IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA APPEAL CASE NO: 523/2015

FLUXMANS INC Appellant

and

LEVENSON, STEVEN ZULLA Respondent

APPELLANT'S HEADS OF ARGUMENT

Introduction and relevant factual background to the appeal

1. For convenience we refer in these heads of argument to the appellant (respondent in the Court *a quo*) as Fluxmans and to the respondent (applicant in the Court *a quo*) as Levenson.

2. The following facts are either common cause or not disputed by Levenson:

2.1. Fluxmans represented Levenson in the institution and prosecution of an action against the RAF for damages for personal injuries suffered by Levenson in a motor vehicle collision on 8 October 2005.

2.2. At the time of the motor vehicle collision Levenson was employed by a valued client of Fluxmans.[1]

2.3. Mr. Perlman ("Perlman") of Fluxmans agreed to represent Levenson on a contingency fee basis after having been approached by a director of Levenson's employer who told Perlman that all of the attorneys that Levenson had approached had required that Levenson agree to a contingency fee arrangement on the basis that he would pay 25% plus VAT of the amount recovered from the RAF. The director enquired if Fluxmans would be prepared to act for Levenson on more favourable terms than those that had been offered by the other attorneys.[2]

2.4. In good faith and in an effort to assist Levenson, a contingency fee agreement was concluded between Fluxmans and Levenson.[3]

2.5. The contingency agreement that was concluded provided that Fluxmans would charge a contingency fee of 22.5% plus VAT of the damages that Levenson recovered from the RAF.[4] In this regard Levenson says that he signed a written fee agreement confirming that Fluxmans

[1] AA p52 para 13.1-13.2. There is no response to this allegation in the RA.
[2] AA p53 para 13.4-13.5. There is no response to this allegation in the RA.
[3] AA p54 para 13.6. There is no response to this allegation in the RA.
[4] AA p54 para 13.7. There is no response to this allegation in the RA.

would accept instructions from him on a contingency on the basis that he would pay 22.5% plus VAT of the damages recovered for Fluxmans' fees in instituting, prosecuting and finalising his case against the RAF.[5]

2.6. The contingency fee of 22.5% agreed to by Levenson and Fluxmans was less than what Levenson had been offered by other firms of attorneys. It was also less than the contingency fee that Fluxmans would have been permitted to charge in terms of the Contingency Fees Act, 66 of 1997 ("the Act"). In this regard, section 2(2) of the Act provides that: "*Any fees referred to in subsection (1)(b), which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.*"

2.7. Fluxmans successfully prosecuted Levenson's claim against the RAF. The court proceedings were concluded and the case was subsequently settled in terms of an agreement that was made an order of court on 23 May 2008, some 27 months after the first instruction to Fluxmans. The order of court provided for payment to Levenson of R4 862 56, 40 together

[5] FA p7 paras 7-8.

with an undertaking for future medical and hospital expenses and party and party costs.[6]

2.8. Prior to receiving a statement of account, a meeting was held between Levenson and Perlman of Fluxmans. After this meeting Levenson addressed a letter to Fluxmans on 22 June 2008.[7] In this letter Levenson confirmed that he was aware when signing the letter of engagement that Fluxman's would earn a fee of 22.5% of any settlement. Levenson also referred in the letter to a request by him to Perlman for a reduction in Fluxman's fee, which request he made at that meeting.[8]

2.9. Levenson received a statement of account from Fluxmans dated 20 August 2008[9], and was paid a total sum of R3 290 138, 90.[10] Annexure D to the statement of account[11] reflects that in calculating the fee due to Fluxmans, Fluxmans charged Levenson 22.5% of the money portion of the settlement received from the RAF and did not charge him any percentage in respect of the RAF's undertaking regarding future medical expenses. Taking into account the RAF's undertaking to Levenson in respect of future medical expenses, therefore, Levenson was charged an amount of R1 119 625,62 being an amount less than 22.5% of the settlement obtained.

[6] FA p10 para 11-12 Annexe SZL1 p23.
[7] Annexure SZL3 p30.
[8] AA p57-58 para 18, p59 para 20.
[9] Annexure SZL2 p24.
[10] FA p10 para 13-14.
[11] FA p29.

