

COMMON LAW PERCENTAGE CONTINGENCY FEE AGREEMENTS - ROUTINELY AMOUNTING TO BETWEEN 25 - 30% OF DAMAGES RECOVERED WAS THE NORM FOR OVER 70% OF ALL SOUTH AFRICA'S PRACTICING ATTORNEYS FOR SOME TWELVE YEARS.

However and notwithstanding that Katz/Discovery's local panel of attorneys were instructed by Katz to only utilise such agreements, he and his proxies Mr Anthony Millar ([go to gotoutingattorneys.co.za](http://gotoutingattorneys.co.za)) and Mr George van Niekerk of Edward Nathan Cape Town were magically able to "convince" the National Prosecuting Authority, that the use of such agreements suddenly became theft, because a Civil Court held in 2014 that such agreements were invalid.

Of course no such allegation is made in respect of Katz/Discovery's panel attorneys, who on Katz's instructions utilised such agreements, nor the 74% of the Law Society's 16 000 members, who responded to a Law Society survey to the effect that the only agreements they used were common law percentage fee agreements.

Unsurprisingly and given that Millar had become Discovery's proxy in return for Discovery attorneys ENS ensuring that the dozens of touting complaints against Millar at the Law Society, would be quietly shelved in return for Millar attacking RBP's Common Law Percentage Contingency Fee Agreements, and routinely issued vulgar statements to the media and published same on social media, attacking Ronald and Darren, he was coyly silent about attorney Selwyn Pearlman of Fluxmans use of a Common Law Percentage Contingency Fee Agreement in the matter of Levensohns vs Fluxmans in which Millar unsuccessfully attacked Pearlman's agreement with Levensohn, and in which the Appeal Court held that Levensohn's claim against Fluxmans had prescribed, as more than three years had passed from the date of Pearlman's accounting to Levensohn.

CHRONOLOGY AND TIMELINE

1. **28 September 1998** – Judgment by Cameron J in the Headleigh Clinic Case No.28862/97 reported in SALR 2001 (4) SA 360 dealing with an attorney's 25% common-law contingency fee agreement in which the Court held the agreement to be valid. Significantly this judgement was delivered AFTER the promulgation of the Contingency Fees Act 66 of 1997, attached hereto as Annexure "RBA1".

[Annexure "RBA1" Headleigh Private Hospital - click here to read](#)

Following on widespread screening of American Trial Movies throughout South Africa featuring the American system of one third percentage

contingency fees, Plaintiff Attorneys are inundated by requests from clients to contract on that basis, and enquiries thereafter directed to the LSNP which resolves to investigate South African Law on the issue.

2. **30 May 2002** – The Law Society of the Northern Provinces obtains an Opinion from Advocate Labuschagne SC which expresses the view that common-law contingency fee agreements are valid and can co-exist with the Contingency Fees Act, such Act not in any way specifically prohibiting common-law agreements, attached as Annexure **"RB2A"**.

[Annexure RB2A Opinion by Advocate Labuschagne SC - Click here to read](#)

3. **August 2002** – Law Society of the Northern Provinces regulating more than 60% of Attorneys in Practice, issues a ruling enthusiastically permitting its members to enter into common-law percentage fee agreements. The ruling authored by Councillor and Court Practice Committee Chair, C P Fourie, refers to 25% as the effective norm, and enthusiastically remarks "A step forward? For sure!", attached as Annexure **"RBA3"**.

[Annexure RBA3 - Contingency Fee Agreements ruling by LSNP - Click here to read](#)

4. **October 2003** – The Law Society of the Northern Provinces issues a further confirmation of its earlier ruling in which it notes that "It is now more than a year since the Law Society of the Northern Provinces gave the green light to its members to enter into common law contingency fee agreements with their clients. The feedback is that it was well received and that, by and large, it works well". Again 25% is effectively referred to as the norm, given that such percentage is specified in the Contingency Fees Act 66 of 1997, attached as Annexure **"RBA4"**.

