

The judicial approach to contingency fee agreements in South Africa

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OPSOMMING

Die geregtelike beskouing van ooreenkomste vir gebeurlikheidsgelde in Suid-Afrika
Ooreenkomste vir gebeurlikheidsgelde kom gereeld voor in eise teen die Padongelukkefonds. Die Wet op Gebeurlikheidsgelde 66 van 1997 het op 23 April 1999 in werking getree. Ten spyte van die bestaan van die Wet het baie prokureurs steeds gemeenregtelike ooreenkomste met kliënte aangegaan waarvolgens hulle meer as die voorskrifte in die Wet gevra het. Hierdie artikel kyk na waar en hoekom hierdie gebruik van 'n gemeenregtelike ooreenkoms ontstaan het. Daarna word aandag gegee aan hoe 'n gebeurlikheidsgelde-ooreenkoms kragtens die Wet behoort te lyk. Sake rakende gebeurlikheidsgelde-ooreenkomste, asook die uitspraak van die Konstitusionele Hof, word ook geanaliseer.

1 INTRODUCTION

“The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client”¹ – *Abraham Lincoln*

A contingency fee agreement may be defined as an agreement between a legal practitioner and his or her client in terms of which the former agrees to charge the latter no fee if the claim is unsuccessfully prosecuted.² In the event of success (as defined between the parties), however, the agreement usually allows the legal practitioner to recover a fee in excess of his or her normal fee, since he or she bears the risk of the losses occasioned by unsuccessful litigation conducted on a contingency fee basis.³ Such agreements are said to enhance access to justice since they enable litigants who would otherwise be constrained by the prohibitive cost of litigation, to obtain legal representation to prosecute their

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1 <http://bit.ly/1L9oWvD> (accessed on 3 January 2014).

2 See *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 SA 583 (GNP) [2]; *Tjatji v Road Accident Fund* 2013 2 SA 632 (GSJ) [2]. See also, the South African Law Commission *Twenty-fourth annual report* (1996) 29 <http://bit.ly/1L9p6TM> (accessed on 10 December 2013).

3 SALC *Twenty-fourth annual report* (1996) 29.

claims.⁴ However, they carry with them the inherent risk of abuse,⁵ arising from the creation of a potential conflict between the duties and interests of the attorney.⁶ It is for this reason that our courts have repeatedly emphasised that contingency fee agreements should be strictly controlled.⁷

“The clear intention of the legislature is that the contingency fees be carefully controlled. The Act was enacted to legitimise contingency fees agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fees agreement between such parties which is not covered by the Act is therefore illegal and unenforceable.”⁸

Contingency fee agreements have attracted a great deal of attention in the context of Road Accident Fund⁹ (RAF) claims,¹⁰ particularly since the enactment of the Contingency Fees Act¹¹ which came into operation on 23 April 1999.¹² The controversy mostly has revolved around the validity of contingency fee agreements that do not comply with the provisions of the Act, or so-called common law contingency fee agreements.¹³

The article explores the development of this controversy with reference to relevant case law, as well as the implications of judicial precedent regarding the validity of common law contingency fee agreements. Attention will be given to the requirements for valid contingency fee agreements in terms of the Contingency Fees Act, as interpreted by the courts. The current state of regulation of contingency fee agreements will be examined. Lastly, arguments will be presented in support of more effective monitoring and enforcement in order to ensure stricter control of contingency fee agreements.

4 *Ibid.* See also *De La Guerre v Bobroff & Partners Inc* (22645/2011) [2013] ZAGPPHC 33 (13 February 2013); Weideman “The myth of the common law contingency fee” 2012 <http://bit.ly/1BjtayM> (accessed on 10 December 2013); Nondwana “No win/No fee v No agreement/No fee” May 2013 <http://bit.ly/1ySB4IK> (accessed on 2 December 2013).

5 *Tjatji v Road Accident Fund* 2013 2 SA 632 (GSJ). See also *Price Waterhouse Coopers Inc v National Potato Co-op Ltd* 2004 6 SA 66 (SCA).

6 See *Price Waterhouse Coopers Inc v National Potato Co-op Ltd* (fn 5) [38] [42].

7 *Idem* [41]; *Mnisi v Road Accident Fund* (fn 30) [12]; *Tjatji v Road Accident Fund* 2013 2 SA 632 (GSJ) [21]; *De La Guerre v Bobroff & Partners Inc* (fn 4) [11]; *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 SA 583 (GNP) [22].

8 *Mofokeng v Road Accident Fund* case no 22649/09; *Makhuvele v Road Accident Fund* case no 19509/11; *Mokatse v Road Accident Fund* case no 24932/10 and *Komme v Road Accident Fund* case no 20268/11 (GSJ) 22 August 2012 [41].

9 The Road Accident Fund was established in terms of s 2(1) of the Road Accident Fund Act 56 of 1996.

10 Hawkey “Clarity on contingency fees agreements” 2012 <http://bit.ly/17eHTht> (accessed on 4 December 2013); Van Niekerk “Door closed on common law contingency fees” 2013 <http://bit.ly/1A0s64Z> (accessed on 4 December 2013); Weideman (fn 4). See also “Discovery Holdings and Ronald Bobroff & Partners” 2012 <http://bit.ly/1AAP0OK> (accessed on 8 December 2013); Du Preez “Injury lawyers take fees to Con Court” 2013 <http://bit.ly/1EloRRo> (accessed on 10 December 2013); Templeton “Bobroff ‘has only himself to blame’” 2013 <http://bit.ly/1zLHLMU> (accessed on 10 December 2013).

11 Act 66 of 1997.

12 Proc R48 in GG 20009 of 23 April 1999.

13 *Ibid.* See also Nondwana (fn 4).

It should be noted that the RAF is in the process of moving from a fault-based system of compensation to a no fault-based system.¹⁴ This could see a reduction of claimants' legal costs with a concomitant reduction in the participation of attorneys in RAF claims. This development will not affect the current debate as contingency fee agreements are also used in other areas of litigation such as medical malpractice claims,¹⁵ to mention but one example.

