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ATT: MR RONALD BOBROFF

OPINION

1. I have been provided *inter alia* with the following documentation:

   1.1. A fee agreement (the "the DLG Agreement") entered into between J De la Guerre and his attorneys.

   1.2. An undated, blank fee agreement ("the Blank Agreement") which I am instructed is an amended and later version of the fee agreement signed by De la Guerre.

2. I have been asked to comment on whether either of the fee agreements comply with the Contingency Fees Act, 66 of 1997 ("the Act").

THE LEGAL POSITION IN RESPECT OF CONTINGENCY FEE AGREEMENTS

3. It is now settled law that the Act exclusively governs contingency fees agreements.

4. The Act defines a contingency fees agreement as "any agreement referred to in section 2(1)".

5. In PRICE WATERHOUSE COOPERS INC AND OTHERS v NATIONAL POTATO CO-OPERATIVE LTD 2004 (6) SA 66 (SCA) the court had this to say of Section 2(1):

"The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a 'no win, no fees' agreement (s 2(1)(a)) and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)). The Act has detailed requirements for the agreement (s 3), the procedure to be followed when a matter is settled (s 4) and gives the client a right of review (s 5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s 6) and the Minister of F Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The 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. What is of significance, however, is that by permitting 'no win, no fees' agreements, the Legislature has made speculative litigation possible. And by permitting increased fee agreements the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action."

6. It may therefore be said that the SCA has determined that:

6.1. Two types of contingency fee agreement exist:

6.1.1. those recognised in section 2(1)(a) where an attorney charges his usual fee in the event of success and no fee in the event of failure - the court *supra* characterised these as “no win, no fee agreements” that make speculative litigation possible but do not provide for a higher fee in the event of a successful outcome;

6.1.2. those recognised in section 2(1)(b) where a claim sounds in money and an attorney charges a success fee as determined by section 2(2) (i.e. double his usual fee or 25% of the amount awarded (whichever is the lesser) – the court *supra* characterised this second type as “higher fee” agreements.

7. It must be noted that in order to be valid a fee agreement to be valid it must fully comply with those limitations and validity requirements contained in the Act and which are applicable to it.

The Limitations

8. These are to be found in Section 2.2 which specifically limits the charging of higher fees. Briefly put, higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or obtained in consequence of the proceedings, excluding costs.

9. The above limitations obviously only apply when a higher fee is charged, i.e only to fee agreements in terms of section 2(1)(b).

Validity Requirements

10. For an agreement to be valid it must comply with section 3 and in particular must:

    10.1. be in the required form; and

    10.2. must also contain the provisions stipulated in sub-section 3.3.

11. It is important to note that section 3 specifically refers to "a contingency fees agreement" and, as noted, this is defined in the Act as *"any agreement in terms of section 2(1)*".

12. As section 2(1) includes fee agreements in terms of both sections 2(1)(a) and 2(1)(b) all fee agreements must comply with section 3. Had the legislature intended application to be only in respect of section 2(1)(b) they would have said so.

VALIDITY OF THE FEE AGREEMENTS IN QUESTION

Form and content of the agreements

13. The DLG Fee Agreement is headed "NO WIN, NO FEE BASIS". It then proceeds to set out how the attorney's fees will be calculated and how they will escalate over time. It also deals with matters such as the termination of the agreement, the address for service of documents and several other "boilerplate" provisions.

14. The Blank Agreement is largely the same but no longer contains the words "no win, no fee agreement". Instead it contains a new paragraph 11 stating:

*"All fees and disbursements herein will be deducted from any award of compensation by the Road Accident Fund before any balance of compensation is paid over to me. <u>If my claim to compensation is unsuccessful no fees or disbursements will be charged to me</u>, but I do emphasise my understanding that I may be liable to pay the Road Accident Fund's party and party costs if my claim is unsuccessful." (*my emphasis*)*

15. Both agreements therefore contemplate the charging of no fee in the event of a loss and normal fees in the event of a win and are therefore both fee agreements in terms of section 2(1)(a) of the Act.

16. As the two fee agreements under consideration are fee agreements in terms of section 29(1)(a) they do not have to comply with the limitations in section 2.2 of the Act and will be valid if they comply with section 3 of the Act, in particular sub-section 3.3.

17. I will now evaluate the extent to which the agreements in question comply with sub-section 3.3

<u>Section 3(3)(a)</u>

A fee agreement must state to what proceedings it relates.

- Both fee agreements comply with this sub-section.

<u>Section 3(3)(b)</u>

This sub-section provides that before the agreement was entered into, the client was advised:

(i) of other ways of financing the litigation and of their respective implications;

- Neither agreement makes reference to the above and consequently do not comply in this respect.

(ii) that in the event of losing, the client may be liable for the successful party's costs;

- Both agreements comply with this provision

(iv) that client understood the meaning and purport of the agreement.

- Both agreements have provisions confirming that the client understands the meaning and purport of various provisions within the fee agreements but neither has a provision confirming understanding of the meaning and purport of the entire agreement. They therefore do not comply with the sub-section

Section 3(3)(c)

The agreement must state what amount would be regarded by the parties as a success and what would be partial success.

- Neither agreement properly defines a success or partial success and therefore do not comply with this provision.

Section 3(3)(d)

The agreement must state under what circumstances a practitioner's fees and disbursements are payable.

- Both agreements comply.

Section 3(3)(e)

The agreement must set out the amount which will be due and the consequences which will follow in the event of partial success in the proceedings and in the event of premature termination of the agreement for any reason.

- Both agreements deal only with the withdrawal of either the attorney or client from the agreement but neither deals with other eventualities and neither addresses the question of partial success. Neither agreement therefore complies with this sub-section.

Section 3(3)(f)

The agreement must set out the amounts payable or method of calculating the amounts payable by the client.

- Both agreements comply with this sub-section.

Section 3(3)(g)

The fee agreement must also state the manner in which disbursements are to be dealt with.

- Both agreements have clauses adequately dealing with this and they comply with the sub-section.

Section 3(3)(h)

The agreement must allow the client a period of 14 days to withdraw from the agreement

- Both agreements allow the client to cancel on 7 days written notice and they therefore comply with the sub-section.

Section 3(3)(i)

The fee agreement must provide for the manner in which any amendments or other ancillary agreements would be dealt with.

- Both agreements have a clause adequately dealing with this and they comply with the sub-section.

CONCLUSION

18. The agreements under consideration are both agreements as contemplated in section 2(1)(a) of the act.

19. As such, the agreement must comply with section 3 of the act in order to be a valid agreement.

20. The agreement has failed to comply with section 3 in the respects set out in paragraph 12 herein-above.

21. Non-compliance with any part of section 3 renders the agreement invalid.

ADV JUSTIN ERASMUS
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