[Annexure RBA4 Common Law Contingency Fee Agreements further confirmation of ruling by LSNP - Click here to read](#)

5. The ruling by the Law Society of the Northern Provinces is adopted and supported by the Free State Law Society.

6. The rulings by the two Law Societies is adopted and supported by the Black Lawyers Association, bringing the number of attorneys officially permitted and encourage to utilise such agreements up to some 70% of the profession.

7. Feedback by Natal members of the South African Personal Injury Lawyers (SAAPIL) was that the use of such agreements was universal amongst all Plaintiff Personal Injury attorneys.

8. **1 June 2004** – Price Waterhouse Case – 448/2003)[2004]ZASCA 64;[2004] 3 All SA (SCA) (1 June 2004).

The Supreme Court of Appeal decides that the decade's long prohibition against maintenance and champerty i.e. prohibiting litigation funders from receiving a share of the proceeds of litigation, is no longer a part of South Africa's common-law. Therefore it is lawful and valid for lay persons to receive a percentage of the damages recovered in actions funded by them. In that case the percentage contracted was for 45% of the millions eventually recovered from Price Waterhouse. A by the way remark, referred to by Lawyers as "obiter", was made by one Judge to the effect that Attorneys would not be permitted to do that which the Court had now said could be done by unregulated lay persons, a copy attached hereto as Annexure "**RBA5**".

[Annexure RBA5 - Price Waterhouse Case - Summary Click here to read](#)

8.1 The Law Society of the Northern Provinces obtains opinions from three senior advocates, all of whom agreed that the statement by the one Judge was "obiter". i.e. by the way, and not to be regarded as a binding ruling by the Court. Many Lawyers interpreted the Court's decision as developing South Africa's common-law so as to enhance the Public's access to the Courts. It was believed that it would be discriminatory and inconsistent, for attorneys, who are tightly regulated by the Law Societies, not to be permitted to do that which the Court had stated could be done by completely unregulated lay persons.

8.2 As the Contingency Fees Act did not anywhere state that Attorneys could not represent clients on a no win – no fee basis, otherwise than in terms of the Act, it was the opinion of Advocate Labuschagne SC on behalf of the LSNP and subsequently Advocates M Brassey SC and Hopkins, in the de la Guerre and SAAPIL matters, that common-law contingency fee agreements could validly exist side by side with the Contingency Fees Act.

9. **2005** – The Law Society of the Northern Provinces informs its members that after taking opinions from senior advocates on the Price Waterhouse obiter – by the way remark of the Judge, the advocates and the Law Society remain of the opinion that common-law percentage contingency fees are permissible and valid. Again 25% is referred to as the norm.

10. On **23 September 2008**, and after Millar had attacked his colleague, Attorney Deon Goldschmidt's Law Society compliant common-law contingency fee agreement, the then President of the LSNP filed an affidavit expressing the Council's strong support for such agreements, which was essentially the same as the 27 page one filed in the de la Guerre matter, attached hereto as Annexure "**RBA6**".

[**Annexure RBA6 - Affidavit J C Janse van Rensburg - Click here to read**](#)

11. **August 2010** – Highly respected Supreme Court of Appeal Judge Malcolm Wallis, presented a paper at an international conference on legal costs. He had the following to say concerning fee litigation in South Africa:

“Contingency fee agreements have been relatively successful in South Africa in making personal injury litigation available to even the very poor in our community. Whilst we have a statute that regulates this topic it is badly drafted and generally ignored by the attorneys who act on a contingency. In practical terms these attorneys conduct litigation on a ‘no win-no fee’ basis where, at the successful conclusion of a case, they will tax a conventional bill of costs (which covers a fair proportion, but not all, of their disbursements) and charge over and above that, a proportion, usually 25% though sometimes less with small claims, of the damages recovered. The latter fee is not recoverable from the other side. Whilst there are occasional complaints of over-reaching in these arrangements by and large they appear to work well and people are willing to sacrifice part of their damages in return for making some recovery”.

“Lastly if something can be done to break the near universal reliance on charging by time, particularly by attorneys, but increasingly by counsel, that would be a good thing. Our courts have bemoaned it as a basis for charging fees; describing it as putting a premium on slowness and inefficiency”.