Furthermore, the hotly-contested Legal Practice Act,¹⁶ passed by the National Assembly on 12 November 2013,¹⁷ enjoins the South African Law Reform Commission (SALRC) to investigate the issue of legal fees and to report back to the Minister of Justice and Constitutional Development.¹⁸ This could see the reform of the costs regime in South Africa. More controversially, the Act envisages the establishment of a Legal Practice Council (LPC), replacing the Bar Associations and the Law Societies¹⁹ and bringing an end to the self-regulation of the legal profession.²⁰ The Act could provide an ideal opportunity for stricter and more uniform control of contingency fee agreements through the establishment of rules by the LPC in terms of section 6 of the Act, as well as regulations by the Minister of Justice and Constitutional Development in terms of section 7.

2 VALIDITY OF COMMON LAW CONTINGENCY FEE AGREEMENTS

It is unclear exactly where the notion of a "common law" contingency fee agreement originated. It would appear, however, that contingency fee agreements were already used by legal practitioners in South Africa for a long time prior to the enactment of the Contingency Fees Act.²¹ The South African Law Commission (SALC) reported in 1996 that "[t]he need for an investigation into contingency fees emanated from an indication by the former Chief Justice that *a system of speculative fees, approved by the Association of Law Societies, is not acceptable in terms of the common law*".²² The above investigation resulted in

14 Road Accident Fund *Integrated annual report* (2013) 28 58 64 89. See also the Road Accident Fund Benefit Scheme Bill 2013.

15 See Sperryn "Review of 2011" 2011 *SA J of Radiology* 15 4 3–4; Michell "Malpractice in the intensive care unit" 2011 *SAJCC* 1 <http://bit.ly/1JnMOOG> (accessed on 9 January 2014); Seggie "The 'boom' in medical malpractice claims – patients could be the losers" 2013 *SAMJ* 433 <http://bit.ly/17eI8Jl> (accessed on 9 January 2014).

16 Legal Practice Act 28 of 2014. GN 740 in *GG* 38022 of 22 September 2014.

17 Anonymous "Legal Practice Bill" Law Society of South Africa <http://bit.ly/1ElnvpJ> (accessed on 9 January 2014); Makinana "National Assembly passes controversial Legal Practice Bill" *Mail & Guardian Online* 12 November 2013 <http://yhoo.it/19sQE90> (accessed on 9 January 2014); Ferreira "Assembly passes Legal Practice Bill" *IOL News* 12 November 2013 <http://bit.ly/19sQPBF> (accessed on 9 January 2014). Part 1 and 2 of Chapter 10 of the Legal Practice Act came into operation on 1 February 2015. Chapter 2 will become effective three years after the date of commencement of Chapter 10 or an earlier date as proclaimed by the President (see <http://bit.ly/1ElnNx4> accessed on 16 February 2015).

18 See s 35(4) of the Legal Practice Act.

19 *Ibid.* See also Ferreira (fn 17); Makinana (fn 17).

20 Ferreira (fn 17).

21 SALC *Twenty-fourth annual report* (1996) 29. See also *Law Society of South Africa v RAF* 2009 1 SA 206 (C).

22 *Ibid.*; own emphasis.

the enactment of the Act. Furthermore, in *Law Society of South Africa v RAF*,²³ Traverso AJP made the following observation regarding contingency fee agreements:

“This system has been employed for decades and is the basis upon which attorneys undertake work of that nature and is the method by which claimants obtain representation in order to enable them to pursue their claims against the RAF.”²⁴

It appears, therefore, that contingency fee agreements were permitted by the Association of Law Societies at some stage prior to the SALC investigation into speculative contingency fees.²⁵ Moreover, it appears that the practice of representing clients on a contingency fee basis considerably pre-dates the Act. In other words, in the absence of statutory regulation prior to the Contingency Fees Act, contingency fee agreements were employed in a completely unregulated environment for many years. It is therefore difficult to avoid the conclusion that certain standard practices developed over time and that, after the commencement of the Act, the status *quo*, as developed over time, was sought to be maintained by invoking the notion of a “common law contingency fee agreement”. In order to understand the need for stricter control it is accordingly both necessary and instructive to examine the approach that our courts have taken to contingency fee agreements that do not comply with the provisions of the Contingency Fees Act.

In *Price Waterhouse Coopers Inc v National Potato Co-op Ltd*,²⁶ Southwood AJA, writing for a full bench of the Supreme Court of Appeal (SCA), stated clearly that:

“The [Contingency Fees] Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal.”²⁷

Since the case was not concerned with a contingency fee agreement between attorney and client, the above statement was regarded by some as *obiter dictum*.²⁸ However, this argument was expressly rejected in *De la Guerre v Bobroff & Partners Inc*.²⁹

In *Mnisi v Road Accident Fund*,³⁰ an attorney (M) had concluded a contingency fee agreement with his client, the plaintiff. The agreement provided that the plaintiff will pay M the following amounts for the conduct of the case:

- (a) 25% (excluding VAT or other tax) of the capital amount awarded as a success fee;
- (b) R1 000 per hour for all work done before receipt of the capital proceeds; and
- (c) any party-and-party cost-contribution made to the plaintiff’s attorney (in respect of which the attorney needs not account to the plaintiff).³¹

23 2009 1 SA 206 (C).

24 *Idem* [4].

25 SALC *Twenty-fourth annual report* (1996) 29.

26 2004 6 SA 66 (SCA).

27 *Idem* [41].

28 Weideman (fn 4).

29 Fn 4, [12]. This case is discussed in more detail below.

30 *Mnisi v Road Accident Fund* (37233/09) [2010] ZAGPPHC 38 (18 May 2010).

31 *Idem* [13].

The parties reached a settlement agreement and the court was presented with a draft order and was requested to make it an order of court. The draft order did not contain a breakdown of the amounts to be paid to the plaintiff and her two minor children and also did not make provision for the administration of the amounts to be paid to the minor children. The court accordingly refused to make the draft order an order of court and required counsel to consider the various options available for the administration of the amounts to be paid to the children and to address the court on these matters the following day. At that stage, the court still was not aware of the contingency fee agreement.

The following day counsel submitted another draft order in which the above matters were addressed. Paragraph 3 further provided as follows: “The Defendant shall pay 25% plus VAT of the total amount to the plaintiff’s attorneys in terms of the Contingency Fee Agreement Act.”

