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

Date: 2010-05-18

Case Number: 37233/09

In the matter between:

FIKILE MANYEU MNISI Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

SOUTHWOOD J

[1] This is a dependants' action in which the plaintiff claimed damages in her personal capacity (R726 792) and on behalf of her minor children, B M (born 1997) (R158 120) and C L M (born 2005) (R265 001) for the loss of support which they suffered as a result of the death of the plaintiff's husband, the children's father, Ndala Henry Mashego as a result of a motor collision. The parties settled the matter and the defendant agreed to pay a total amount of R844 686 to the plaintiff: i.e.

R547 490 for the plaintiff personally; R92 923 for B M and R204 273 for C M. This judgment is not concerned with any issues raised in the trial but with the manner in which the plaintiff's attorney conducted the trial and purported to charge fees for his services. In order to deal with these matters it is necessary to record the manner in which the case progressed.

[2] The matter was allocated to me on Wednesday 28 April 2010. Counsel came to my chambers at about 12h00 and informed me that they were attempting to settle the matter and requested that the matter stand down. I understood that the defendant's attorney was experiencing difficulty in obtaining instructions from the defendant and allowed the matter to stand to 14h00.

[3] At about 14h00 I went into court and was informed by counsel that the defendant's attorney was still having difficulty in obtaining instructions and counsel again requested that the matter stand down. I adjourned the matter as requested and counsel later informed me in chambers that they were attempting to settle the matter.

[4] At about 15h45 counsel again approached me in chambers with a handwritten draft order and requested me to make it an order of court. The draft recorded that the defendant would pay the plaintiff the sum of R844 686 and costs and that the defendant would pay that amount into the plaintiff's attorney's bank account, the particulars of which were set out in the draft. The draft did not state what amounts were to be paid to the plaintiff and each of the minor children and no provision was made for the administration of the amounts to be paid to the children.

At that stage I was not aware that the plaintiff and her attorney had entered into a contingency fees agreement and obviously there was no attempt to comply with s 4 of the Contingency Fees Act 66 of 1997 ('the Act') by filing the prescribed affidavits.

[5] After perusing the draft I informed counsel that in the absence of a breakdown of the amounts to be paid to the plaintiff and her children and proper arrangements for the administration of the funds to be paid to the children I was not prepared to make the draft order an order of court. I had also noticed that the plaintiff's attorney was not at court and when I questioned the plaintiff's counsel Mr. Makotoko he was not able to explain where he was. After I had explained to counsel that there were various possibilities for the administration of the amounts to be paid to the minor children (e.g. payment into the Guardians Fund; payment to a *curator bonis* appointed by the court; payment to a financial institution to invest and administer) I told them that they should consider these matters overnight and address me at 10h00 on 29 April 2010.

[6] At about 10h00 on 29 April 2010 after no-one appeared I requested my registrar to make enquiries as to the whereabouts of the counsel and the attorneys. She established that they were in another court attending to other matters. At about 10h45 the defendant's counsel, Adv. M.G. Molai, telephoned my registrar and told her that counsel

would come to my chambers at 11h30.

[7] At about 11h30 counsel, but no attorneys, presented themselves at my chambers and handed to me a typed draft order which they requested me to make an order of court. (The draft order is marked 'A'). It reads as follows:

'By agreement between the parties:

It is hereby ordered that:

1. The Defendant shall pay to the Plaintiff the total amount of R844 686 made up as follows:

   1.1. an amount of R547 490 to be paid to the mother

   1.2 an amount of R92 923 to be paid to the minor child B M

   1.3 an amount of R204 273 to be paid to C L M.

2. The Plaintiff's Attorneys is directed to pay the amounts in 1.2-1.3 to the guardian fund by order of the court.

3. The Defendant shall pay 25 % plus VAT of the total amount to the plaintiff's attorneys in terms of the Contingence Fee Agreement Act.

4. Defendant pay Plaintiff interest on the aforementioned sum *a tempora morae* at the rate of 15,5 %, calculated from 14 days from date of judgement to the date of payment.