2.10. By 30 August 2008, Levenson had received his account from Fluxmans and payment to him of the settlement amount less the fee to Fluxmans.[12]

2.11. On an unspecified date after 2014, Levenson read reports in the media regarding challenges to "so called 'common law Contingency Fee Agreements'".[13] At the end of February 2014 it was reported that after consideration of this issue by a number of courts culminating in the Constitutional Court Judgments of Ronald Bobroff & Partners v De La Guerre and Another and SAAPIL v Minister of Justice and Another that "so called 'common law contingency fee agreements' were definitely illegal, invalid and unenforceable and in fact have always been so."[14]

2.12. After he read of the Constitutional Court judgment of 20 February 2014, Levenson decided to write to Fluxmans requesting a reimbursement.[15] The said letter, is dated 9 April 2014.[16]

2.13. On 20 May 2014, and in response to a letter from Fluxmans on 11 April 2014[17], Levenson sent a further letter to Fluxmans[18] in which he records *inter alia* that at the time that the contingency fee was agreed with Fluxmans he was not advised of the provisions of the Act and detailing the

[12] As well as less other disbursements and costs that are not relevant to this application. RA p68 para 6.
[13] FA p11 para 18.
[14] FA p11-12 para 19.
[15] FA p12 para 20.
[16] Annexure SLZ4 p31.
[17] Annexure SZL5 p32.
[18] Annexure SZL6 p33.

respects in which he contends that the contingency fee agreement with Fluxmans did not comply with the Act.

2.14. In its response on 10 July 2014[19] Fluxmans recorded *inter alia* that the agreed contingency fee is less than the 25% maximum to which it would have been entitled in terms of the Act. Fluxmans further pointed out that Levenson "*enjoyed the benefits of receiving legal services by an experienced and very senior attorney and without having to pay for those services for a period of about two years*". In addition the letter expressed particular surprise at receiving Levenson's letter as "*at the time you expressed your appreciation for all that Fluxmans Inc did on your behalf and in particular for the services rendered by Mr Perlman.*" It was also said to Levenson that he is "*…now being opportunistic and even if you had such a claim, it has prescribed…*".

2.15. The application that is the subject matter of this appeal was instituted on 29 July 2014.[20] In it Levenson sought a declaratory that the contingency fee agreement was invalid and repayment of the amount paid less an amount that he unilaterally considered to be appropriate as a fee, alternatively an accounting and taxation.

2.16. The application was heard by her Ladyship, Justice Windell. In her judgment, which was handed down on 27 March 2015, the learned Judge *a quo* dismissed Fluxmans' argument that the claim against it was

[19] Annexure SZL7 p34-35.
[20] NOM p1.

extinguished by prescription and granted an order in favour of Levenson in the following terms[21]:

"*1. The quantum of the applicant's claim is referred to trial, in respect of which:*

1.1 The notice of motion is to stand as the simple summons and the respondent's notice of opposition as notice of intention to defend.

1.2 The applicant as plaintiff is to file a declaration within 30 days of the date of this order.

1.3 Thereafter the normal rules relating to the filing of pleadings and preparation for trial will apply.

2. The percentage contingency fee agreement entered into between the applicant and the respondent, in respect of fees payable by the applicant to the respondent in pursuance of the applicant's claim against the Road Accident Fund, in respect of the accident in which the applicant was involved on 8 October 2005, is declared invalid, void and of no force or effect.

3. The respondent is ordered to deliver to the applicant, within 20 days of the date of this order, a fully itemised and detailed statement of account in the form of a bill of costs, duly supported where necessary by vouchers, reflecting the fees of the respondent

[21] The judgment of the court *a quo* is reported as **Levenson v Fluxmans Inc** 2015 (3) SA 361 (GJ).

(disbursements excluded) in the action instituted on behalf of the applicant in the South Gauteng High Court between the applicant and the Road Accident Fund.

