Door closed on common law contingency fees
By George van Niekerk

De la Guerre v Ronald Bobroff & Partners Inc and Others (GNP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J) The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening) (GNP) (unreported case no 32894/12, 13-2-2013) (Kathree-Setiloane J)

For many years contingency fees agreements have been a matter of contention, and the questionable existence of common law contingency fees agreements after the enactment of the Contingency Fees Act 66 of 1997 (the Act), in particular, has led to much confusion.

However, the two recent full Bench decisions in the linked *De la Guerre* and *South African Association of Personal Injury Lawyers (SAAPIL*) cases appear to have finally put the matter to rest.

It is important to note, however, that at the time of going to print, notice of leave to appeal both decisions had been filed at the Supreme Court of Appeal.

The *De la Guerre* decision

The applicant, De la Guerre, was a client of the first respondent, Ronald Bobroff & Partners (RBP). She had instructed RBP to claim damages on her behalf from the third respondent, the Road Accident Fund (RAF), for injuries she had sustained in a road accident.

The RAF paid compensation of approximately R 2,8 million, and it was common cause that RBP charged a fee of approximately R 870 000, which was 30% of the capital and costs awarded to De la Guerre, together with value added tax.

The fee was determined in accordance with a so-called common law contingency fees agreement concluded between De la Guerre and RBP. De la Guerre contended that this agreement was invalid as it contravened the Act.

De la Guerre's contention was that a reasonable attorney and client fee for the services rendered would have been approximately R 180 000. Even if doubled, as provided for in the Act, RBP was notionally entitled to charge her approximately
R 354 000, she claimed.

The second respondent, the Law Society of the Northern Provinces, argued that common law contingency fees agreements were permissible if concluded within the recognised parameters, including that the attorneys' remuneration was fair. RBP did not file an answering affidavit but requested the court to stay the proceedings pending a decision in the *SAAPIL* matter, which was heard on the same day by the same full Bench. SAAPIL, *inter alia*, argued in favour of common law contingency fees agreements.

The RAF supported De la Guerre's view that a contingency fees agreement between a lawyer and his client was unlawful at common law.

The full Bench, per Fabricius J (with Mlambo JP and Kathree-Setiloane J), held that the provisions of the Act clearly prohibit any contingency fees agreement between an attorney and client outside of the Act.

The court noted that, after the promulgation of the Act, the Supreme Court of Appeal in *PricewaterhouseCoopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) held that: 'Any contingency fee agreement ... which is not covered by the Act is therefore illegal.'

Fabricius J also referred to a number of decisions in the North and South Gauteng High Courts that arrived at the same conclusion.

In the present matter, the court held: 'It is abundantly clear from all authorities that the common law prohibited contingency fee agreements between lawyers and their clients,' and added that the Act is 'exhaustive' on the subject. Any contingency fees agreement not in compliance with the Act is thus invalid.

Further, the court held that RBP 'must have been aware' that its agreement with De la Guerre was invalid and that concluding such an agreement 'could, in the proper context, amount to unprofessional conduct'.

The court awarded a punitive costs order against RBP on a scale as between attorney and own client.

The *SAAPIL* decision

The court in the *SAAPIL* application dealt with two main arguments advanced by SAAPIL, which were that the Act did not override the common law and that legal practitioners retained a common law right, outside of the Act, to enter into contingency fees agreements, provided they observed their ethical duties, alternatively that the Act is unconstitutional on the grounds that it discriminates against lawyers and their clients in breach of s 9 of the Constitution.

The application was opposed by the respondent, the Minister of Justice and Constitutional Development, and the RAF, which was granted leave to intervene in the proceedings.

The court dismissed the constitutional challenge to the Act with costs, holding it was without merit.

The court traced the history of the Act to the South African Law Reform Commission report 'Speculative and Contingency Fees' (Project 93) (1996), which had recommended the legalisation on contingency fees agreements, subject to the prescribed safeguards contained in the Act.

It noted that 'the meaning, effect and constitutionality of the Act have generated much controversy and debate in the legal profession since its enactment.'

The full Bench, per Kathree-Setiloane J (with Mlambo JP and Fabricius J), held that the law commission had highlighted the conflict of interests introduced by a contingency fees agreement – the legal practitioner owed a responsibility to the client and a duty to the court, and the practitioner enjoyed a financial interest in the outcome of the matter. These conflicts have to be managed very carefully, hence the safeguards contained in the Act.

The court noted that the effect of the Act is twofold:

• It permits contingency fees agreements.

• It makes all contingency fees agreements subject to certain limitations and requirements in the Act.

In doing so, the court held, 'the Act leaves no room for lawful contingency fees agreements which do not comply with [these] limitations and requirements'.

Further, the court held that SAAPIL's 'proposition that parliament has no right to put in place special statutory protections to prevent abuse by lawyers acting on contingency', was unsustainable.

The court found that the limit prescribed by the Act on attorneys' fees – to no more than 100% of the normal fees (ie, double the normal fee) or, in claims sounding in money, a maximum of 25% of the total amount awarded – was both permissible and justifiable.

Further, the constraints in the Act were required to protect clients, and were described by the court as, 'plainly laudable and important measures which outweigh the marginal limitation of rights contended for by SAAPIL'.

Conclusion

Much-needed clarity on the permissibility of common law contingency fees agreements has now been achieved and the decisions in these two matters should settle once and for all the difference of opinion that caused much uncertainty.

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• At the time of going to print, notice of leave to appeal to the Supreme Court of Appeal in both the *De la Guerre* and *SAAPIL* decisions was filed by RBP and SAAPIL respectively. In both matters the respective appellant claims that the court erred in fact, alternatively law, alternatively in fact and law in a number of respects – *Editor.*

• See 2012 (Oct) *DR* 48 and 2012 (Dec) *DR* 44.