintiff, the entire subject matter of the suit had been ceded under the agreement. Consequently, as was pointed out in those cases, the real plaintiff was the cessionary and the purpose of the action was to implement and give effect to a champertous agreement. It was because of this that the Court refused to entertain the action. Where, on the other hand, the plaintiff has an original and valid cause of action and he pursues that cause of action as the real plaintiff and for his own benefit, then, in my view, the Court*

should not refuse to entertain the action merely because he may have made a champertous agreement in regard to a portion of the proceeds of the action. Fouche v The Corporation of the London Assurance supra (1931) WLD 145 - [my insertion] *and Hilton v Woods supra (LR4 Eq432)* - [my insertion] *are instances of this type of case. The distinction between these two classes of case may ultimately depend upon the extent to which the subject matter of the action has been alienated under the champertous agreement and other similar factors which are largely matters of degree but the basis of the distinction is clear. In the present case I am satisfied that the nominal plaintiff is also the real plaintiff."*

10.

The Court held that a success fee arrangement of 25% of the damages did not mean that the litigation instituted by the plaintiff was anything other than the institution of her own claim. See:

Shelton v Baxter, (1916) 1 KB 321;

Lekeur v Santam Insurance Co Ltd, supra at 6H.

This was however only the reason why the Plaintiff was not non suited, as opposed to a postitive endorsement of the success fee arrangement by the court.

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11.

The line of cases in which plaintiffs had been non-suited due to the action being the enforcement of a champertous agreement include the following:

11.1. **Hugo and Möller v Transvaal Loan Finance and Mortgage Co** [1894] 1 OR 336.

11.2. **Green v De Villiers and Others,** [1895] 2 OR 289.

11.3. **Schweizer's Claimholders' Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd,** [1896] 3 OR 140.

12.

In **Campbell v Welverdiend Diamond Ltd,** 1930 TPD 287 the plaintiff had claimed £11 000 damages for breach of contract. During the trial it became apparent that an amount of £2 700 of the amount claimed had been ceded to one Hutchinson and that this transaction was not entered into for the purpose of assisting the plaintiff in his action for a fair recompense, but as a speculation or for some ulterior motive other than a desire to assist the plaintiff. Feetham J held that the cession was champertous and said the following at 294:

"It is clear from the authorities that while a transaction of this kind may be properly entered into, and may be supported where it is a genuine case of assisting a litigant for a fair recompense, it cannot be supported in other cases; the Court is not to give effect to arrangements which are made by persons who traffic in litigation."

13.

From the aforesaid judgment in **Campbell** it is therefore apparent that an agreement for a success fee could be entered into properly where:

13.1. It is a genuine case of assisting a litigant;

13.2. for fair remuneration;

13.3. and not in order to gamble in litigation.

See also:

Kotze CJ in **Hugo and Möller NO** supra at 340-341.

14.

I must mention that the aforesaid summary of the Common Law position

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differs from that of A van Dijkhorst and H F Mellett in their treatise on legal practitioners in the latest addition of LAWSA. See:

LAWSA, 1st reissue, Vol. 4, par. 391, p. 363-364.

The aforesaid authors are of the opinion that, before the introduction of the Contingency Fees Act, remuneration by result, for instance where an attorney takes a case on the basis that he will be paid a certain percentage of the proceeds if successful, but will receive no remuneration if not successful, was *contra bonos mores*. The authorities on which they rely are the following:

14.1. **Gramowsky v Steyn**, 1922 SWA 48.

14.2. **Incorporated Law Society v Reid**, [1908] 25 SC 612.

14.3. **Lekeur v Santam Insurance Co Ltd**, 1969(3) SA 1 (C).

[I do not believe that this latter judgment supports the proposition advanced by the learned authors].

15.

The aforesaid benevolent approach to success fee agreements arises from

our Courts following certain English judgments and the considerations quoted below have been repeated in a number of South African judgments as being good law. Rose-Innes CJ said in Patz v Salzburg (1907 TS, 526):

> *"The rule was clearly laid down by the Privy Council in the case referred to during the argument - Ram Coomar Condoo v Chunder Canto Mokerjee (2 AC 186). It is a general rule, not founded on the law of India, but upon public policy, and therefore binding on this Court. It was stated in these terms: 'Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being per se opposed to public policy. Indeed cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.'*

Then the judgment proceeds:

> *'But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense*

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therefor, but for improper objects - as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, such as to be contrary to public policy - effect ought not to be given to them.'"

See also:

Lord Abinger in Findon v Parker (11 M&W);

Ram Coomar Condoo v Chunder Canto Mokerjee (LR 2 App. Cas. p. 186].

16.

The *ius civile* and the Roman Dutch law is less forgiving of success fee agreements. The civil law forbids any agreement to maintain a law suit or to have part of the thing in dispute.

See: D48 7 6;

Grotius 3 1 41.

In Voet's time it was vexatious to traffic in law suits and the maxim *ex turpi causa non oritur actio* applied.

