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Rooth & Wessels Inc 012 346 7614

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IN THE NORTH GAUTENG HIGH COURT - PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case No: 57523/2011

In the matter between:

J. E. DE LA GUERRE

Applicant

and

RONALD BOBROFF & PARTNERS INC

1st Respondent

THE LAW SOCIETY OF THE NORTHERN PROVINCES
(Incorporated as the Law Society of the Transvaal)

2nd Respondent

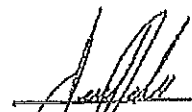
ROAD ACCIDENT FUND

3rd Respondent

FILED NOTICE

DOCUMENT: LAW SOCIETY'S AFFIDAVIT

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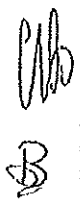


Attorneys for applicant
ROOTH & WESSELS INC

Rooth & Wessels Building
Parc Nouveau
225 Veale Street
Brooklyn
PRETORIA
Ref: Mr A Bloem / SL/B29824

REGISTRAR OF THE HIGH COURT
NORTH GAUTENG PROVINCE
PRETORIA
2011-12-12
L. F. M. DAVIES
REGISTRAR
OFFICE VAN DIE HOOGHOF WAG
1001 JOR PRETORIA

TO: THE REGISTRAR OF THE HIGH COURT
PRETORIA



AND TO: **NORMAN BERGER & PARTNERS INC**
 c/o Geyser van Rooyen
 383 Farenden Street
 Arcadia
 PRETORIA
 (ref Mr Millar/gm.960494)

GEYSER VAN ROOYEN ATTORNEYS
 Accepted without prejudice to clients rights
 Onvrug sonder bevoegdheid van regte.
 Dated: 11/20/11
 11/20/11

Received copy this
 Day of December 2011

AND TO: **RONTGEN & RONTGEN INC**
 Attorneys for first respondent
 13 Stanvrug Street
 Val de Grace
 Pretoria
 (ref K.M Rontgen Snc)

Received copy this
 day of December 2011.

For: 1st respondent

AND TO: **LINDSAY KELLER & PARTNERS**
 Attorneys for third respondent
 c/o Friedland Hart Solomon Nicolson
 Suite 301 Block 4
 Monument Office Park
 79 Steenhok Street
 Monument Park
 Pretoria
 (ref Mr Palmer/hy/303265)

FRIEDLAND HART SOLOMON & NICOLSON Received copy this
 Received without prejudice to com day of December 2011.

10/23/11 15:19:20
 For: 3rd respondent

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IN THE NORTH GAUTENG HIGH COURT - PRETORIA
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JUANNE ELIZE DE LA GUERRE

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2nd Respondent

(Incorporated as the Law Society of the Transvaal)

ROAD ACCIDENT FUND

3rd Respondent

LAW SOCIETY'S AFFIDAVIT

I, the undersigned,

JOHANNES CORNELIS JANSZ VAN RENSBURG

do hereby make oath and say:

1. **THE LAW SOCIETY**

1.1 The Law Society of the Transvaal came into existence by Volksraadbesluit

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1307 dated 19 October 1882 of the Zuid-Afrikaansche Republiek. The body continued in existence by virtue of the Constitution of the Incorporated Law Society of the Transvaal Ordinance No 1 (Private) of 1905 (since repealed) and continued in existence by virtue of the Attorneys, Notaries and Conveyancers Admissions Act, No 23 of 1934 (since repealed) and continues further in existence by virtue of section 56 of the Attorneys' Act No 53 of 1979 (the Attorneys' Act),

Motivated by a desire to recognise the newly named areas of the erstwhile Transvaal Province, namely Gauteng, Mpumalanga, Limpopo and portion of North-West Provinces over which it has jurisdiction, the Council of the Law Society of the Transvaal resolved on 23 February 2001, with effect from 1 March 2001, that the Law Society of the Transvaal henceforth be known as the Law Society of the Northern Provinces incorporated in terms of section 56 of the Attorneys' Act as the Law Society of Transvaal (the Law Society).

- 1.2 I am the President of the Law Society,
- 1.3 I am authorised to depose to this affidavit on behalf of the Law Society.
- 1.4 The contents of this affidavit, where they are within my own knowledge,

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are true and correct. Where the contents are not within my own knowledge, they have been made known to me and I believe in their veracity.

