SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT (ROAD ACCIDENT FUND, INTERVENING PARTY) 2013 (2) SA 583 (GSJ) A

Citation 2013 (2) SA 583 (GSJ)

Case No 32894/12

Court South Gauteng High Court, Johannesburg

Judge Mlambo JP, Kathree-Setiloane J and Fabricius J

Heard November 19, 2012

Judgment February 11, 2013

Counsel *MSM Brassey SC* (with *KG Hopkins*) for the applicant.
Q Pelser SC for the respondent.
GJ Marcus SC (with *S Budlender* and *N Mayosi*) for the intervening party.

Annotations Link to Case Annotations

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Flynote : Sleutelwoorde

Attorney — Fees — Contingency fees — Contingency-fee agreement — All C contingency fee agreements to comply with Contingency Fees Act — No such thing as valid non-statutory (or common-law) contingency fee agreement — Act complying with Constitution — Not unfairly discriminating against attorneys or unjustifiably limiting their rights — Contingency Fees Act 66 of 1997.

Headnote : Kopnota

The applicant (SAAPIL) claimed that the common law entitled them to claim D greater fees under contingency fee agreements with their clients than what was allowed under the Contingency Fees Act 66 of 1997, which limited contingency fees to double the legal practitioner's normal time-based fees or 25% of the settlement, whichever was lower. SAAPIL argued that the Act did not override the common law and that legal practitioners could E therefore claim more than the Act allowed, provided they acted ethically. In the alternative they argued that the Act was unconstitutional or partially unconstitutional. The respondent minister, who was charged with the administration of the Act, argued that, if SAAPIL's contentions were upheld, then a significant portion of the funds earmarked for road-accident victims would be claimed by their legal representatives instead. F

Held: So-called 'common-law' contingency fee agreements between legal practitioners and their clients, ie agreements that allow legal practitioners to charge fees greater than those allowed by the Contingency Fees Act 66 of 1997, were doubly unlawful, since (1) the common law itself expressly prohibited contingency fee agreements between lawyers and their clients; and (2) the Contingency Fees Act left no room for contingency fee G agreements that did not specifically comply with its requirements. (Paragraphs [11], [18], [26] – [27] and [34] at 588H, 591E, 596B – 597C and 600A – C/D.) There was also no room for the argument that the entire Act (or any part of it) was unconstitutional because it unfairly discriminated against legal practitioners or

unjustifiably limited their rights by curbing the fees they were allowed to charge. (Paragraphs [43], [47], [52], [56], [62] and [66] – [68] at 603A – B, 605A – C, 607B – C, 608D – G, 610F – H and 612D – I.) H

Cases Considered

Annotations:

Case law

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3): referred to I

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15): dictum in para [22] applied

Bel Porto School Governing Body and Others v Premier, Western Cape and Another 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2): referred to J

A *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22): dictum in para [36] applied

De la Guerre v Ronald Bobroff & Partners Inc and Others (GNP case No 22645/2011, 11 February 2013): approved and applied

B *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) (2007 (5) BCLR 457): referred to

Ex parte Swain 1973 (2) SA 427 (N): referred to

Harksen v Lane NO and Others 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489; [1997] ZACC 12): applied

Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others 2001 (4) SA 360 (W): criticised and not followed

C *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) (2011 (2) BCLR 150): dictum in para [32] applied

Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10): dictum in para [60] applied

D *Mnisi v RAF* [2010] JOL 25857 (GNP): referred to

Mofokeng v Road Accident Fund and Two Other Cases [2012] ZAGPJHC 150: approved

Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559): referred to

E *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) (2001 (8) BCLR 765): referred to

Mort NO v Henry Shields-Chiat 2001 (1) SA 464 (C) ([2002] 2 All SA 515): discussed

New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5): F dictum in para [24] applied

Patz v Salzburg 1907 TS 526: referred to

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1): dictum in para [44] applied

G *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en*

Andere 2001 (11) BCLR 1175 (CC): referred to

Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA) (2004 (9) BCLR 930): dictum in para [41] applied

Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa 2003 (3) SA 54 (SCA) ([2002] 4 All SA 723): referred to

H *S v Hollenbach* 1971 (4) SA 636 (NC): referred to

Taylor v Mackay Bros and McMahon Ltd 1947 (4) SA 423 (N): referred to

Tecmed (Pty) Ltd v Hunter and Another 2008 (6) SA 210 (W): approved

Thulo v Road Accident Fund 2011 (5) SA 446 (GSJ): approved

Thusi v Minister of Home Affairs and Another and 71 Other Cases 2011 (2) SA 561 (KZP): discussed

I *Tjatji and Others v Road Accident Fund* 2013 (2) SA 632 (GSJ): approved

Weare and Another v Ndebele NO and Others 2009 (1) SA 600 (CC): dicta in paras [46] and [72] applied.

