Decoding s 2(1)(a) and (b) of the Contingency Fees Act

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By Gert Nel

Section 2 (1)(*a*) and (*b*) of the Contingency Fees Act 66 of 1997 (the Act) states:

'(*a*) that the legal practitioners 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 agreements;

(*b*) that the legal practitioners 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'.

This article focusses on a number of issues, including the origin of contingency fees, foreign law, incentives for attorneys, the reasonability of fees and how the fees should be calculated.

Clients should be protected against potential abuses, but the question is what constitutes a reasonable fee and what is regarded as overreaching?

The origin of contingency fees was discussed in the case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (9) BCLR 930 (SCA).

The government of the United Kingdom (UK) published a green paper on Contingency fees in 1989. After a consultation process, it was decided to consider –

- the introduction in England and Wales of speculative actions on the Scottish model of a 'no win, no fee' basis; and
- the validation of agreements for an increase in terms in the costs payable. That way to encourage lawyers to undertake speculative actions, such as being unrelated to the amount of the damages or property recovered.

The above proposals led to the enactment of s 58 of the United Kingdom Courts and Legal Services Act of 1990. This permitted speculative actions and a conditional fee agreement. The most important being the strict regulation of the percentage whereby the fee was to be increased.

According to the case, the importance of this change was emphasised by Steyn LJ in *Giles v Thompson and related appeals* [1993] All ER 321 at 331 d – f. The court pointed out that the ability to recover fees – beyond what was otherwise reasonable – was intended to be an incentive to lawyers to undertake speculative actions, and these developments have been mirrored from English law to South African law.

Project 93 'Speculative and contingency fees' report

In 1996, the South African Law Commission (the Commission) investigated and reported on the question of contingency feeds in Project 93 'Speculative and Contingency Fees'. The Commission recommended that contingency fee agreements should be legalised in South African law and that common law prohibitions on such fees should be removed. The South African legislature followed the English example of permitting contingency fee

arrangements namely, the ‘no win, no fees’, and increased fees in case of success, but this was subject to strict controls.

The Commission was requested to investigate the desirability of a system of contingency fees and published a working paper for general information and comment during March 1996. The report was approved by the Commission and was submitted to the Minister on 6 December 1996.

According to the report, the Commission’s main recommendation was that contingency fee agreements were to be legalised in South African law and that common law prohibitions on such fees had to be removed.

The Commission concluded that a system of contingency fees – in terms of which a prospective litigant was only liable to remunerate their legal representative in the event of successful litigation – could contribute significantly to promote access to the courts and that such a system was desirable.

The report further stated: ‘Should the client win the case, the fee payable to the legal practitioner – in terms of a contingency fee agreement – may be recovered from the proceeds of the litigation (in those cases where the claim concerned is one sounding in money) and is usually higher than the practitioner’s normal fee. This is so because the legal practitioner bears the risk of not being compensated in a number of cases. In view of these risks the *Commission recommends that legal practitioners, in the event of successful litigation, should be entitled to receive, in addition to their normal fees for the case in question, an uplift to a maximum of 100 per cent of their normal fees.* In practice this would mean that legal practitioners will be entitled to charge double their normal fees if they conduct their clients’ cases successfully’ (my italics).

Another important safeguard recommended by the Commission was, that the success fee payable to the legal practitioner – in the event of success – should not exceed 25% of the proceeds of the litigation in the case of claims sounding in money. The reason for this was to prevent a situation in which all proceeds were swallowed up in legal fees.

The Commission also recommended that both attorneys and advocates be entitled to enter into contingency fee agreements with their clients.

The Act

The Act came into operation on 23 April 1999 and provides for two forms of contingency fee agreements, which attorneys and advocates may enter into with their clients, namely –

- 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. According to the *Price Waterhouse* case, at para 41 it was held that the '[h]igher fees may not exceed the normal fees of the legal practitioner by more than 100 per cent and in the case of claims sounding in money this fee may not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (section 2(2)). The Act has detailed requirements for the agreement (section 3), the procedure to be followed when a matter is settled (section 4) and gives the client a right of review (section 5).'

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.'

In the *Price Waterhouse* case it was held at para 41 and 42 that by 'permitting increased fee agreements the legislature has made it possible for legal practitioners to receive part of the proceeds of the action.

As in England, this Act [has been] designed to encourage legal practitioners to undertake speculative actions for their clients.'