See: Fisher's Digest [Vol. 2, p. 42] and the authorities there cited;

Voet 2 14 18.

17.

For purposes of completeness the following further references to Roman Dutch authorities are given:

Digest 2.14.53;

Code 2.6.5;

Kersteman Woordenboek s.v. Procureur p. 379;

Merula IV.16.1.5;

Merula 1st Part, Book IV, TIT.18 CAP.10 p. 371.

18.

In **Incorporated Law Society v Reid** (1908) SC 612 the Court suspended an attorney for 3 months for having entered into an agreement with a client for one half of his inheritance in consideration of all his fees and services already or to be rendered in recovering the inheritance. The facts of this matter demonstrated that the attorney ascertained that a will was not a good will and had then approached the beneficiary *ab intestato* with the offer of recovering his inheritance against payment of half thereof. This arrangement clearly smacks of opportunism by the attorney and therefore the reproach by the Court is not surprising.

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19.

The case of Law Society v Tottenham and Longinotto (1904) TS 802 has also been quoted as authority for the proposition that it was unprofessional conduct for an attorney to engage in lieu of work for payment by results. This was based on a finding that the Plakaat, Vol. III, p. 667, section 53 at p. 680 prohibited attorneys and advocates from making fee arrangements with clients to a suit by which they are to get a larger fee in case of success, or in the case of failure, than is allowed to them by law.

20.

In **Goolam Mohamed v Janlon** 1908 NLR 304, Bale CJ held the following:

> *"Now I have always understood that an agreement such as that relied upon when entered into by an attorney, who is an officer of this Court, could not be enforced. I am of the opinion that by the common law of Holland, by the statutes of England, and by the practice in South Africa the emoluments of solicitors cannot be made to depend upon the event; that contingent fees are not recoverable; that we cannot give effect to any agreement which is entered into upon the principle of no cure, no payment; and that being so we have no option in this matter but to hold that this is an agreement which we cannot recognise or give effect to."*

The aforesaid judgment contains the unforgiving approach adopted by Van Dijkhorst and Mellett *supra*, which unfortunately does find support in a number of the judgments to which I have referred above.

21.

In **Goodgold Jewellery P/L v Brevadan CC**, 1992(4) 474 (W) Stegmann J raised the issue *mero motu* whether a *pactum de quota litis* was of an objectionable and therefore unlawful nature. The case was decided before the promulgation and coming into operation of the Contingency Fees Act, 1996. The agreement in question provided for the cession of the applicant's debtors' book to the respondent for collection purposes. The respondent would be remunerated from the proceeds of debts collected by retaining an agreed percentage. Stegmann J struck down the agreement. In the course of the judgment the following points are made:

21.1. A *pactum de quota litis* is not necessarily unlawful, but may be unlawful. [At 479G-H; See Voet 2.14.18; Grotius 3.1.41; Patz v Salzburg, 1907 TS 526].

21.2. An acceptable *pactum de quota litis* is distinguished from an unacceptable *pactum*, by referring to certain criteria [at 481J etc].

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21.2.1. It would be unacceptable where the transaction would have the effect of keeping up litigation amongst the parties, eg where an attorney takes cession of 100% of his client's claim in settlement of the costs of the action, including costs already incurred and still to be incurred. Such an arrangement would have no purpose other than to produce money, all of which would be used to pay legal costs. [See **East London Municipality v Halberd**, (1884) 3 SC 140].

21.2.2. It would be acceptable to render *bona fide* pecuniary assistance to an impecunious suitor to help him obtain his just rights, in return for a reasonable recompense or interest in the suit. It would not be unlawful or void on the ground of champerty or maintenance. Such agreements are however carefully scrutinised.

21.2.3. They will be held to be unlawful if they

21.2.3.1. are extortionate, unconscionable or inequitable;

21.2.3.2. amount to gambling in litigation.

[At 482E-J].

See also:

Kotze CJ in **Hugo and Others v Transvaal Loan** [referred to *supra*] at 340;

Patz v Salzburg, 1907 TS 526;

See:

Feetham J in **Campbell v Welverdiend Diamonds Ltd**, 1930 TPD 287.

21.2.3.3. Where the transaction is motivated by a desire for profit by speculation in litigation and not for purposes of rendering assistance [at 483A-C].

See also:

Schweizer's Claimholders' Rights

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Syndicate Ltd v Rand Exploring Syndicate Ltd, (1896) 3 OR 140.

22.

From the aforesaid exposition it appears that there is a dichotomy in the judgments. On the one hand, if the facts smack of unconscionable conduct by the attorney in concluding the agreement, the Court adopts the unforgiving approach of striking down the action as being based on the enforcement of a champertous agreement, or of disciplining the attorney in question. Where the Court however, has a case where there is a genuine attempt to assist the litigant in bringing his case to Court, against payment of a part of the proceeds as a success fee, the Court would not regard the agreement as champertous, but would fall short of endorsing the agreement. It would merely not non suit the plaintiff by virtue of the agreement.