This was the first time the court had been made aware of the fact that M had concluded a contingency fee agreement with the plaintiff. Furthermore, the affidavits required by section 4 of the Act had not been filed. The court again refused to make the draft order an order of court, *inter alia*, because it was not satisfied that the defendant could be ordered to pay 25% of the total amount to M in terms of a contingency fee agreement, and also because the affidavits required by section 4 of the Act had not been filed. The court accordingly demanded to see the contingency fee agreement.

Regarding the terms of the contingency fee agreement, it is respectfully submitted that Southwood J appeared somewhat ambivalent in his finding³² that the agreement was “clearly not covered by the [Contingency Fees] Act and the agreement appears to be illegal”. This stands in stark contrast to the learned judge’s earlier *dictum*, to which he made reference,³³ in *Price Waterhouse* that “[a]ny contingency fee agreement between such parties which is *not covered* by the Act *is* therefore illegal”. This *dictum* suggests that invalidity is an unavoidable consequence of a finding that a contingency fee agreement does not comply with the Act. Yet, almost six years later, in *Mnisi*, Southwood J was only prepared to form a *prima facie* view that the contingency fee agreement was invalid, despite stating that it was “clearly not covered by the Act”.³⁴ Instead of making an order declaring the agreement invalid, the judge directed the Registrar to refer the matter to the President of the Law Society of the Northern Provinces (LSNP) to investigate, *inter alia*, the validity of the contingency fee agreement and M’s failure to file the affidavits prescribed by section 4 of the Act.

Another interesting aspect of the *Mnisi* judgment is that it appeared that M laboured under the misconception that he was entitled to charge between 15% and 25% of the amount awarded in all claims sounding in money, regardless of whether this amount exceeded double his normal fee. This aspect is what appears to have prompted the court to also direct the Registrar to require the President of the LSNP to investigate whether the contingency fee agreements M enters into generally, are valid. Southwood J explained the effect of section 2(2) of the

32 *Ibid.*

33 *Mnisi v Road Accident Fund* (fn 30) [12].

34 *Idem* [33].

Contingency Fees Act with reference to two examples.³⁵ It is clear from these examples that the learned judge interpreted the section to mean that M would only be entitled to charge 25% of the amount awarded if this amount did not exceed double his normal fee.

This is indeed the effect of the court's interpretation of the section in *Thulo v Road Accident Fund*.³⁶ In this case, there was no suggestion that the contingency fee agreement provided for a fee in excess of that allowed by section 2(2) of the Act. However, due to the "potentially ambiguous wording" of the section, Morison AJ considered it in the interests of plaintiffs generally to lay down the correct interpretation.³⁷ The learned judge stated that the section allows a legal practitioner to claim either double his or her normal fee or 25% of the amount awarded, whichever is the lesser, as well as the taxed costs payable by the other side.³⁸ Morison AJ elaborated further by explaining that, if double the normal fee exceeds 25% of the amount awarded, the legal practitioner may not claim double his normal fee. Conversely, if 25% of the amount awarded exceeds double the normal fee, the practitioner may only charge double his normal fee, provided that the normal fee, itself, is not equivalent to over-reaching.³⁹

Applying the judgment in *Price Waterhouse*, Morison AJ also stated clearly that contingency fees were prohibited under the common law⁴⁰ and that "there is accordingly no such thing as a common law contingency fee".⁴¹ The judge concluded that the Act is the only legal framework within which contingency fee agreements may validly exist.⁴²

A comprehensive analysis of the legal framework created by the Act appears in *Mofokeng v Road Accident Fund and three similar matters*,⁴³ per Mojapelo DJP. The RAF was the defendant in each case and the plaintiffs had all concluded contingency fee agreements with their legal representatives. In all four matters, the parties had reached agreement on the *quantum* of the claim and costs. The RAF made settlement offers and, in each case, included the following term in the settlement offer:

"In the event of plaintiff having concluded a contingency fees agreement with his/her attorney, such settlement shall be deemed to denote that the plaintiff and his/her attorney had complied with section 4 of the Contingency Fees Act, 66 of 1997 through having filed required affidavits with either the court, if the matter is before court, or with the relevant professional controlling body, if the matter is not before court."⁴⁴

35 *Idem* [24].

36 2011 5 SA 446 (GSI).

37 *Idem* [48] [54].

38 *Idem* [52].

39 *Idem* [52] [55].

40 *Idem* [49].

41 *Idem* [50].

42 *Idem* [59].

43 *Mofokeng v Road Accident Fund and three similar cases* (fn 43).

44 S 4 of the Contingency Fees Act provides as follows: "(1) Any offer of settlement made to any party who has entered into a contingency fees agreement may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling if the matter is not before court, stating: (a) the full terms of the settlement; (b) an estimate of the amount or other relief that may be obtained by taking the matter to trial; (c) an estimate of the chances of success or failure at

In two of these matters no affidavits had been filed, but were only filed after the issue had been raised by the defendants. In one case, only the affidavit of the plaintiff had been filed and, in yet another case, both the affidavits as well as the contingency fee agreement itself had been filed. The only outstanding issue was the conditionality of the offer. Ultimately, Mojapelo DJP was therefore confronted with the question of the nature of the court's function in regard to the affidavits required by section 4 of the Act when a settlement is made an order of court, and also whether the contingency fee agreement, itself, should be handed in to the court.

In delivering judgment, Mojapelo DJP thoroughly analysed the provisions of the Contingency Fees Act against the development of the law pertaining to champerty⁴⁵ and maintenance.⁴⁶ Against this background, the learned judge considered the purpose of the Act, the intention of the legislature and the consequences of an agreement that does not comply with the Act, and held as follows:

“The clear intention of the legislature is that the contingency fees be carefully controlled. The Act was enacted to legitimise contingency fees agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fees agreement between such parties which is not covered by the Act is therefore illegal and unenforceable.”⁴⁷

Regarding the interpretation of section 2(2) of the Act, Mojapelo DJP held that the legal practitioner's fee is limited to either double his or her normal fee or 25% of the total amount awarded, whichever is the lesser.⁴⁸ The learned judge further held that section 2(2) does not allow a legal practitioner to claim the taxed party-and-party costs to be paid by the other side, over and above the already generous fee allowed under the section.⁴⁹ In this respect, Mojapelo DJP differed from Morison AJ in *Thulo*.⁵⁰

trial; (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial; (e) the reasons why the settlement is recommended; (f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement. (2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating: (a) that he or she was notified in writing of the terms of the settlement; (b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and (c) his or her attitude to the settlement. (3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.”