2. The Law Society, the 2nd respondent in this matter, has its offices at Proctorium, 123 Paul Kruger Street, Pretoria.

3. In terms of the Attorneys' Act:

3.1 every attorney, notary and conveyancer duly admitted, enrolled and practising as such in the Gauteng, Mpumalanga, Limpopo Provinces and portions of North West Province is, *ipso facto*, a member of the Law Society;

3.2 the affairs of the Law Society are managed and controlled by a Council, (the Council), consisting of 24 practising attorneys who hold office in terms of the provisions of Part IV of the Rules referred to in paragraph 4 *infra*.

4. The legal interest which the Law Society has in bringing this application flows from the Attorneys' Act and the Rules made under authority of section 74 of the Attorneys' Act (the Rules) and the common law. In

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terms thereof the Law Society is required, and is given the power, *inter alia*

- 4.1 to maintain and enhance the prestige, status and dignity of the profession;
- 4.2 to regulate the exercise of the profession;
- 4.3 to encourage and promote efficiency and responsibility in relation to the profession;
- 4.4 to deal with all matters relating to the interests of the profession and to protect those interests;
- 4.5 to uphold the integrity of practitioners;
- 4.6 to uphold and improve the standards of professional conduct and qualifications of practitioners;
- 4.7 to provide for the effective control of the professional conduct of practitioners;
- 4.8 to promote uniform practice and discipline among practitioners;

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- 4.9 to encourage the study of the law;
- 4.10 to initiate and promote reforms and improvements in any branch of the law, the administration of justice, the practice of the law and in draft legislation;
- 4.11 to represent generally the views of the profession;
- 4.12 in the interest of the profession in the Republic, to co-operate with such other societies or bodies of persons as it may deem fit;
- 4.13 to exercise disciplinary jurisdiction over all practitioners no matter where the conduct which is, or allegedly is, unprofessional or dishonourable or unworthy is perpetrated;
- 4.14 in appropriate cases and in terms of section 22(1)(d) of the Attorneys' Act, to launch an application for the striking off the roll or suspension from practice of a practitioner if the Honourable Court is satisfied that a practitioner is not a fit and proper person to continue to practise as an attorney.



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5. THE PRESENT PROCEEDINGS

5.1 The applicant does not seek any relief against the Law Society in this application.

5.2 By filing this affidavit the Law Society does not signify its opposition to the application, nor does the Law society signify its concurrence with any defences which may be raised by the first respondent. The Law Society will attempt to assist the Court by placing submissions before the Court on the legal proposition fundamental to the applicant's case, namely that a contingency fee agreement which does not strictly comply with the provisions of the Contingency Fees Act, 1997 is void and invalid. As will be demonstrated below the Law Society regards the abovementioned proposition as an overstatement of the law in that there are recognised circumstances at common law where a common law contingency fee agreement is in fact valid.

5.3 On 12 October the Law Society's attorneys advised the attorneys for the applicant that the Law Society does not intend opposing the application. The applicant's attorneys replied on 14 October 2011 by inviting the Law Society to appear at the hearing of the application and to place before the Court any arguments it considered appropriate.

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5.4 I wish to emphasize that, as far as the reasonableness of the fees charged by the first respondent is concerned, the Law Society will not make submissions and it will abide the decision of the above Honourable Court. The first respondent will no doubt place evidence before the Court in order to justify the fee reflected in the agreement.

5.5 The term *common law contingency fee agreement* has in recent times become contentious. It has become apparent that the term does not have a fixed content. For purposes of clarity the Law Society refers to a valid common law contingency fee agreement as an agreement which complies with the three minimum requirements at common law (set out in par 6.1 below) and where the fee is expressed as a percentage of the capital awarded by the Court (subject to the fairness requirement inherent in any fee). This will be explained below.

5.6 The fee agreement concluded between the applicant and the first respondent on 27 November 2005 attached to the founding affidavit as annexure J2, is a common law contingency fee agreement which is alleged by the applicant to be invalid due to non-compliance with the Contingency Fees Act. The Law Society does not dispute that the agreement in question does not comply with the Contingency Fees Act.

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5.7 The applicant contends that, as the said agreement attached as annexure J2 to the founding affidavit does not comply with the Contingency Fees Act, it is illegal, invalid and unenforceable. ¹

5.8 Where clients have a complaint of overreaching they are free and entitled to report such overreaching to the Law Society. The complaint will be dealt with by the Law Society in the normal course. Disciplinary proceedings are routinely dealt with by a disciplinary committee of the Council of the Law Society in terms of Section 67(2) of the Attorneys' Act.