4. Respondent is ordered to pay the costs of this application."

Issues to be determined on appeal

Prescription

3. The central issue to be determined on appeal is whether the learned Judge *a quo* erred in finding that Levenson's claim against Fluxmans had not prescribed.

4. In terms of section 12(1) of the Prescription Act, 68 of 1969 ("the Prescription Act"), prescription begins to run as soon as the debt is due.[22] This means that the debt must be immediately claimable by the creditor in legal proceedings and be one in respect of which the debtor is under an obligation to perform immediately.[23]

5. On Levenson's own version, by the end of August 2008, he had received his account from Fluxmans and payment to him of the settlement amount less the

[22] **Santam Ltd v Ethwar** 1999 (2) SA 244 (SCA) at 252.
[23] **Uitenhage Municipality v Molloy** 1998 (2) SA 735 (SCA) at 739.

now disputed fee to Fluxmans. By this date, therefore Fluxman's debt to him was claimable and there was an obligation to perform immediately. To quote from Van Heerden JA in **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) at paragraph 16, by 31 August 2008 Levenson had acquired "*…a complete cause of action for the recovery of the debt, that is, … the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.*"

6. Section 12(3) of the Prescription Act, however, provides that a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to such debt, provided that a creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge.

7. Relying upon section 12(3) the learned Judge *a quo* held, with respect incorrectly, that by 31 August 2008 Levenson did not have knowledge of the facts giving rise to Fluxman's debt to him. More specifically the learned Judge *a quo* held at paragraph 15 of her judgment that by 31 August 2008 Levenson did not know that there was an Act prohibiting his agreement with Fluxmans and that the agreement was in consequence invalid. In this regard the Judge *a quo* said that: "*The invalidity of a common-law contingency fee agreement is a fact, and not a legal conclusion.*"

8. The first issue that requires determination in this appeal is, therefore, whether the Judge *a quo* was correct in characterising Levenson's lack of knowledge of the invalidity of the contingency fee agreement as a "fact".

9. If invalidity of an agreement is a legal conclusion, as opposed to a fact, then it is settled law that the creditor is not required to have knowledge (actual or deemed) of such legal conclusion for the prescriptive period, which in this case is three years, to commence running.[24]

Knowledge of the invalidity of an agreement is not a "fact" for the purposes of section 12(3) of the Prescription Act

10. As it is common cause that by 31 August 2008 Levenson had knowledge of the fact of the conclusion of the contingency fee agreement as well as all of its terms, this case turns on the narrow question of whether knowledge of the invalidity of the contingency fee agreement is properly characterised as knowledge of a fact (as the Judge *a quo* held) or knowledge of a conclusion of law (as the appellant contends).

11. This issue is not a novel one. There are at least four decisions of this Court that support the appellant's contention that knowledge of the legal position is not a fact and was not required in order for prescription to commence running.

[24] "In terms of s 11*(d)* read with s 12(1) of the Prescription Act 68 of 1969, civil debts prescribe three years from the date the debt is due." **Macleod v Kweyiya** 2013 (6) SA 1 (SCA) at para 9.

12. The first decision is **Truter v Deysel** 2006 (4) SA 168 (SCA).

12.1. In **Truter** the issue for determination was when the period of prescription began running in respect of the plaintiff's claim for damages for personal injury alleged as a result of the negligence of the defendants in their performance of certain medical procedures in circumstances where the procedures had been performed on the plaintiff in 1993 but it was only in early 2000 that the plaintiff managed to secure a medical opinion to the effect that the defendants had conducted themselves negligently (and, for that reason, that summons was issued only in April 2000.)

12.2. In this case Van Heerden JA said at paragraphs 17 to 20:

"*[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:*

'A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.' (Emphasis added.)

[18] In the words of this Court in Van Staden v Fourie:

'Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van "die feite waaruit die skuld ontstaan".'

[19] 'Cause of action' for the purposes of prescription thus means

> *'. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'*

[20] As contended by counsel for Drs Truter and Venter, an expert opinion that a conclusion of negligence can be drawn from a particular set of facts is not itself a fact, but rather evidence. As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running - it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions." (Footnotes omitted)

13. The second decision is **Minister of Finance v Gore NO** 2007 (1) SA 111 (SCA).

13.1. In this case Cameron JA et Brand JA said the following at paragraph 17:

"*This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'…*" (Footnotes omitted.)