The Judges paper is attached with the relevant portions marked and attached hereto as “**RBA7**”.

[**Annexure "RBA7" Paper by Malcom Wallis - Click here to read**](#)

12. It was stated in the de la Guerre judgment, inexplicably the court state that as a seasoned practitioner Ronald should have been aware of what he referred to as the “numerous authorities holding common law contingency fees to be invalid, and further that Ronald should have been aware of the letter written by the Judge President to the Natal Law Society in which he expressed his disapproval.

12.1 However such comment with respect was wholly incorrect and inappropriate, and quite clearly so imminent a lawyer as Supreme Court Judge Malcolm Wallis was also clearly unaware. He was also clearly unaware of any letter from the Judge President to the Natal Law Society, as referred to, or regarded it as irrelevant almost a decade later.

12.2 Had he been aware of such authority, he would surely have mentioned this in his paper, which was thereafter published the following year in the professional journal "The Advocate".

Again one presumes that had the publishers of the Advocate's Journal or the editor thereof, been aware as at August 2011 of any South African Case Law holding common-law contingency fee agreements to be invalid or unlawful, the editor would have placed a note at the commencement of the article or at the end, indicating that since the learned Judge had presented his paper, there had been such a decision.

13. In the LSSA's (Law Society of South Africa) annual report March 2011 at page 28 thereof, Mr Clem Druker, Chairperson of the LSSA's Contingency Fees Committee, and also at the time a serving member of the Council of the Cape Law Society, announced on behalf of the Cape Law Society that:

"Given the fact that the Cape Law Society Council is now prepared, in principle, to side with all the other bodies which recognize common-law contingency fees..." attached hereto as Annexure **"RBA8"**.

[**Annexure RBA8 Law Society South Africa Annual Report March 2011 - Clem Druker announces.. Click here to read**](#)

13.1 Significantly, Discovery's attorney, Mr George van Niekerk, who has consistently severely criticized RBP, and by implication of the Councils of the LSNP and Free State Law Societies, as also the Black Lawyers Association who had consistently promoted and supported common-law percentage contingency agreements, as also every one of the many thousands of attorneys who utilized common-law contingency fee agreements and on Cape Councillor and/or on its committee.

14. In **November 2011** LSNP President, Mr Tony Thobane, an oft acting Judge of the High Court, had the following to say concerning common-law contingency fee agreements in his President's report:

"We plan to do everything in our power to ensure that when issues around the common law fee agreements are litigated upon, the interests of our members are protected, intertwined with the interests of our members, are the interests of the public for whom the common law fee agreements provide access to justice. The cause is worth fighting for and neither effort nor resource will be spared". Attached as Annexure **"RBA9"**.

[**Annexure RBA9 - President Tony Thobane comments concerning Common Law Contingency Fee Agreements - Click here to read**](#)

15. On the **6 December 2011**, Law Society of the Northern Provinces President, Mr Johannes van Rensburg, deposed to an affidavit filed in court in the de la Guerre matter, in which inter alia had the following to say concerning common-law contingency fee agreements as attached in annexure "**RBA6**".

[Annexure RBA6 LSNP Affidavit J C Janse van Rensburg - Click here to read](#)

"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 provisions of the contingency Fees Act".

"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".

The Law Society advances the following contentions:

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

15.2 that consequent upon decades of screening on South African televisions and cinema circuits of American programs depicting various forms of contingency fee litigation, for example Erin Brokovitch, 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;

15.3 that given that the majority of victims of all forms of wrongfully caused personal injuries, suffer 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;

15.4 that the inequality of arms which prevails between the majority of road accident victims on the one hand and the 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;

15.5 That the common law recognises circumstances under which a valid common law contingency fee agreement may be concluded;

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

15.7 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;

15.8 That the Contingency Fees Act, whilst constituting an admirable attempt at providing access to justice by litigants unable to afford the normal costs of litigation, has unfortunately by virtue of its impractical and unworkable provisions not been utilised by the attorneys' profession to any significant extent;