45 Champerty means the financial support by a non-party of one of the litigants in exchange for a share in any proceeds resulting from the settlement. It is a concept inherited from English and Roman-Dutch law. It is legal provided the agreement was drawn up in good faith and did not negatively affect public politics. Until 2004, most champertous agreements were considered contrary to public opinion and were therefore not enforceable in most cases. This view changed with the Supreme Court of Appeal's judgment in *Price-waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA). See also *Price Waterhouse Coopers Inc v IMF (Australia) Ltd* 2013 6 SA 216 (GNP); Anonymous “Litigation funding in South Africa” 2010 *Litigation Funding Magazine*, August www.litigationfunding.co.za/lfsa_article.pdf (accessed on 13 February 2014).

46 *Mofokeng v Road Accident Fund and three similar cases* (fn 43) [25]–[34].

47 *Idem* [48].

48 *Ibid.*

49 *Idem* [49]–[50].

50 *Idem* [50].

In relation to compliance with section 4 of the Act, Mojapelo DJP held that the provisions of the section are peremptory and that the prescribed affidavits must therefore be filed before the settlement may be made an order of court.⁵¹ It was further held that the effect of section 4(3) is that an out-of-court settlement is not possible where one of the parties had concluded a contingency fees agreement,⁵² and that the purpose of this provision is to ensure that the court is placed in a position to exercise its monitoring function whenever such matters are settled or finalised.⁵³

Mojapelo DJP proceeded to deal with the question of the nature of the court's monitoring function. The judge stated that the court must be satisfied that the affidavits have been signed and filed and that, in order to ensure that this is indeed the case, the court must have sight of the affidavits.⁵⁴ Mojapelo DJP further held that the court must be satisfied that the affidavits indeed contain the matters prescribed in section 4(1) and (2).⁵⁵ The judge explained the monitoring functions of the court with reference to the specific contents prescribed by these provisions.⁵⁶

With reference to the right of review created by section 5 of the Act,⁵⁷ Mojapelo DJP held that in addition to the matters prescribed in section 4, the affidavit of the attorney must indicate that he or she has informed the client of this right.⁵⁸ This fact must also be confirmed by the client's affidavit.⁵⁹ Such disclosure is necessary to give effect to the right of review.⁶⁰ The attorney's affidavit must further indicate that he or she has furnished the client with the name and contact details of the relevant professional controlling body.⁶¹ Such disclosure enables the client to exercise the right of review, should he or she wish, and is therefore necessary for the right to be meaningful to the client.⁶²

Significantly, Mojapelo DJP held that the monitoring powers of the court exist not only at the stage of settlement but also at the end of trial in the case of matters which are not settled.⁶³ The courts, therefore, have the power to ensure compliance with the provisions of the Contingency Fees Act at the stage of settlement and also at the end of the trial.⁶⁴

51 *Idem* [52].

52 *Idem* [53].

53 *Idem* [54].

54 *Idem* [55].

55 *Ibid.*

56 *Idem* [56]–[57].

57 S 5 of the Contingency Fees Act provides as follows: “(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the *Gazette* for the purposes of this section. (2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his or her or its opinion the provision or fees are unreasonable or unjust.”

58 *Mofokeng v Road Accident Fund and three similar cases* (fn 43) [58].

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 *Idem* [62].

64 *Ibid.*

The question whether or not the contingency fee agreement itself should be handed in was answered in the affirmative.⁶⁵ Mojapelo DJP pointed out that even though the Act does not expressly require disclosure of the agreement, the court is tasked with monitoring compliance with the Act, as well as balancing the interests of the legal practitioner with those of the client.⁶⁶ Attorney-client privilege is not a barrier to disclosure and, even if this was the case, public policy considerations demand disclosure of the contingency fee agreement whenever such disclosure is necessary in the exercise of the court's monitoring function.⁶⁷ The judge concluded that

“the court is entitled, if it deems it necessary, to call for and examine the contingency fees agreement in the monitoring of the application of the Act between the legal practitioner and the client”.⁶⁸

It is submitted that this is a laudable judgment which is open to very little criticism. Mojapelo DJP also cemented his judgment by issuing a practice directive which he described as being necessary for the effective exercise of the court's monitoring function.⁶⁹ This practice directive will be discussed in more detail below.

In *Tjatji v Road Accident Fund*,⁷⁰ the primary focus was on compliance with the provisions of section 3 of the Act. This case involved three separate matters that were heard together. In each case, acceptable settlement offers had been made and the parties sought to have the terms of settlement made an order of court. Furthermore, the plaintiffs in each instance had concluded contingency fee agreements with their legal practitioners. However, since these agreements did not comply with the provisions of the Act, new agreements were concluded with the intention of ensuring compliance. Moreover, in all three matters the new agreements were concluded shortly before the trial, after the legal practitioners concerned had already commenced acting on the basis of the prior, invalid contingency fee agreements, and after disbursements had already been incurred.

The plaintiff's legal representatives contended that since the Act does not expressly state when and at what stage of proceedings the agreement should be concluded, such agreement can be concluded at any stage prior to the achievement of success as defined between the parties.

The court had to decide whether the new contingency fee agreements comply with the Act and are, therefore, valid and legally binding. The court once again emphasised the need for compliance with the Contingency Fees Act in the following terms:

“The phrase: *‘Notwithstanding anything to the contrary in any law or the common law’* which appears in s 2(1), and the long title of the Act, make it plain that the Act was intended to be exhaustive of the rights of legal practitioners to conclude contingency fee agreements with their clients. There is no room whatever for a legal

65 *Idem* [61].

66 *Idem* [59].

67 *Idem* [59]–[60].

68 *Idem* [62].

69 *Idem* [63].