I now focus on the case of *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ), where the court stated at para 3: 'In terms of both our law and the English law, which the development of our law on the subject mirrored, contingency fees agreements are allowed and recognised as valid, subject to the provisions that they will be supervised strictly by the courts to ensure that the rights of the clients in litigation are protected and not compromised'.

International law

The Courts and Legal Services Act of 1990, was an Act, which reformed the legal profession and the courts of England and Wales, which included Conditional Fee Agreements in s 58. A conditional fee agreement is an agreement with a person providing advocacy or litigation services, which provides for their fees and expenses, or any part of them, to be payable only in specified circumstances. It also provides for a success and references a success fee. Further conditions are applicable to a conditional fee agreement, which provides for a success fee as follows –

'(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(b) it must state the percentage by which the amount of the fees, which would be payable if it were not a conditional fee agreement, is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.'

According to s 58 the additional conditions are applicable to a conditional fee agreement, which –

- provides for a success fee, and
- relates to proceedings of a description specified by order made by the Lord Chancellor.

Section 58(4B) sates: 'The additional conditions are that –

(a) the agreement must provide that the success fee is subject to a maximum limit,

(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,

(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and

(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.'

The approach in English law is that in matters where a lawful conditional fee agreement in terms of s 58 had been entered into with the client, the practitioner will be allowed to charge a 'success' fee in addition to his base costs ('normal' fee).

Incentive for attorneys

In England, the law had been incentivised to allow practitioners willing to risk speculative litigation to charge in case of success, a normal fee (based on hourly billing plus a profit element) plus statutory capped success (or bonus/uplift) fee.

In the matter of *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) the court stated at para 6 that:

'The basic idea behind a contingency fee agreement is that the attorney takes on the risk of financing his or her client's litigation in the hope – or anticipation – of succeeding. If the litigation is not successful, the attorney will not be paid. If the litigation is successful, the attorney will be entitled to a success fee that is higher than his or her normal fee' and further stated at para 11: 'Section 2 of the Act is the core of the Act. It makes provision for contingency fee agreements and for the higher than normal fee that an attorney may charge to "offset" the risk of earning no fee in the event of him or her not concluding a case successfully'.

In the *Masango* case at para 12, Mojapelo DJP, stated:

'The attorney (legal practitioner) is authorised in terms of s 2(1)(b) read with 2(2) of the [Act], as an incentive, to charge a success fee which is higher than his or her normal fee, subject to the two caps'.

Definition of normal and success fees

Mojapelo DJP remarks in the *Masango* case at para 13 that:

'The term "fees" and its derivatives "normal fees" and "success fees" are not defined in the [Act]. One should therefore consider the ordinary meaning of these concepts'.

According to the Legal English Dictionary, 'ordinary meaning rule' implies: 'A rule of a statutory construction under which statutes should be interpreted using the ordinary meaning of the language used unless a statute explicitly defines some of its terms otherwise' (www.translegal.com, accessed 23-5-2018).

- ***Normal fees***

In *Masango* the term 'normal fees' was described at para 17 as follows:

'In a sense normal fees that an attorney charges his client are the fees which are included in what is referred to as attorney and client costs. Leaving aside the

disbursement part of such costs, attorney and client fees are the fees that an attorney is entitled to recover from his client for professional services rendered. Such fees are payable by the client regardless of the outcome of the matter for which the attorney's services were engaged'.

The court stated at para 12 that '[t]he normal fees of the attorney are taken as a base and the attorney is authorised to increase the normal or base fee by up to 100%. The attorney may thus increase the normal fee by say 10%, 20%, 30%, 45% etcetera, but the percentage increase may not exceed 100%. This is the first cap on success fees. What is important is that there is a base (the normal fee) from which a percentage increase is permissible.'

- ***Success fees***

Mojapelo DJP further stated in *Masango* at para 18 that:

'"Success fees" are contemplated and explained, but are not defined, in s 2(2) of the [Act]. They are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in the litigation to the extent set out in the agreement concluded in terms of the [Act]. The subsection requires the legal practitioner and the client to specify in the agreement what they will regard as success in the particular litigation. A success fee is a normal fee which has been increased by a pre-agreed percentage. There is no other way of increasing the normal fee to the increased or success fee other than through a percentage. The normal fee may be increased by up to 100% to reach the success fee. A success fee may thus be and is often double the normal fee'.

At para 19 the court stated: 'The second cap on the increase that the attorney may charge is introduced as a proviso to s 2(2) and applies only in claims sounding in money.'