15.9 The wording of the Contingency Fees Act is ambiguous and problematic. A straight percentage fee is not provided for, but rather a complicated formula in which the attorney is initially required to stipulate a so-called normal fee. In terms of Rule 80 of the Law Society's Rules an attorney's normal fee is subject to a whole variety of parameters and this provision in itself would no doubt give rise to endless disputes in the context of a contingency fee agreement;

15.10 That the normal fee is then to be doubled upon a successful conclusion of a matter, but the total of the success fee is not to exceed 25% of the monetary result obtained. Whereas it was always understood that the 25% maximum referred only to the attorney's fee, it was recently held in the matter of RMA van der Merwe v Mariette Geldenhuys, Case No.36216/06 (WLD) that counsel's fees are also to be included under the 25% cap. This demonstrates the unworkability of the Contingency Fees Act as in many cases this would result in the attorney's fee being negligible in relation, to say senior counsel's fees;

15.11 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, some times 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;

15.12 That given that;

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

15.12.2 the vast majority of RAF claims are handled on a contingency basis;

15.12.3 most RAF claims are settled prior to reaching trial stage;

15.12.4 some two hundred thousand claims are lodged against the RAF 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 clients;

An irresistible inference must be drawn that attorneys and their clients in RAF 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 Fees 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, 2005-29, 2007-15, 2008-8, 2010-18 and 2011-21;

*(i.e. a reasonable inference is that at least 1 million RAF claims were handled by attorneys who charged at least a 25% common law contingency fee).

15.13 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;

16. During the period 1999 to date the Law Society's records indicate that some complaints were received from clients relating to overreaching and some overcharging. Of these complaints very few related to fees in terms of common law contingency fee agreements.

16.1 In 2000 the Law Society conducted survey amongst its members. A copy of the Law Society's letter containing the relevant questions and answers are attached hereto as Annexure "RBA10".

[Annexure "RBA10" Law Society Member Survey - Click here to read](#)

16.2 The relevant questions and the average response thereto are:

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

Answer : 94.94%

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

Answer : 76.4%

16.2.3 If you utilise common law percentage contingency fee agreements, do you ascertain the prospects of success before entering into such agreements with client?

Answer : Yes

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

17.1 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 interest of the clients.

17.2 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”.

18. On the **20 February 2014**, the Constitutional Court, delivering judgment in an appeal against the decision of the North Gauteng High Court which had held in the de la Guerre and SAAPIL matters that common-law contingency to be invalid, stated as follows and is hereto attached as Annexure **“RBA11”**;

[Annexure RBA11 - Constitutional Court Judgment in the de la Guerre and SAAPIL matter - Click here to read](#)

18.1 “uncertainty reigned in the attorneys’ profession about the correct legal position in relation to contingency fees;

18.2 could these fees be charged only under the Act, or also outside its provisions?

18.3 RBP was one of the firms which charged more than allowed for in the Act, as the rules of its professional association allowed”.

19. It is therefore submitted that there can be no proper basis for criticizing or penalizing any attorney for contracting with a client to act on contingency outside the provisions of the Contingency Fees Act, prior to the date on which the Constitutional Court finally ruled on the issue.

20. Certainly it could never be said that members of the LSNP were in any way acting unprofessionally by doing so, or overreaching clients by complying with their Council’s rulings, which were reaffirmed year after year for more than a decade, during which the Council expressed consistent support for common-law contingency fee agreements.

21. Even van Niekerk of ENS Cape Town, the attorney Discovery used throughout its vendetta against Ronald and RBP Inc. in an article published by him in De Rebus – the South African attorneys journal – noted as follows” for many contingency fee agreements have been a matter of contention, and the questionable existence of common law contingency fee agreements after the enactment of the contingency fees act, in particular, has led to much confusion.