70 2013 2 SA 632 (GSJ).

practitioner to enter into a contingency fee agreement with a client outside the parameters of the Act or under the common law.⁷¹

It was accordingly held that a contingency fee agreement not concluded in compliance with the Act is illegal.⁷² It was further held that, although the Act is silent as to when and at what stage of proceedings a contingency fee agreement may be concluded, there are textual indications in the Act that such agreements should be concluded at a “sufficiently early” stage of the proceedings in order to make it possible to comply with the provisions of the Act.⁷³ Whether or not the agreement was concluded at a “sufficiently early” stage is a question of fact and depends largely on the nature of the particular proceedings and whether compliance with the requirements of the Act was “reasonably possible” at that stage.⁷⁴ The court referred to the following textual indications:

- i. S 2(1) of the CFA Act which provides that, prior to concluding a contingency fee agreement, the legal practitioner must be of the opinion that his or her client has a reasonable prospect of success in the proceedings. This requires a thorough evaluation of the merits of the client’s claim before the contingency fee agreement is concluded.⁷⁵
- ii. S 3(2) and (4) which require the legal practitioner to sign the agreement and deliver a copy to the client on the date of signature. These provisions must be complied with before the legal practitioner may commence acting on a contingency fee basis.⁷⁶
- iii. The agreement must be in the prescribed form and section 3 lays down the minimum requirements for validity of a contingency fee agreement.⁷⁷

According to the court, it is clear that prior to concluding a contingency fee agreement, the legal practitioner must comply with section 3(3)(b)(i)–(iv) of the Act and agreement must also be reached on the matters specified in section 3(3)(c)–(g) and (i), in order to enable the client to appreciate the financial ramifications of the agreement.⁷⁸ It is inconsistent with the Act to agree on these issues only after the legal practitioner has already commenced acting on a contingency fee basis, and after disbursements have already been incurred.⁷⁹

The court also pointed out that section 3(3)(h) makes provision for a 14 day cooling-off period during which the client is entitled to withdraw from the agreement.⁸⁰ To enable the client to exercise this right, he or she must be informed thereof by using the prescribed form of agreement which expressly refers to section 3(3)(h).⁸¹ It was held that to do so “only after the legal practitioner has commenced acting on a contingency basis, and shortly before the trial . . . would render the cooling-off provision nugatory and ineffectual”.⁸²

71 *Idem* [12].

72 *Idem* [13].

73 *Idem* [15].

74 *Ibid.*

75 *Idem* [16].

76 *Idem* [17].

77 *Idem* [18].

78 *Idem* [19].

79 *Ibid.*

80 *Idem* [20].

81 *Ibid.*

82 *Ibid.*

It was held further that the legislature “undoubtedly” intended that non-compliance with the Act should result in nullity of the agreement.⁸³ Regarding this aspect, the court expressed itself in the following terms:

“Although the Act does not state in express terms that a failure to fulfil the statutory requirements will render the contingency fee agreement null and void, there are clear indications that this was indeed the legislature’s intention. The primary object of the Act was to legitimise contingency fee agreements which were otherwise prohibited by the common law. The purpose was also to encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts but subject to strict control so as to minimise the disadvantages inherent in the contingency fee system and to guard against its abuse . . . The safeguards introduced to prevent such abuses include ss 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would undoubtedly have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions.”⁸⁴

As a further indicator of the legislature’s intention in this regard, the court also referred to the fact that sections 2 and 3 are formulated in peremptory terms due to the liberal use of the word “shall”.⁸⁵ The court expressed the view that it is unlikely that the provisions of section 3 were complied with, or that compliance was even possible at such an advanced stage of the proceedings.⁸⁶ It was accordingly held that although the new agreements were “formally in order” as the prescribed form of agreement had been used, they were “substantially invalid” since the parties had not complied with the prescriptions of the Act.⁸⁷

Despite the consistency of all the judicial ink spilled since *Price Waterhouse*, the debate regarding the validity of common law contingency fee agreements continues. However, two recent full-bench decisions of the North and South Gauteng High Court in *De La Guerre v Bobroff & Partners Inc*⁸⁸ and *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)*⁸⁹ respectively appear to put the matter to rest. In both cases, it was again held that contingency fee agreements were unlawful at common law and that such agreements must comply with the Contingency Fees Act in order to be valid.⁹⁰ For present purposes, the judgment in *De La Guerre* is of particular interest. In this case, the applicant had concluded a “percentage contingency fee agreement” with her attorney (B), in terms of which B purported to charge her a fixed 30% plus VAT of the total amount recovered from the RAF in a claim for damages. The applicant was subsequently advised that this agreement was in contravention of the Contingency Fees Act, whereupon she launched an application seeking, *inter alia*, that the contingency fee agreement be declared invalid, void and of no force

83 *Idem* [21].

84 *Ibid.*

85 *Idem* [22].

86 *Idem* [23].

87 *Idem* [24].

88 (Fn 4).

89 2013 2 SA 583 (GSJ).

90 *De La Guerre v Bobroff & Partners Inc* (fn 4) [14] and *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 SA 583 (GSJ) [26]–[27] [34].

or effect, and an order that B pay her the difference between what she was in fact charged and the fee that B was lawfully entitled to charge on taxation.

The court cited the oft quoted *dictum* in *Price Waterhouse* and concluded that contingency fee agreements were unlawful at common law and that the common law only permitted a legal practitioner to claim a reasonable fee for work actually done.⁹¹ In disposing of the argument that the *Price Waterhouse dictum* was *obiter*, the learned judge held that the SCA was dealing with the validity of champertous agreements⁹² in general, of which contingency fee agreements are a species.⁹³ According to the court, the *dictum* was therefore central to the reasoning by which the SCA's decision was reached.⁹⁴ The application was accordingly granted.

Any lingering doubts about the validity of common law contingency fee agreements were finally put to rest by the Constitutional Court in *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*.⁹⁵ There is accordingly no room whatsoever for the argument that a contingency fee agreement need not comply with the Act, or that there is such a thing as a "common law" contingency fee agreement which can be validly concluded as an alternative to the statutory agreement.