13.2. The case relied upon by Cameron JA et Brand JA in the quotation referred to above that is relevant to the present matter is **Van Staden v Fourie** 1989 (3) SA 200 (A), which is discussed in footnote 2 of the judgment in the following terms:

" *Van Staden v Fourie 1989 (3) SA 200 (A) ([1998] 2 All SA 571) at 216B - F (SA). The Court held, per E M Grosskopf JA (in the context of a statutory provision permitting recovery of moneys paid), that running of prescription is not postponed 'until the creditor has established the full extent of his rights' (totdat die skuldeiser die volle omvang van sy regte uitgevind het nie). It followed that prescription started running when the creditor knew the facts the statute postulated for recovery, even though the creditor only later learned what requirements the statute posed and what rights he acquired when the payee failed to fulfil those requirements.*"

14. The third decision is **Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng** 2009 (3) SA 577 (SCA).

14.1. A question that arose in this case was whether the plaintiff's claim against the defendant had prescribed in circumstances in which it was alleged that the defendant's employees had conducted themselves negligently in concluding an agreement for the sale of property that was held in an earlier case to be invalid. In this regard Leach AJA said the following at paragraph 37:

"*[37] It was then argued by the applicant that by reason of the provisions of s 12(3) of the Prescription Act, prescription only began to run once Smit J had delivered his judgment as until then the applicant could not have known that the sale was invalid. Again, this argument cannot be accepted. The section provides that a creditor shall be deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if he could have acquired it by exercising reasonable care. In the present case, the applicant was told by the Department of Development Planning and Local Government in its letter of 12 December 2000 that the property 'belongs to the National Department of Public Works and not the Gauteng Department of Education who instructed the disposal of the property'. From then on, the applicant was aware that the property did not vest in the respondent. This was also clearly set out in the respondent's opposing*

affidavit in case 15278/2001 which was filed in August 2001, more than three years before the institution of the applicant's action for damages. It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run."

15. The fourth and most on point decision is that of the Supreme Court of Appeal in **Claasen v Bester** 2012 (2) SA 404 (SCA).

15.1. As appears from paragraph 3 of the judgment of Lewis JA, the issue in **Claasen** is in substance the same as the issue that arises in this case. In **Claasen** the issue was described as "*whether failure to appreciate that a contract is void or voidable is a 'fact' for the purposes of s 12(3) of the Prescription Act 68 of 1969*". In this matter, the issue is whether Levenson's failure to appreciate that his contract with Fluxmans was invalid or void is a 'fact' for the purposes of section 12(3) of the Prescription Act.

15.2. **Claasen** concerned a special plea of prescription raised in the context of an action in which the plaintiff claimed a declaration that a sale of immovable property was void or voidable having regard to a provision (referred to as "the buy-back provision") in the deed of sale that was unenforceable.

15.3. The SCA overruled the decision of the High Court that the claim had not prescribed as prescription only started running on 11 January 2006 when the plaintiff was advised that the buy-back provision was not enforceable, and that in the circumstances the plaintiff did not have knowledge of the facts from which the debt arose until that date – i.e. the Supreme Court of Appeal held that the High Court erred in holding that ignorance of the unenforceability of the provision was a "fact" for the purposes of section 12(3) of the Prescription Act.

15.4. In upholding the appeal against the decision of the High Court, Lewis JA makes it clear that knowledge or appreciation of unlawfulness or invalidity does not constitute a "fact" for the purposes of the Prescription Act. Thus, as appears from paragraph 11 of the judgment in **Claasen**, while the plaintiff's lack of knowledge of the fact that a price or a determinable price had not been put in writing in the deed of sale would delay the running of prescription (of which fact he became aware on 3 March 2004), his lack of knowledge that the provisions of the deed of sale were void due to there being no price or determinable price in the deed of sale was irrelevant to the issue of prescription. This is apparent from paragraphs 15 to 18 of the judgment in which Lewis JA held as follows:

"*[15] These cases … make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others…*

[16] It is thus clear that prescription began to run on 3 March 2004, when Bester knew that no provision as to the price at which he could buy back the farm from Claasen had been included in the deed of sale. That he believed nonetheless that the provision was enforceable is not relevant…

…

[18] Accordingly, prescription began to run by 3 March 2004, and any claim that Bester may have had prescribed by the date when summons was issued and served — 14 December 2007. The appeal must thus succeed."