22.Indeed van Niekerk is entirely correct in finally acknowledging what he refers to as much confusion but in reality was a situation where the governmental regulatory bodies representing more than 70% of all attorneys practising in South Africa were of the firm opinion that common law fee agreements were valid and permissible, that as recently as February 2011 the Cape Law Society of whose Council van Niekerk was a member resolved to adopt the same approach as the Law Societies of the Northern Provinces and the Law Societies of the Northern Provinces and the Law Societies of the Free State: thereby effectively bringing the percentage of attorneys in South Africa whose governing bodies were of the view that common law contingency fee agreements were valid and permissible to over 90%.

The South African Association of Personal Injury Lawyers (SAAPIL) which at the time comprised of most attorneys throughout South Africa, representing victims of all forms of trauma and medical negligence was made aware from its members throughout South Africa that all forms of personal injury and medical negligence litigation was conducted exclusively by way of common law percentage fee agreements.

23.For anyone to seriously suggest that any attorney who contracted with a client, could in any way be guilty of theft or fraud simply because a civil court held – more than a decade after such fee agreements were permitted, promoted and encouraged by the Law Societies, is absurd, malicious, and wholly at odds with the long established principle ***mens rea*** being an essential element of any common law crime.

It would also have the bizarre result of many thousands of attorneys suddenly becoming thieves and the Councillors of the three law societies which had adopted the view that common law fee agreements were valid, also suddenly becoming accessories to theft.

24.Perhaps the most enlightening of all the Law Society's actions in support of common-law percentage contingency fee agreements, is the content of its letter to the then Deputy Judge President of the North Gauteng High Court on 12 October 2011, attached hereto as Annexure "**RBA12**".

[**Annexure RBA12 Letter from the Law Society to the then Deputy Judge President - Click here to read**](#)

24.1 The letter in question attached a proposed model common-law contingency fee agreement, and also noted the following:

24.2 that attorneys could properly charge more than 25% of monies recovered subject to the guidelines set out in such letter, specifically, "For example although no minimum or maximum percentage is prescribed and given that attorneys and their clients are free to negotiate a contract in the same way as any other contract between competent parties, we indicated to our members that should the 25% cap referred to in the Act, be exceeded, it will have to be justified, having regard to the various aspects which will have to be considered. This will inter alia include the complexity of the matter, the overhead cost structure of the firm, the extent of the disbursements to be covered by the attorney, the anticipated period that the attorney would have to carry such disbursements to be covered by the attorney, the anticipated period that the attorney would have to carry such disbursements and wait for payment of fees, as well as other criteria such as those referred to in Rule 80 of the Law Society's rules".

A copy of the letter referred to above is attached in the above annexure **"RBA12"**.

25. With regard to the Price Waterhouse Case, all three Counsel from the Law Society secured opinions were ad idem that Southwood J's remarks were obiter. The Law Society chose to rely on the opinion of Labuschagne SC. Further it appears that Southwood J may have had second thoughts if one has regard to his statements in the Mnisi case as commented on in a paper by Professor Magda Slabbert – "The Judicial Approach to Contingency Fee Agreements" published in 2013 (78)(THRHR). The author considers and refers to the obiter by Southwood AJA in the Price Waterhouse Coopers Case, where the learned judge adopted a very firm approach in stating inter alia that:
"Any Contingency Fee agreement between such parties which is not covered by the Act is therefore illegal" Attached as Annexure **"RBA13"**.

[Annexure RBA13 The Judicial Approach to Contingency Fees - A paper by Professor Magda Slabbert - Click here to read](#)

She however notes that when the learned Judge had occasion to consider an agreement between Attorney Mnisi and his client, which was clearly not in compliance with the Contingency Fees Act and was essentially a common law contingency fee agreement, the honourable judge did not hold the agreement invalid, but as stated by the Author " Regarding the terms of the contingency fees agreement, it is respectfully submitted that Southwood J appeared somewhat ambivalent in his finding 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 judges earlier dictum, to which he made reference, in the Price Waterhouse Case that any 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 for a prima facie view that the contingency fee agreement was invalid, despite stating that it was “clearly not covered by the Act”. 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 Mnisi’s failure to file the affidavit prescribed by section 4 of the Act”.