It is therefore clear that a contingency fee agreement must comply with the requirements of the Act in order to be valid. These requirements, as supplemented by case law, are as follows:

- (a) The agreement may not provide for a fee that exceeds either double the practitioner's normal fee or, in the case of claims sounding in money, 25% of the amount awarded,⁹⁶ whichever is the lesser.⁹⁷ Furthermore, the "normal fee" is limited to the reasonable fee that may be charged, as determined by reference to taxation on an attorney-and-own-client scale.⁹⁸ Accordingly, such normal fee may not itself amount to over-reaching.⁹⁹
- (b) The contingency fee agreement must be in writing and in the prescribed form.¹⁰⁰
- (c) The agreement must be signed by the client, the attorney and, where applicable, must be counter-signed by the advocate who thereby becomes a party to the agreement.¹⁰¹
- (d) A copy of the agreement must be delivered to the client on the date of signature.¹⁰²

91 *De La Guerre v Bobroff & Partners Inc* (fn 4) [13].

92 See fn 45.

93 *Idem* [12].

94 *Ibid.*

95 CCT123/13 [2014] ZACC 2 (20 February 2014).

96 Act 66 of 1997, s 2.

97 *Thulo v Road Accident Fund* 2011 5 SA 446 (GSJ) [52]; *Mofokeng v Road Accident Fund and three similar cases* (fn 43) [48].

98 Act 66 of 1997, s 1(iv).

99 *Thulo v Road Accident Fund* 2011 5 SA 446 (GSJ) [55].

100 Act 66 of 1997, s 3(1)(a).

101 S 3(2); see also *Mofokeng v Road Accident Fund and three similar cases* (fn 43) [37].

102 *Idem* s 3(4); *Mofokeng v Road Accident Fund and three similar cases* (fn 43) [39].

- (e) The agreement must contain all the matters set out in section 3(3)(a)–(i) of the CFA Act.¹⁰³
- (f) In order to ensure compliance with the above, the contingency fee agreement must be concluded at a “sufficiently early stage of the proceedings”.¹⁰⁴

3 IMPLICATIONS OF JUDICIAL PRECEDENT REGARDING THE VALIDITY OF COMMON LAW CONTINGENCY FEE AGREEMENTS

It should be evident that the legal and socio-economic implications for legal practitioners and the legal profession at large, of judicial precedent on the validity of common law contingency fee agreements, are potentially far-reaching indeed. Firstly, a finding that a contingency fee agreement in a particular case is invalid for failure to comply with the Contingency Fees Act means that the common law will apply.¹⁰⁵ In terms of the common law, the legal practitioner concerned will only be entitled to a reasonable fee for work actually performed.¹⁰⁶ The reasonableness of the fee is determined by reference to taxation of a bill of costs.¹⁰⁷ The client also has a claim against the legal practitioner for payment of the difference between what he charged under the invalid contingency fee agreement and what he was entitled to charge on taxation.¹⁰⁸ This means that legal practitioners who act largely on a contingency fee basis and who have up till now not complied with the Act, could find themselves confronted with multiple claims by former clients.¹⁰⁹

In such litigation there is, furthermore, the prospect of adverse costs orders against the legal practitioner concerned. In *De La Guerre* the court ordered B to pay costs on an attorney and own-client scale. In this regard, it was held that it was “blatantly obvious” that the agreement *in casu* was in contravention of the Act.¹¹⁰ It must also have been clear to B, *a seasoned practitioner possessing expertise in personal injury claims*, that the overwhelming weight of authority supports the view that failure to comply with the Contingency Fees Act results in invalidity of a contingency fee agreement, and could also give rise to disciplinary proceedings for unprofessional conduct.¹¹¹ It was accordingly held that the “applicant is entitled to a punitive cost order which would in turn express the strong disapproval of this court with the First Respondent’s conduct in these proceedings”.¹¹²

103 *Idem* [38].

104 *Tjatji v Road Accident Fund* 2013 2 SA 632 (GSJ) [15].

105 *Idem* [26].

106 *Ibid*; *De La Guerre v Bobroff & Partners Inc* (fn 4) [13]; *President of the Republic of South Africa v Gauteng Lions Rugby Union* [2001] ZACC 5, 2002 2 SA 64 (CC), 2002 1 BCLR 1 (CC) and *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC* [2010] ZACC 1, 2010 5 SA 124 (CC), 2010 5 BCLR 451 (CC).

107 *Tjatji v Road Accident Fund* 2013 2 SA 632 (GSJ) [26].

108 *De La Guerre v Bobroff & Partners Inc* (fn 4).

109 Edward Nathan Sonnenbergs “Discovery Holdings and Ronald Bobroff & Partners” Creamer Media (Pty) Ltd 29 October 2012 <http://bit.ly/1AAP0OK> (accessed on 8 December 2013).

110 *De La Guerre v Bobroff & Partners Inc* (fn 4). [16].

111 *Ibid*.

112 *Ibid*.

The magnitude of these consequences is amplified in the context of RAF claims, where personal injury specialists act primarily on contingency¹¹³ and where billions of Rands in public funds¹¹⁴ are paid out annually to compensate victims of road accidents.¹¹⁵ The RAF reported in its 2013 Annual Report that a total of R11.3 billion was paid in compensation to victims of road accidents.¹¹⁶ The report further estimates that contingency fees amounted to 50% of the compensation paid out to such victims, meaning that legal practitioners claimed approximately R5.7 billion in contingency fees in the financial year ending 31 March 2013.¹¹⁷ However, the factual basis for this estimation does not emerge from the report and it is submitted that the estimation of 50% may, in fact, be misleading. Nevertheless, assuming contingency fees are estimated at only 30% of compensation pay-outs, this still suggests over-reaching on a large scale. This state of affairs appears to be at least one of the reasons behind proposals to shift from a fault-based system of compensation to a no fault-based system.¹¹⁸ One of the intended consequences of such a shift is the reduction of legal costs to claimants by eliminating or, at least reducing, the need for participation of attorneys in claims against the RAF.¹¹⁹ Introducing a regime in terms of which claimants would not have to prove fault could conceivably result in the creation of a purely administrative process,¹²⁰ rather than a judicial process involving lengthy trials on complex issues of fault.