6. THE LAW SOCIETY'S SUBMISSIONS

6.1 On 21 June 2002 the Council of the Law Society made a ruling permitting its members to enter into certain common law contingency fee agreements other than in terms of the provision of the Contingency Fees Act. A copy of an article in the Society News reflecting the aforesaid ruling is attached hereto as annexure 1. A common law contingency fee agreement should meet the following criteria:

6.1.1 It should relate to a genuine case of assisting an impecunious client to

¹ Founding affidavit, par. 20, 21, 22, 23, 29, 33 and 36



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assert his or her rights. Impecunious in this context does not mean totally indigent, but would refer to someone who, due to lack of means, is unable to assert his or her right to relief in our Courts; and

6.1.2 the attorney's remuneration must be fair; and

6.1.3 the agreement must not amount to gambling, speculation or trafficking in litigation.

6.2 The interest of the Law Society in the present application is to advance legal argument pertaining to the validity of common law contingency fee agreements which comply with the abovementioned requirements. Since the interest of the Law Society is limited to the aforesaid issue, the Law Society will not express a view or respond to any of the other averments made by the applicant against the first and third respondents.

7. The Law Society advances the following contentions:

7.1 that the same need expressed by the public and members of the Law Society and which gave rise to the enactment of the Contingency Fees Act continued to be expressed with increasing urgency with regard to the introduction of a simple, easily understood and equitable

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contingency fee agreement, given the perceived unpopularity and impracticality of the agreement provided for in terms of the Contingency Fees Act;

7.2 that consequent upon decades of screening on South African television and cinema circuits of American legal programs depicting various forms of contingency fee litigation, for example Erin Brokovich, A Civil Trial and others the South African public have become exposed to the concept of the simple, fair and workable American Percentage Contingency Fee Agreements. The Law Society has in turn been informed by many of its members that clients request that members enter into such agreements, rather than the complicated agreement provided for in terms of the Contingency Fees Act after the details of the agreement in terms of the aforesaid Contingency Fees Act have been discussed with the clients;

7.3 that given that the majority of victims of all forms of wrongfully caused personal injuries suffer significant financial loss such as to render them unable to afford legal services in the normal way, an acknowledged need has arisen for assistance via common law contingency fee agreements so as to enable such victims to assert their rights to claim damages against the wrongdoer;

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7.4 that the inequality of arms which prevails between the majority of road accident victims on the one hand and large and powerful institutions such as the Road Accident Fund / Insurance Companies on the other hand, speaks to a particular need for personal injury victims to gain access to justice through easily understandable and practical common law contingency fee agreements;

7.5 that the common law recognises circumstances under which a valid common law contingency fee agreement may be concluded. These relate to circumstances which have been dealt with in paragraph 6.1 above;

7.6 that the aforesaid circumstances are in consonance with the constitutional right of persons to have access to the Courts as enshrined in the Constitution;

7.7 alternatively, that if it is held that the common law referred to *supra* does not exist as a matter of right, it will be submitted that the common law needs to be developed in terms of Section 39(2) of the Constitution to incorporate the right to conclude a common law contingency fee agreement in the circumstances envisaged *supra*;

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Fees Act as in many cases this would result in the attorney's fee being negligible in relation to, say, senior counsel's fees;

7.11 that in terms of Section 4 of the Contingency Fees Act where summons has been served, the legal practitioner is obliged to file an onerous and extensive affidavit with regard to any offer of settlement and which is in addition to be accompanied in terms of Section 4(2) by an affidavit from the client. Given that a number of offers are usually made in most personal injury claims sometime during the days preceding the trial and on the day of the trial, this section results in the absurd situation of attorneys and their clients having to make repeated affidavits each time a new offer is made;

7.12 that, given that:

7.12.1 the Contingency Fees Act was promulgated in 1997 and the prescribed agreement in 1999;

7.12.2 the vast majority of Road Accident Fund claims are handled on a contingency basis;

7.12.3 most Road Accident Fund claims are settled prior to reaching trial

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7.12.4 some two hundred thousand claims are lodged against the Road Accident Fund annually, primarily by attorneys and that from 1999 to date in excess of one million claims would have been lodged by attorneys on behalf of their clients;

an irresistible inference must be drawn that attorneys and their clients in Road Accident Fund matters are not utilising the agreements in terms of the Contingency Fees Act to any extent as only one (1) affidavit in terms of Section 4 of the Contingency Fees Act was filed with the Law Society during the first ten years that the Contingency Fee Act has been in force. Some attorneys have submitted copies of agreements concluded between themselves and clients to the Law Society, although it was not necessary to do so as follows: 2001-1, 2005-11, 2006-29, 2007-16, 2008-8, 2009-8, 2010-18 and 2011-21.