5. Defendant pay costs and disbursements of this action on party and party bases.

Plaintiff's Attorney's Banking Details

PT MHLANGA INCORPORATED

Name of the Bank:	FNB
Type of Account:	Trust Account
Acc No:	62114948807
Brach Code:	254205
Brach:	Southdale'

This was the first that I knew of a contingency fees agreement and the plaintiff's attorney did not file an affidavit or an affidavit by the plaintiff as required by s 4 of the Act.

[8] I was not prepared to make this draft an order of court as it appeared that no effort had been made to establish whether a better option was available for the administration of the damages to be paid to the minor children and I was not satisfied that I could order that the defendant pay 25 % plus VAT on the total amount to the plaintiff's attorney pursuant to the terms of a contingency fee agreement and the prescribed affidavits had not been filed. I demanded to see the contingency fees agreement as well as the plaintiff's attorney together with counsel and the defendant's attorney at 14h00 on 29 April 2010.

[9] At 14h00 the counsel and the attorneys arrived at my chambers. The plaintiff's attorney handed to me the contingency fees agreement apparently signed by the plaintiff and Mr. Lesiba Mailula introduced himself as the plaintiff's attorney. He informed me that his associate Mr. P.T. Mhlanga is handling the matter and had requested him, Mr. Mailula, to 'stand in for him'. Mr. Mailula was clearly unaware of the necessity for filing affidavits in accordance with s 4 of the Act. (The contingency fees agreement is marked 'B').

[10] Mr. Mailula knew about the contingency fees agreement and informed me that he was present when it was explained to the plaintiff and when it was signed by her. When questioned by me he refused to estimate the firm's usual or ordinary fees for handling the case and simply replied that 'he stuck with' the 25 % of the amount awarded as stated in the agreement. The agreement purports to have been signed at Bushbuckridge on 21 January 2009 and to have been witnessed by Phillip Tinyiko Mhlanga. The document is entitled 'Power of Attorney and Contingency Fee Agreement'. The relevant part of the document reads as follows –

> 'P.T. Mhlanga Inc will be entitled to either charge me a contingency fee or hourly charge calculated in terms of an 'attorney and own client' basis.

I also hereby enter into a contingency fee agreement with my attorney in terms of which PT Mhlanga Attorneys will be entitled to recover for their account 25 % (twenty five percent) excluding any value added tax or other tax payable of the capital amount awarded to me or my dependants as a success fee, the capital awarded will exclude any party costs contribution made to my attorney. My attorney will only be entitled to hourly charge for any work done before receipt of any capital proceeds.

The hourly charge shall be R530 (five hundred and thirty Rand) in magistrate court maters and R1 000 (one thousand Rands) in High Court matter exclusive vat or all other taxes for all work done in connection with the said action, including consultations, time spent on medical research, preparations, perusal and time spent on telephone calls and travelling. I have been advised that the aforesaid hourly charge has been calculated in relation to:

1. the costs structure of any attorney's office;

2. the particular expertise in the filed of personal injuries;

3. Investigations in regard to both merits and quantum which exclude medical research, perusal and review.

I confirm that the following have been explained to me in my language of preference and I understand the contents hereof:

1. The difference between 'party and party', 'attorneys and own client' costs have been explained to me.

2. That I am entitled to other ways financing this matter and the implications thereof.

3. That I can withdraw from this agreement within 14 (fourteen) days from date hereof, by given written notice to PT MHLANGA ATTORNEYS.

> PT MHLANGA ATTORNEYS shall be entitled to any party and party costs contribution made for expenses incurred on my behalf in condition to the contingency arrangement or hourly fee charge between ourselves which party and party costs allocation PT MHLANGA ATTORNEYS not need to account to me. In the event of circumstances warranting an increase in hourly charge this will be subject to my confirmation. In view of the fact that PT MHLANGA ATTORNEYS will incur certain disbursements and fees on my behalf if hereby irrevocably and in vain sue authorize them to recover and receive party and party costs from any institution, personal company to deduct fees and disbursements (if an hourly charge is applicable from the capital amount before payment of it to me, I confirm that a copy hereof was sent to me.'