16. There is no principled basis to distinguish the decision in **Claasen** from the facts in the present matter. By 31 August 2008 everything had "*happened which would entitle the creditor [Levenson] to institute action and to pursue his … claim*" against Fluxmans. The suggestion that it was open to Levenson to wait for an indefinite period for another litigant in another case and armed with no extra facts than those available to him to successfully prosecute a claim in the Constitutional Court (or indeed any other court) has no merit.

17. Substantial reliance was placed by the Judge *a quo* on **Macleod v Kweyiya** 2013 (6) SA 1 (SCA). This case, however, does not support the conclusion that Levenson's claim had not prescribed. On the contrary, the decision in **Macleod** is consistent with the other Supreme Court of Appeal decisions quoted above, and supports Fluxmans' contention that the claim against it had prescribed. The following is apposite in this regard:

17.1. The Court in **MacCloud** was focused upon a different enquiry to that which faces this Court. Specifically it was not contended in **MacCleod** that the creditor had actual knowledge of the identity of the debtor and of the facts giving rise to the debt outside of the three year prescriptive period. Rather, the Court in **MacCleod** was focused upon the question of whether the plaintiff (who it was accepted had no actual knowledge) could have acquired such knowledge "by exercising reasonable care" and in consequence be "deemed to have such knowledge" in terms of section 12(3) of the Prescription Act.

17.2. Where, as is the case in the present appeal, it is contended that a creditor has actual knowledge of the facts giving rise to the debt it is unnecessary and unhelpful to engage in questions regarding whether the said creditor was negligent (or innocent) in not acquiring knowledge of the said facts such that it can be said of such creditor that he/she/it is "deemed to have such knowledge" because he/she/it "could have acquired the knowledge by exercising reasonable care". In other words, the focus of the enquiry in **MacCleod**'s case is inapplicable to the present matter.

17.3. What is, however, significant is that it is clear from the decision in **MacCleod** that – in keeping with **Claasen** (which is quoted with approval in **MacCleod**) – the SCA did not consider knowledge of the legal conclusion of unlawfulness to comprise part of "the facts" of which the creditor was required to have knowledge in order for a debt to be deemed

due in terms of section 12(3) of the Prescription Act. Thus, the Supreme Court of Appeal held in **McCleod**'s case that prescription commenced running not from the date when the plaintiff (respondent) consulted with her attorneys and became aware that the defendant (appellant) was negligent (being 4 February 2009) but, rather, that prescription commenced running from the date when the plaintiff first became aware of the terms of the settlement agreement (being 19 April 2006). In other words, prescription commenced running from the date when the plaintiff acquired knowledge of the facts giving rise to the debt. (As stated above the Court's further enquiry in **MacCleod** regarding whether by the exercise of reasonable care the respondent could have acquired the knowledge earlier, is irrelevant.)

18. It is not disputed that in the present matter Levenson had actual knowledge of all of the terms of the contingency agreement concluded between him and Fluxmans by 31 August 2008. By this date there had also been performance in terms of such agreement. What Levenson says that he did not have knowledge of, and what he was not required to have knowledge of for purposes of prescription, was the legal conclusion that such agreement was invalid or void.

19. In any event, even if the law required knowledge of the invalidity or voidness of an agreement in order for prescription to commence running (which, for the reasons set out above, it does not) it is apparent that Levenson would still not be able to rely on section 12(3) of the Prescription Act.