7.13 that the Law Society's ruling on common law contingency fee agreements has been followed by at least the Law Society of the Free State and the Black Lawyers Association.

8. During the period 1999 to date the Law Society's records indicate that

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some complaints were received from clients relating to overreaching and some to overcharging. Of these complaints very few related to fees in terms of common law contingency fee agreements.

9.1 In 2008 the Law Society conducted a survey amongst its members. A copy of the Law Society's letter containing the relevant questions and answers are attached hereto as annexure 2.

9.2 The relevant questions and the average response thereto are:

9.2.1 What percentage of plaintiffs in your practice has a need for assistance by means of a common law percentage contingency agreement in order to assert their claims in Court?

Answer 94.94%

9.2.2 In what percentage of cases administered in your practice is a common law percentage contingency fee agreement utilised?

Answer 76.4%

9.2.3 If you utilise common law percentage contingency fee agreements, do

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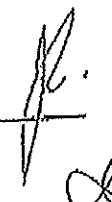
you ascertain the prospects of success before entering into such agreements with client?

Answer: Yes

10.1 In the North Gauteng High Court the introduction of new practice directives with effect from 25 July 2011 has had a considerable impact.

10.2 By virtue thereof the existence or not of a contingency fee agreement needs to be disclosed to Court for purposes of making a settlement agreement an order of Court. The relevant provisions of Practice Rule 6.16 are:

- 1. *Where the parties to a civil trial have entered into a settlement agreement, a judge will only make such settlement agreement an order of court if-*
 - 1.1 *counsel representing all the parties to the trial are present in Court and confirm the signature of their respective clients to the settlement and that their clients want the settlement agreement made an order of court; or*



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1.2 proof to the satisfaction of the presiding judge is provided as to the identity of the person who signed the settlement agreement and that the parties thereto want the settlement made an order of court.

2. Where the parties to a civil trial have settled on the terms set out in a draft order, a judge will only make such draft order an order of court if -

2.1 counsel representing all the parties to the trial are present in court and confirm that the draft order correctly reflects the terms agreed upon; or

2.2 proof to the satisfaction of the presiding judge is provided that the draft order correctly reflects the terms agreed upon.

3. In both 1 and 2 above, if -

3.1 a contingency fee agreement as defined in the Contingency Fees Act, 1997 (the Act) was entered into, the affidavits referred to in

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Section 4 of the Contingency Fees Act must be filed;

3.2 no contingency fee agreement was entered into, affidavits by the legal practitioner and his/her client must be filed confirming such fact.

10.3 The aforesaid practice directives only provide for a fee agreement in terms of the Contingency Fees Act and not for common law contingency fee agreements. As the majority of agreements between attorneys and their clients in third party matters appear to be common law contingency fee agreements, attorneys are faced with an array of practical difficulties in dealing with the matters and finalising them speedily in the best interests of the clients.

11. It is submitted that in the light of the impracticality arising from the Contingency Fees Act and the need for a workable alternative, common law contingency fee agreements may validly be concluded within the stated recognised parameters.

ROOTH & WESSELS
Advocates



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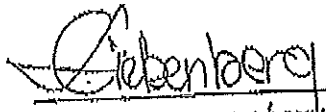
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J C JANSE VAN RENSBURG

I certify that this affidavit was signed and sworn to before me in my capacity as commissioner of oaths at Pretoria on this the 6 day of December 2011 by the deponent who:

- (a) confirmed that he:
 - (i) knows and understands the contents of this affidavit;
 - (ii) has no reservations about making the oath;
 - (iii) considers the oath as binding on his conscience;
- (b) uttered the words "So help me God".



COMMISSIONER OF OATHS

Full names :
 Full address :
 Area :
 Capacity :

CHRISTEL LIEBENBERG
 Kommissaris van Eede / Commissioner of Oaths
 Praktiserende Advokaat / Practising Attorney R.S.A.
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