This purports to be the contingency fees agreement prescribed by the Minister of Justice and published in the Gazette after consultation with the advocates and attorneys professions as stipulated in s 3(1) of the Act.

[11] Because I was not satisfied with the contingency fees agreement, the arrangements for administering the damages to be paid to the minor children and the conduct of the case by Mr. Mhlanga I directed that the matter be adjourned to Monday 3 May 2010 so that the plaintiff's attorney could file the affidavits required by s 4 of the Act and deal with the other problems referred to. On 29 April 2010 the following was recorded on the court file –

'It is recorded that the matter is settled and that the parties have agreed that the defendant will pay the following amounts to the plaintiff and her children:

(1) Plaintiff – R547 490,00;

(2) B M – R92 923,00;

(3) C L M – R204 273,00

and that the defendant will pay the plaintiff's party and party costs. The court was not satisfied with the contingency fees agreement and the provisions in the draft order for the administration of the damages payable to B M and C L M. The court was not satisfied with the conduct of the plaintiff's attorney and stood the matter down to Monday 3 May 2010 for argument on the following:

(1) whether the contingency agreement handed in by the plaintiff's attorney (Mr Lesiba Mailula) is valid and binding – it makes provision for a fee of 25 % of the amount awarded;

(2) what arrangements must be made for the administration of the damages payable to B and C M;

(3) whether the plaintiff's attorney's conduct should be referred to the Law Society to investigate –

    (a) his failure to attend court on 28 April 2010 and 29 April 2010;

(b) his failure to attend court at 2 pm on 29 April 2010 as required by the court;

(c) the terms of the contingency agreement and how it was entered into;

(d) his failure to comply with section 4 of the Contingency Fees Act 66 of 1997 and file an affidavit by himself and an affidavit by the plaintiff.

The plaintiff's attorney is to file an affidavit and an affidavit by the plaintiff in order to comply with section 4 of Act 66 of 1997.'

[12] S 2 of the Act provides:

'(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed –

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than

his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

(2) 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 percent: provided that, in the case of claim sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 percent 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.'

In ***Price Waterhouse Coopers Inc v National Potato Co-op Ltd*** **2004 (6) SA 66 (SCA)** in para 41 the court considered the Act in the following terms –

'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 a 100 % and in the case of claim 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 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.'

[13] The agreement provides that the plaintiff will pay the following to the attorney for the conduct of the case:

(1) 25 % (excluding VAT or other tax) of the capital amount awarded to the plaintiff and her dependants as a success fee; and

(2) for all work done before receipt of the capital proceeds, R1 000 per hour (excluding VAT or other tax); and

(3) any party and party cost contribution made to the plaintiff's attorney (in respect of which the attorney need not account to

the plaintiff).

This is clearly not covered by the Act and the agreement appears to be illegal.

[14] It is clear that the attorney, Mr. Mhlanga, considers that he is entitled to the exorbitant fee stipulated in the agreement and the overwhelming probability is that all the contingency agreements which he enters into are not covered by the Act and are therefore illegal. The Law Society should therefore investigate every contingency fee agreement entered into by Mr. Mhlanga's firm since the Act came into operation.

[15] Mr. Mhlanga did not attend court on 28 April 2010 or 29 April 2010 and did not send anyone to court to represent his firm. This is a clear breach of his professional duty. His failure to attend when required by me was clearly deliberate and contemptuous. His failure to attend to the matter as he is required to do also has a direct bearing on the fees he would be entitled to charge. A contingency fees agreement may make provision for only double his usual fee at the most.

[16] Mr. Mhlanga's ignorance of the provisions of the Act and his duty to properly provide for the administration of the damages paid to the minor children is deserving of censure. It must be questioned whether Mr. Mhlanga went to Bushbuckridge to have the power of attorney and

agreement signed and whether the meaning and purport of the power of attorney and agreement were properly explained to the plaintiff. It is probable that the plaintiff is poorly educated if not illiterate and that she was simply requested to sign the document.

[17] On 3 May 2010 Mr. Mhlanga appeared at court assisted by Adv. Makotoko. What happened and the answers Adv. Makotoko provided on Mr. Mhlanga's instructions are as follows.