20. On Levenson's own version he would be "deemed to have such knowledge" as by the exercise of "reasonable care" he could have acquired it. The following is relevant in this regard:

20.1. Levenson's case is that until he "*became aware of the Judgment in the case of Bobroff v De La Guerre in the Constitutional Court*" he was "*unaware of the true legal position.*"[25]

20.2. The decision of the Constitutional Court in **Ronald Bobroff & Partners Inc v De la Guerre** 2014 (3) SA 134 (CC) is, however, irrelevant to Levenson's claim against Fluxmans. All that the Constitutional Court was required to determine in **Ronald Bobroff & Partners Inc v De la Guerre** was whether the Act was constitutional. The question of whether contingency fee agreements that did not comply with the provisions of the Act were valid or void was not raised before the Constitutional Court.

20.3. In fact, as appears from the decision of the Constitutional Court in **Ronald Bobroff & Partners Inc v De la Guerre** 2014 (3) SA 134 (CC)[26] the Act did not alter the legal position that common law contingency agreements were invalid, rather the Act made it legal for attorneys to charge contingency fees "*in regulated instances and at set percentages*".

[25] RA p70 para 10.
[26] At para 2 read with footnote 4.

20.4. Legal certainty regarding the invalidity of common law contingency fee agreements had been established as early as 2004 by the Supreme Court of Appeal in the case of **Price Waterhouse Coopers Inc v National Potato Co-op Ltd** 2004 (6) SA 66 (SCA). In this case it was said at paragraph 41 that: "*Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal*". This is conceded by Levenson in his replying affidavit.[27]

20.5. To the extent, therefore, that knowledge of the invalidity of common law contingency fee agreements was a "fact" for purposes of section 12(3) of the Prescription Act, Levenson could by the exercise of "reasonable care" have acquired knowledge of such "fact".

The rule in Wilken v Kohler

21. The second issue in this appeal only arises if Fluxmans' contention that the claim against it has prescribed is not upheld. In such event Fluxmans contends that there exists a further reason why Levenson is not entitled to reclaim the payment made by him to Fluxmans in terms of the contingency agreement. The reason is that while it is correct that the contingency fee agreement in question did not comply with the provisions of section 3 of the Act, section 2 of the Act expressly validates a contingency fee agreement that complies with section 2(1) and 2(2) of the Act, "*notwithstanding anything to the contrary in any law or the common law*".

[27] RA p70 para 12.

22. The definition of “contingency fee agreement” in section 1 of the Act also does not require compliance with section 3 for the purpose of a valid agreement.

23. In these circumstances, and having regard to the fact that both Fluxmans and Levenson have performed their bargain in full, and that such bargain complies with sections 2(1) and 2(2) of the Act, the rule articulated by Innes JA in **Wilken v Kohler**1913 AD 135 and unequivocally approved by the SCA in **Legator McKenna Inc v Shea** 2010 (1) SA 35 (SCA)[28] is of application. In **Legator McKenna Inc v Shea** Brand JA described the rule as follows[29]:

“*… Succinctly stated, the rule provides that, if both parties to an invalid agreement had performed in full, neither party can recover his or her performance purely on the basis that the agreement was invalid. The 'rule' has its origin in an obiter dictum by Innes JA in Wilken v Kohler 1913 AD 135. In context Innes JA was dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. In the course of his judgment he then stated (at 144) obiter, as it turned out, that:*

'It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through

[28] At para 28.
[29] At para 26.

in accordance with its terms. Suppose, for example, an . . . [oral] agreement of sale of fixed property . . . , a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that . . . it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out.'"

23.1. Relevant in this regard is that, as the contingency agreement in the present matter complies with section 2 of the Act, it cannot be said that "*the purpose of the transaction is prohibited by law*"[30]. On the contrary, the Act expressly permits a transaction with this purpose.[31]

Conclusion

24. In the circumstances it is respectfully submitted that the appeal should be upheld with costs, including the costs consequent upon the employment of two counsel.

A Subel SC

S Stein

Appellant's counsel

Chambers, Sandton

[30] **Legator McKenna Inc v Shea** at para 29.

[31] To the extent that this is contrary to the decision of the full bench in **South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)** 2013 (2) SA 583 (GSJ), it is respectively submitted that SAAPIL is incorrect.

15 October 2015