Stringent requirements of the Contingency Fees Act

Both types of agreements in subs 2(1)(*a*) and (*b*) are still bound to the stringent requirements of the Act.

Mojapelo DJP in Masango quoting Fabricius J in *De la Guerre v Ronald Bobroff & Partners Inc and Others*(GP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J) reaffirmed in para 58 to 60:

'[T]he Contingency Fees Act is exhaustive on its stated object, and any contingency fee agreement not in compliance with it is invalid.

The court in [*Tjatji v Road Accident Fund and Two Similar cases* 2013 (2) SA 632 (GSJ)] came to the same conclusion, holding that the intentions of the Act and the use of peremptory language pointed towards non-compliance of a contingency fees agreement being visited with invalidity.

Furthermore, compliance must be substantial and not merely formal compliance with the prescribed form.'

Fees must be reasonable

In terms of r 28 of the Rules for the Attorneys' Profession a practitioner is entitled to a reasonable fee for professional services rendered.

Under s 2(1)(*b*) of the Act the practitioner may contractually negotiate a 'higher' normal fee with their client without having to reduce their fee subject to the statutory 'cap'.

In the matter of *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) the court stated in para 55 that practitioners fees are 'subject always to the caveat that the normal fee should never amount to overreaching in the first place.'

Both types of agreements are still subject to 'the principle of reasonableness' and practitioners will always be subject to the application of this approach either practicing under a s 2(1)(*a*) or (*b*) agreement.

When determining the reasonableness of a fee the court discussed the following guidelines at para 10 in the case of *Coetzee v Taxing Master, South Gauteng High Court and Another* 2013 (1) SA 74 (GSJ) at para 29: 'The payment by a client to the client's own attorney is not aimed at a "full indemnity", but rather is aimed at payment of a reasonable recompense for services rendered.'

The tariff in r 70 is not binding on attorney and own client scale costs, and is merely a guide for taxation.

'In exercising the discretion to determine a reasonable rate for time charges for services rendered the practice is to have regard to:

- Fees charged by other legal practitioners.
- The seniority of the attorney.
- The time taken over the work.
- The nature of the work performed.'

These guidelines should always be applied in determining the reasonableness of the practitioner's fee regardless the outcome or the value of the claim and any agreement that caters for an inappropriately large fee could be subject to review and be found to be unenforceable.

A reasonable principle to follow in the application of fees under contingency fee agreements, is to be found in the *Thulo* case, where Morison AJ, remarks in para 59: 'That the client is assured of being paid at least 75% of the money amount obtained by successful litigation.'

Method of calculating fees

In the case of *Masango* Mojapelo DJP gave the following guideline in para 12 of the judgment:

'The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fees agreement, and then increases it in terms of the contingency fees agreement. The success fee is a fee which has been increased from the normal fee.'

He adds in para 24: 'The first cap is the percentage by which the legal practitioner is entitled to increase his fee, which is from 0% up to 100%. The second cap is a percentage of client's capital award, which the success fee may not exceed, namely 25%.'

In matters where the practitioner assumed liability for all the disbursements, much of which will be recovered from the party-to-party costs, I submit that those costs could reasonably be recovered from the party-to-party costs and make up for any shortfall in fees and disbursements.

Any excess remaining after the fees (normal/success) and disbursements had been recovered will accrue to the client.

The practitioner must account to their client for the balance of the capital and party and party costs.

Current case law comments

Morison AJ, in *Thulo* took the position on s 2 of the Act to imply:

'The true function of a proviso is to qualify the principal matter to which it stands as a proviso – as to which see, for example, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 79 F – J and the cases there cited. In other words, a proviso taketh away, but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double – 100% more than – the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.

…

The practitioner's fee is limited, on a proper reading of the section, to (i) 25% of the amount awarded in the judgment, or (ii) double the normal fee of that practitioner, whichever is lower.' (See para 51 and 52).

Morison AJ's approach had a startling result that the client would receive more than the capital award.

By not allowing for an uplift or success fee over and above the normal fee the client was enriched at the expense of the practitioner under a s 2(1)(*b*) agreement.

Having regard to the approach in English law, the definition of 'normal' and 'success' fees, dealt with above and the recommendations by the Commission, I submit that it is not the total fee that is so limited, but only the 'success fee'.