Our courts have stated clearly that legal practitioners who conclude contingency fee agreements that do not comply with the Act, expose themselves to disciplinary proceedings for unprofessional conduct.¹²¹ In *Graham v Law Society of the Northern Provinces*¹²² the court ordered the LSNP to resume a disciplinary inquiry which had been instituted against the attorneys who had represented the first and second applicants in a claim against the RAF. The claim against the RAF was settled in the amount of R1 979 952,69. An amount of R858 689,05, representing 43%, was deducted from this amount for contingency fees and party-and-party costs. The first applicant then lodged a complaint of over-reaching with the LSNP. The Law Society's Investigating Committee found that there was a *prima facie* case of unprofessional or dishonourable or unworthy conduct against the attorneys concerned. However, the applicants became disgruntled by the manner in which their complaint was dealt with. They accordingly approached the court, essentially for an order that the disciplinary inquiry take place under court supervision or, alternatively, that the court itself take over and conduct the hearing. The applicants also sought and obtained a postponement of

113 *Mofokeng v Road Accident Fund and three similar cases* (fn 43) [2] where this fact was acknowledged as "common knowledge".

114 See s 5 of the Road Accident Fund Act 56 of 1996 which makes provision for the procurement of funds by way of, *inter alia*, a levy on all fuel sold within the Republic.

115 Road Accident Fund *Integrated annual report* (2013) 30–31.

116 *Idem* 31.

117 *Ibid.*

118 *Idem* 89.

119 *Idem* 93.

120 In addition to the proposed introduction of a no fault-based system, the RAF has also launched a campaign to deal with claimants directly.

121 *Mnisi v Road Accident Fund* (37233/09) [201] ZAGPPHC 38 (18 May 2010); *De La Guerre v Bobroff & Partners Inc* (fn 4).

122 (61790/20120 [2014] ZAGPPHC 496 (15 April 2014).

the disciplinary proceedings pending the outcome of this application. The court refused to grant the orders sought and instead ordered, *inter alia*, that the Law Society of the Northern Provinces resume the disciplinary inquiry within 60 calendar days from the date of the order.

The cumulative effect of the above considerations for legal practitioners, the legal profession in general and the public at large, emphasises the need to give effect to the legislature's intention to subject contingency fees to strict control. The question which now arises is whether or not contingency fees are subject to sufficient control.

4 CURRENT REGULATION OF CONTINGENCY FEE AGREEMENTS

As far as could be established, none of the Law Societies has made rules in terms of section 6¹²³ of the Contingency Fees Act specifically dealing with contingency fees.¹²⁴ Furthermore, a perusal of the existing Rules of the various Law Societies¹²⁵ reveals no addition of provisions dealing with contingency fees. The only reference to contingency fees is to be found in rule 18 of the 8th Schedule to the Rules of the Natal Law Society.¹²⁶ Similarly, the Minister of Justice has not made any regulations other than a regulation dealing with determinations in terms of sections 1(vi)(b) and 5 of the Contingency Fees Act, of professional controlling bodies in respect of advocates as well as professional controlling bodies in respect of attorneys who are not members of a professional controlling body.¹²⁷

In *Mofokeng* the court attempted to fill this gap by issuing a practice directive¹²⁸ clearly aimed at enabling the court to ensure compliance with the Contingency Fees Act, after finding that the court has a monitoring role to play with regard to contingency fee agreements.¹²⁹ However, this practice directive is only applicable in the South Gauteng High Court.¹³⁰

It seems that despite the regulatory scheme created by the Act, contingency

123 S 6 of the Contingency Fees Act provided as follows: "Any professional controlling body or, in the absence of such body, the Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1986 (Act No. 107 of 1985), may make such rules as such professional controlling body or the Rules Board may deem necessary in order to give effect to this Act."

124 However, on 21 June 2012 the Law Society of the Northern Provinces and, shortly thereafter, the Law Society of the Free State, made rulings allowing their members to conclude so-called common law contingency fee agreements. See *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 SA 583 (GNP) [3] in this regard.

125 See the Rules of the Law Societies of the Cape of Good Hope, Natal, the Free State and the Northern Provinces.

126 The Rule provides that: "A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a Court as to its reasonableness."

127 GN R546 in *GG* 20009 of 23 April 1999.

128 *Mofokeng v Road Accident Fund and three similar matters* (fn 43) [63].

129 *Idem* [42].

130 *Idem* [63].

fee agreements have been largely immune to effective monitoring in South Africa. This is confirmed, to some extent, by the correlation between the figures in the RAF 2013 Annual Report and the comparatively few cases where non-compliance with the Act has been brought to the fore since the commencement of the Contingency Fees Act more than a decade ago, on 23 April 1999.¹³¹ This highlights how easy it has been for contingency fee agreements to escape scrutiny in the absence of strict control. This, together with the legal and socio-economic implications of judicial precedent regarding the validity of so-called common law contingency fee agreements, further demonstrates the need for more effective monitoring and enforcement.

5 TIME FOR MORE EFFECTIVE MONITORING AND ENFORCEMENT

It should be stated at the outset that the call for more effective monitoring and enforcement is neither aimed at curbing litigation on a contingency fee basis, nor should it be. The purpose of the Contingency Fees Act is to encourage legal practitioners to enter into speculative litigation on behalf of their clients, in order to increase access to justice, but subject to strict control.¹³² The RAF and the medical fraternity have lamented the excessively high percentage of compensation that is swallowed up in contingency fees, exacerbating the plight of injured plaintiffs.¹³³ Such criticism is justified to the extent that it relates to contingency fees that exceed the fee limits allowed by the Act, but only to that extent. The medical fraternity has also criticised contingency fees as being partly responsible for the increase in medical malpractice litigation as well as an increase in the monetary value of claims.¹³⁴ If litigation on contingency fee basis has indeed increased in certain areas, then the Act has achieved its purpose. Monitoring and enforcement should, therefore, be seen only as a means of effecting stricter control in order to prevent the abuse of contingency fees, and not limit their use.