Contingency Fees Act 66 of 1997

[18] (1) Mr. Mhlanga provided the court with his affidavit and an affidavit by the plaintiff.

(2) Mr. Mhlanga contends that while he was not present at court on 28 April 2010 he was represented by somebody from his office who was sitting outside the court with the plaintiff. Mr. Mhlanga did not attend court at 14h00 on 29 April 2010 as 'he was not in the vicinity' and arranged for Mr. Mailula to attend court.

(3) Mr. Mhlanga did not and does not use the form prescribed by s 3(1)(a) of the Act for contingency fees agreements. He did not offer an explanation for not doing so.

(4) Mr. Mhlanga enters into contingency fees agreements with his clients and, depending on the risk, he stipulates for between 15

% and 25 % of the award as his fee. He is clearly not aware of the interpretation given to s 2 of the Act in ***Price Waterhouse Coopers Inc v National Potato Co-op Ltd*** **2004 (6) SA 66 (SCA)** para 41. In this case Mr. Mhlanga did not provide the Law Society with a copy of the contingency fees agreement. He did not offer an explanation for this. Adv. Makotoko referred to the Law Society's guidelines which point out that this is a lacuna in the Act.

(5) Mr. Mhlanga did not file the affidavits required by s 4 of the Act because the settlement happened so quickly. To comply with the court's direction that the affidavits be filed he arranged for a car to bring the plaintiff to court on 3 May 2010.

(6) The plaintiff passed standard ten but is unemployed and was completely dependent on the deceased. Apparently the plaintiff has never worked. According to Adv. Makotoko the plaintiff speaks and understands English, but with some difficulty, and the contents of the settlement and the affidavit were fully explained to her.

Administration of the amounts awarded to the minor children

[19] (1) Mr. Mhlanga did not offer an explanation for the first draft order

which made no provision for the administration of the damages awarded to the two minor children. See e.g. in this regard ***Van Rij NO v Employers Liability Assurance Ltd*** **1964 (4) SA 737 (W)** at 739; ***Southern Insurance Association v Bailey NO*** **1984 (1) SA 98 (A)** at 120G-121C; **Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa*** **5 ed Vol 2** at 1561-1562.

(2) After his attention was drawn to the problem Mr. Mhlanga ascertained from the Master's office that the Guardian Fund pays only 3 % per annum on the funds it holds and that First National Bank would pay 6 % per annum. He did not ascertain from FNB what its charges for administering the funds would be. Before the plaintiff agreed that the minor children's awards should be paid into the Guardians Fund (see the second draft order) he did not tell her about the difference in the interest rates payable. Mr. Mhlanga did not explain why this was not done.

[20] At the end of the hearing Adv. Makotoko tendered his and Mr. Mhlanga's apologies for their conduct and this was duly noted.

[21] It has not been suggested that the plaintiff is capable of managing the damages awarded to her children. In view of the information available I am satisfied that the court must make an appropriate order to

safeguard their interests. I informed Adv. Makotoko that the matter would be postponed to 10h00 on 18 May 2010 to enable Mr. Makotoko to provide the court with a report on the most beneficial means of administering the minor children's funds in their best interests. I also informed Adv. Makotoko that, if so advised, Mr. Mhlanga could address the court on the validity and/or legality of the contingency fees agreement. Finally, I informed Mr. Mhlanga that the costs of all proceedings after 29 April 2010 are to be for his account. The matter was then postponed to 10h00 on 18 May 2010.

[22] On 18 May 2010 Mr. Mhlanga again appeared at court assisted by Adv. Makotoko. Adv. Makotoko handed in concise heads of argument which I marked 'C' and a report by Mr. Mhlanga regarding the administration of the damages payable to the children which I marked 'D'. According to Mr. Mhlanga's report the best option for the investment and administration of the children's damages is the Guardians Fund. At present the Fund pays interest at 11,5 % per annum; there are no administration expenses and no taxes. The Fund makes money available to the beneficiary once a year and in case of pressing need the Master can be approached to release further funds. Obviously the Master will have to be satisfied that it is in the interests of the beneficiary to do so.