It is quite evident that any other approach would defeat the purpose of the Act in as far as making allowance for an 'incentive' to be paid to the practitioner willing to engage in speculative litigation on behalf of a client that would, otherwise, not have had the means to approach the courts.

The comments made by the Commission is explained in the following examples:

For purposes of the examples discussed, VAT was not included in the fee as per Mojapelo DJP in *Masango*, as I am of the opinion that VAT is not a fee but a tax.

Example A – normal plus capped success fee approach (the Commission)

Step 1: Calculating the fee (normal and success)	
Capital:	R 208 456 (representing the capital settlement)
Normal fee:	R 86 830 (as taxed in accordance with the agreed normal fee
Plus success fee:	R 52 114 (25% of capital, which is lesser than double the no fee)
Subtotal:	R 138 944 (total fees)
Plus expenses:	R 196 142
Total fees/expenses:	R 335 086
Step 2: Applying the fees and disbursements to the capital and costs received	
Capital:	R 208 456
Less: fees/expenses:	R 335 086
Subtotal:	– R 126 630
Plus party and party costs:	R 289 331
Total:	R 162 701 (78,05% of the capital to be paid to the client)

Example B – applying Morison AJ's approach

Step 1: Calculating the fee	
Capital:	R 208 456
Less success fee:	R 52 114 (25 % of capital or two times the normal fee, whichever lesser)
Subtotal:	R 156 342
Plus expenses:	R 196 142
Total fees/expenses:	R 248 256
Step 2: Applying fees and disbursements to the capital and costs received	
Capital:	R 208 456
Less fees/expenses:	R 248 256
Subtotal:	– R 39 800
Plus party and party costs:	R 289 331
Total:	R 249 531 (119,7% of the capital payable to the client)

Choosing between s 2(1)(*a*) or (*b*) agreement

In accordance with s 2(1)(*b*) a 'success' fee is normal fee, which has been increased by a pre-agreed percentage.

There is no other way of increasing the normal fee to the increased or success fee other than by applying a percentage, as Mojapelo DJP, stated in the Masango case.

The increase, incentive, uplift or elevated normal fee may be increased by up to 100% to reach the 'success' fee.

The practitioner wishing to engage a client on speculative cases may thus charge an 'uplift' fee in addition to their normal fee subject to the statutory cap as per the Commission's recommendations.

Unfortunately these types of agreements are the most contentious, as they need to balance the rights of the client and the practitioner equally.

The debate surrounding the correct interpretation of s 2(1)(*b*) agreements continues.

In most, if not all of the case law on the Act, the validity of a particular contingency fees agreement was addressed as in the Masango matter where the agreement was clearly invalid as it constituted a common law agreement.

However, in none of the current case law, clear guidance is given as to the approach to be taken on what constitutes 'normal' and 'success' fees.

In many of these cases it is acknowledged that our Act is derived from the English law, yet these judgments give a totally different approach to the interpretation of the Act.

I acknowledge that our judiciary is independent; however, in seeking direction, even the Commission's recommendations are in line with the approach of the tried and tested English law approach on contingency fees.

Currently s 2(1)(*a*) agreements are a safer option as the Act clearly defines the practitioner's right to draw a 'higher' uncapped fee, without the risk of being questioned by client or peer, as long as the fee is reasonable and does not amount to overreaching.

However, there is another alternative, by combining the two scenarios, for example, stipulating that in case of 'partial success' claims under R 1 000 000, s 2(1)(*a*) would apply, and in cases of 'success' in matters settled in excess of R 1000 000, a 2(1)(*b*) would apply.

Conclusion

Practitioners are currently left with having to engage in speculative litigation and having to decide between two different approaches either s 2(1)(*a*) or (*b*) with the latter placing the practitioner at an enormous risk, either financially and legally due to the lack of clear and concise guidelines.

I acknowledge that the client should be protected against potential abuses and for that reason guidance is given as to the qualification of what constitutes a reasonable fee and what should be regarded as overreaching, always subject to scrutiny by either the professional controlling body or the courts.

The fact is that the courts are conservative in their approach, to the extent that practitioners are actually being prejudiced to the benefit of their clients, is in stark contrast to the intention of contingency fee legislation.

In conclusion, by following the guidelines offered in terms of the English law and by applying the recommendations by the Commission, which were aimed at preventing exactly the challenges practitioners are facing today, the general principle is simply that in matters where a case is successful, the practitioner may charge a 'success' fee in addition to his 'normal' fee, subject to the statutory limitations and principle of reasonableness.

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