Some may argue that the call for stricter control of contingency fees is unnecessary and that non-compliance with the Act can be remedied effectively by the courts on a case-by-case basis. However, the reality is that the majority of clients are unaware of the limits set by the Act and their rights thereunder. Moreover, due to the generally high cost of legal services,¹³⁵ many clients do not even know

131 Proc R48 in *GG* 20009 of 23 April 1999.

132 SALC *Twenty-fourth annual report* (1996) 29. See also *Price Waterhouse Coopers Inc v National Potato Co-op Ltd* 2004 6 SA 66 (SCA) [40]; *Mofokeng v Road Accident Fund and three similar matters* (2009/22649) [2012] ZAGPJHC 150 (22 August) [33]–[34]; *De La Guerre v Bobroff & Partners Inc* (fn 4) [11]; *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 SA 583 (GNP) [20]–[21].

133 Road Accident Fund *Integrated annual report* (2013 80); Sperryn “Review of 2011” 2011 *SA J of Radiology* 3–4.

134 Sperryn (fn 133); Michell (fn 15); Seggie (fn 15); Hinson and Hubbard “Access to justice in Namibia: Proposals for improving public access to courts. Costs and contingency fees. Paper no 3 39 Legal Assistance Centre 2012.

135 Roger “High Fees and Questionable Practices” *Advocate: Forum Ethics* 40–42, April 2012 <http://bit.ly/1DCKJy0> (accessed on 3 November 2014); De Broglio Attorneys “Why legal fees are high” <http://bit.ly/1DCKMdd> (accessed on 3 November 2014); Oriani-Ambrosini “Bring South Africa’s lawyers in line with modern world” *Business Day Live* 2 April 2013 <http://bit.ly/1vTa6pL> (accessed on 3 November 2014).

when they are being overcharged and whether they have a valid complaint against the practitioner concerned. In fact, it is reasonable to assume that the applicants in *De La Guerre* and in *Graham* would never have taken action had they not been subsequently advised that the respective contingency fee agreements did not comply with the Contingency Fees Act and that they had been over-reached. It is submitted that the courts have not always been consistent in their approach to unlawful contingency fee agreements. In *Mnisi* the attorney's conduct was referred to the law society for investigation despite the fact that the court was only prepared to form a *prima facie* view as to the validity of the agreement. Conversely, in *De La Guerra* the court took note of what was said in *Mnisi*, but surprisingly made no order to this effect, despite making an unequivocal finding that the agreement in question was invalid.

There is further justification for stricter control of contingency fee agreements. It has been argued that currently, the legal profession is faced with an ethical crisis.¹³⁶ The abuse of contingency fee agreements is but one manifestation of this. The controversy surrounding the validity of so-called common law contingency fee agreements, and the fees being charged by some attorneys in terms of these agreements, has attracted unflattering media attention.¹³⁷ Stricter control of contingency fee agreements is imperative in restoring public confidence in the legal profession.

The mechanism by which stricter control can best be implemented is a matter deserving of urgent debate, particularly in view of the passing into law of the controversial Legal Practice Act. Whether the current Law Societies will survive the Legal Practice Act or whether they will be replaced by the envisaged LPC, the prevailing professional controlling body should look urgently at making binding rules in terms of section 6 of the Contingency Fees Act.¹³⁸ Section 6 also provides that, in the absence of a professional controlling body, the Rules Board for Courts of Law may make such rules it deems necessary to give effect to the Contingency Fees Act.

It is suggested that the practice directive issued in *Mofokeng* should serve as a useful blueprint for such rules. In terms of this practice directive, whenever a matter is settled in which a contingency fee agreement was concluded, the affidavits required by section 4 of the Act must be filed before the court grants an order making the settlement agreement an order of court.¹³⁹ The attorney's affidavit must, in addition to the matters prescribed in section 4(1) and (2) of the Act, confirm that he or she has given the client an explanation of the right of review created by section 5.¹⁴⁰ This fact must also be confirmed by the client's affidavit. The client's affidavit must further confirm that he or she has understood

136 Slabbert "The requirement of being a 'fit and proper' person for the legal profession" 2011 *PER* 209–231.

137 Edward Nathan Sonnenbergs "Discovery Holdings and Ronald Bobroff & Partners" Creamer Media (Pty) Ltd 29 October 2012 <http://bit.ly/1AAP0OK> (accessed on 8 December 2013); Templeton "Bobroff 'has only himself to blame'" *The Citizen* 23 October 2013 <http://bit.ly/1zLHLMU> (accessed on 10 December 2013); Du Preez "Injury lawyers take fees to Con Court" Personal Finance IOL 27 October 2013 <http://bit.ly/1EloRRo> (accessed on 10 December 2013).

138 See fn 123.

139 *Mofokeng v Road Accident Fund and three similar matters* (fn 43) [63.1]–[63.1.1].

140 *Idem* [63.1.4].

the explanation of his or her rights under section 5 and also that he or she is in possession of the name, address and contact details of the relevant professional controlling body.¹⁴¹

Counsel must also confirm that he or she has read the agreement and advise the court whether or not it complies with the Act.¹⁴² The court furthermore, has discretion to call for and examine the contingency fee agreement.¹⁴³ In cases where no contingency fee agreement has been concluded, affidavits confirming that fact must be filed by both the attorney and client.¹⁴⁴ Finally, the above practice directive applies not only when a matter is settled, but also at the end of the trial and whenever a court is required to make an order for payment of capital in favour of the client.¹⁴⁵

6 CONCLUSION

The debate regarding the validity of common law contingency fee agreements has finally been put to rest more than a decade after the enactment of the Contingency Fees Act. It is now beyond dispute that all contingency fee agreements must comply with the statutory requirements of the Act, as supplemented by case law, in order to be valid. Notwithstanding the regulatory scheme created by the Act, it is clear that active participation of all the relevant role-players is essential if effect is to be given to the legislature's intention that contingency fee agreements be strictly controlled. The case law discussed in this article demonstrates that contingency fee agreements are highly susceptible to abuse if not strictly controlled. This is precisely what the legislature sought to prevent. In view of the far-reaching legal and socio-economic consequences of these judgments for agreements that do not comply with the Act, as well as the ethical crisis currently plaguing the legal profession, it is essential that measures be implemented to address the issue. Stricter control of contingency fee agreements is therefore necessary in the interests of the legal profession as well as the public and it is hoped that this article will stimulate urgent debate in this area.

141 *Ibid.*

142 *Idem* [63.1.3.1].

143 *Idem* [63.1.3.2].

144 *Idem* [63.1.2].

145 *Idem* [63.2].