23.

It therefore appears that there is a mere tolerance to be found in the old case law for *bona fide* succees fee agreements complying the requirements summarised in paragraph 13 *supra*.

24.

The Courts would however discipline an attorney who enters into an agreement for a success fee in appropriate circumstances. I therefore understand the common law, at the commencement of the Contingency Fees Act in 1997 to contain no clear endorsement of the validity of a success fee agreement, even in an appropriate case. At best there would be a tolerance thereof. This probably arises from the nature of a defence based on maintenance and champerty. In no case could I find any attempt to seek a declarator regarding the enforceability of a success fee arrangement.

25.

S2 of the Contingency Fees Act, 1997 is couched in permissive language in that it enables the conclusion of such an agreement, notwithstanding what is stated in statute or common law. The absence of a sanction if the agreement concluded falls foul of the provisions of the Contingency Fees Act, raises the question whether such an agreement would be valid or invalid. In my opinion, a Court will, in adjudicating the validity of a success fee agreement which falls foul of this Act, have regard to the safeguards contained in the Act as a guide to determining the current *mores* of society.

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26.

An agreement which does not comply with the Contingency Fees Act may therefore be struck down or declared unenforceable on exactly the same approaches to be found in the authorities referred to *supra*.

27.

It is my opinion that the Contingency Fees Act has provided a statutory definition of what would be *"fair recompense"* in a success fee agreement. It would be limited to double the normal fee, or 25% of a claim sounding in money. To this extent there is a deviation from the common law, which did not wish to define what would be fair or not. It depended on the facts of each case.

28.

Based on what has been said above, it is therefore my opinion that a success fee agreement which does not comply with the provisions of the Contingency Fees Act, may, depending on the terms of the agreement, be struck down if it is perceived to be unreasonable or extortionate. If not, it will probably be tolerated, but not endorsed.

29.

The validity or not of such an agreement will depend on the terms of the specific agreement, rather than determining the apparent principle of whether an attorney can conclude a so-called common law contingency fee agreement.

30.

The Law Society must reassess judgments like the Incorporated Law Society v Reid (1908) 2 SC 612 and Incorporated Law Society v Tottenham and Longinotto (1904) TS 802 case. This is necessary so that the Law Society can determine what its stance would be in principle regarding agreements which comply with the Act and those that do not.

31.

31.1. I have had the opportunity of looking at the opinions of Mr Bobroff and another attorney regarding the need for contingency fee agreements. In personal injury cases, I understand and accept the need for contingency fee agreements.

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31.2. In the second King Report on Corporate Governance for South Africa, there appears a brief reference to the issue of contingency fees.

See: King Report (III), p. 146, para. 6.

The reference to contingency fee agreements is in the context of the enforcement of existing remedies against delinquent directors of companies. The King report recommends that an approach be made to the General Council of the Bar and the Law Society to discuss contingency fees to promote access to the law. While the purpose of such discussions is not clearly stated, it is perhaps an indication that the King Commisson regards suits against delinquent directors as an area where contingency fee agreements may be appropriate to assist victims of bad corporate governance.

31.3. A further area in which contingency fee agreements may become essential is in class actions. This would be in line with the discernible judicial trend of increasing the accessibility of the Courts.

See: Cameron AJA in De Freitas and Another v Society of Advocates of Natal, 2001(3) SA 752 (SCA).

32.

Conclusion:

32.1. Common law contingency fee agreements may be validly entered into by attorneys. The Contingency Fees Act does not proscribe such agreements. It must however be accepted that such agreements will continue to be keenly scrutinised by the Courts. Such scrutiny by the Courts may even be raised *mero motu* by the Court.

32.2. A common law contingency fee agreement should meet the following criteria:

32.2.1. It should relate to a genuine case of assisting an impecunious client to assert his rights. Impecunious does not mean totally indigent but in contenxt it would refer to someone who, due to lack of means, is unable to assert his right to relief in the Courts.

32.2.2. The attorney's remuneration must be fair.

32.2.3. The agreement must not amount to gambling, speculation or trafficking in litigation.

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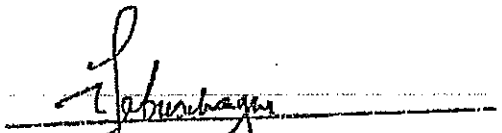
32.3. The question whether a common law contingency fee withstands judicial scrutiny will depend on the facts of every matter. It can be assumed that reasonableness will remain the touchstone in respect of the percentage of the agreed success fee. Because the Courts will probably refer to the 25% cap on success fees in the Contingency Fees Act, in determining the reasonableness, any agreed percentage in excess of that cap would be at risk.

32.4. The restrictions to be found in the Contingency Fees Act will probably resonate in various guises in any judicial scrutiny of a common law contingency fee agreement.



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