[23] Regarding the contingency fees agreement Adv. Makotoko submits

that it is covered by the provisions of the Act and is therefore valid and binding. With reference to ***Brisley v Drotsky*** **2002 (4) SA 1 (SCA)** he submits that the plaintiff and Mr. Mhlanga should be allowed to contract as they see fit and that unless there is a complaint by the plaintiff that she entered into the contingency fees agreement without having fully comprehended its financial implications the agreement should not be impugned.

[24] During argument it became clear that there may be (or is) a fundamental misunderstanding on the part of Mr. Mhlanga (and the colleagues with whom he says he has discussed the question of contingency fees) as to the meaning of s 2(2) of the Act. As appears from the ***Price Waterhouse Coopers*** judgment quoted above all contingency fees agreements in terms of which the legal practitioner is entitled to fees higher than the normal fee are subject to the limitation that the higher fees may not exceed the normal fees of the legal practitioner by more than 100 %. In addition, in cases of claims sounding in money, this fee (i.e. the higher fee) may not exceed 25 % of the total amount awarded or any amount obtained by the client in consequence of the proceedings excluding costs. The effect of these two limitations may be illustrated by two examples:

(1) a client with a claim sounding in money is awarded R200 000. The attorney's normal fee is R20 000 and the maximum higher

fee would be R40 000. This is recoverable by the attorney as it does not exceed 25 % of the award;

(2) a client with a claim sounding in money is awarded R100 000. The attorney's normal fee is R20 000 and the maximum higher fee would be R40 000. However the attorney may not recover that higher fee as his fee is limited to R25 000.

[25] While it is difficult to understand how there can be any doubt as to what s 2(2) of the Act means Adv. Makotoko informed me that Mr. Mhlanga and his colleagues with whom he has discussed the matter understand it differently. Adv. Makotoko informed me that Mr. Mhlanga would welcome an investigation by the Law Society.

[26] Although I hold a (strong) *prima facie* view that the contingency fees agreement offends against the Act and is not valid I shall not make an order declaring that it is invalid.

Order

[27] I The defendant is ordered to pay to the plaintiff and the two minor children the following amounts:

(1) plaintiff – R547 490;

(2) B M – R92 923;

(3) C L M – R204 273;

together with interest thereon calculated at the rate of 15,5 % per annum from 18 May 2010 to date of payment;

II The defendant is ordered to pay the following amounts into the Guardians Fund for the benefit of the two minor children:

(1) B M – R92 923;

(2) C L M – R204 273;

III The defendant is to pay the amount of R547 490 to the plaintiff by paying it into the plaintiff's attorney's trust account with the following details:

Name of the Bank: FNB

Account type:	Trust Account
Account Number:	62114948807
Branch Code:	254205
Branch:	Southdale

IV The defendant is ordered to pay the costs of this action on the scale as between party and party up to and including 29 April 2010;

V The plaintiff's attorney, Mr. P.T. Mhlanga, is to bear the further costs relating to the hearings on 3 May 2010 and 18 May 2010;

VI The registrar is requested and directed to send a copy of this judgment together with exhibits 'A', 'B', 'C' and 'D' and the

affidavits filed to the President of the Law Society of the Northern Provinces to investigate the conduct of the attorney, Mr. P.T. Mhlanga, as set out in paragraph [11] at para 3(a)-(d) of this judgment; whether the contingency fees agreement between the plaintiff and Mr. Mhlanga does not comply with Act 66 of 1997 and is therefore invalid and whether the contingency fees agreements which Mr. Mhlanga has entered into with his clients generally do not comply with Act 66 of 1997.

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B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

CASE NO: 37233/09

HEARD ON: 28 April 2010, 29 April 2010, 3 May 2010 and 18 May 2010

FOR THE PLAINTIFF: ADV. B. MAKOTOKO

INSTRUCTED BY: Mr. P.T. Mhlanga of P.T. Mhlanga Incorporated

FOR THE DEFENDANT: ADV. M.G. MOLAI

INSTRUCTED BY: Mr. M.C. Godi of Iqbal Mahomedi Attorneys

DATE OF JUDGMENT: 18 May 2010