Statutes Considered

Statutes

The Contingency Fees Act 66 of 1997: see *Juta's Statutes of South Africa* J *2011/12* vol 7 at 5-145.

Case Information

Application for declaratory order stating that legal practitioners may A conclude contingency fee agreements with clients, that do not comply with the Contingency Fees Act 66 of 1997. Application refused in para [69].

MSM Brassey SC (with *KG Hopkins*) for the applicant.

Q Pelser SC for the respondent. B

GJ Marcus SC (with *S Budlender* and *N Mayosi*) for the intervening party.

Cur adv vult.

Postea (February 11). C

Judgment

Kathree-Setiloane J (Mlambo JP and Fabricius J concurring):

Introduction

[1] This matter concerns the legality and enforceability of contingency D fee agreements which are concluded without complying with the Contingency Fees Act 66 of 1997 (the Act) and the constitutionality of the Act itself.

[2] A contingency fee agreement is an agreement between a legal practitioner and his or her client where the legal practitioner agrees to E charge no fee if the client's court case is unsuccessful. Prior to the coming into operation of the Act (on 23 April 1999), which provides for contingency fee agreements between legal practitioners and their clients, contingency fee agreements between legal practitioners and their clients were prohibited under the common law. F

[3] The meaning, effect and constitutionality of the Act have generated much controversy and debate in the legal profession since its enactment. In an attempt to put this controversy to rest, the various law societies across the country had considered the contending positions, sought legal advice, and two branches — the Law Society of the Northern Provinces [1] G and of the Free

State — made rulings permitting its members to conclude contingency fee agreements outside the prescripts of the Act, provided that certain criteria were met. [2] Until recently legal practitioners, following the rulings of the Law Society of the Northern Provinces and the Free State, have been concluding such agreements without compunction. A spate of recent court decisions on the subject of the legality of H these contingency agreements has, however, generated uncertainty as to whether the 'so-called' common-law contingency fee agreement can coexist with the Act. The South African Association of Personal Injury

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Kathree-Setiloane J (Mlambo JP and Fabricius J concurring)

A Lawyers (SAAPIL), a voluntary association representing personal-injury lawyers who frequently litigate on contingency, has launched this application in an effort to obtain certainty on the question whether the Act exhaustively regulates the power of legal practitioners to conclude agreements with their clients for recompense by way of contingency fees.

B [4] SAAPIL's case is threefold:

(a) First, it contends that the Act does not override the common law. Its primary argument is that the legislature could never have intended the Act to be exhaustive and that the common-law right of practitioners to conclude contingency fee agreements is untrammelled. C It therefore contends that legal practitioners can conclude enforceable contingency fee agreements with their clients without complying with the requirements of the Act, provided they observe their ethical duties.

(b) Secondly, and in the alternative, SAAPIL contends that in the event that the court concludes that the Act is exhaustive, then the entire D Act is unconstitutional on the grounds that it discriminates against lawyers and their clients in breach of s 9 of the Constitution.

(c) Thirdly, and in the further alternative, SAAPIL contends that ss 2 and 4 of the Act are unconstitutional because they breach various rights contained in the Bill of Rights.

E [5] SAAPIL's application is opposed by the respondent, the Minister of Justice and Constitutional Development (the Minister), who is charged with the function of administering the Act. The Road Accident Fund (the Fund) also opposes the application. The Fund was granted leave to intervene in these proceedings at the hearing of the matter, as it has a F clear and substantial interest in the outcome of this application. If SAAPIL's contentions are upheld, then a significant portion of the funds earmarked for road accident victims would be claimed by their legal representatives instead — even beyond the very generous compensation already permitted by the Act. The primary concern of the legislature in G enacting the Road Accident Fund Act 56 of 1996 (the RAF Act) has been 'to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle'. [3] The object of the RAF Act is the payment of compensation for loss or damage wrongfully caused by the driving of motor vehicles. [4] The Fund accordingly has a clear interest in ensuring H that road accident victims receive payment of fair and reasonable compensation as contemplated by the RAF Act.

Status of contingency fee agreements under the common law

[6] SAAPIL's primary contention is that the Act does not override the I common law as developed under the Constitution or, at the very least, should now be construed as not doing so. It accordingly seeks a

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Kathree-Setiloane J (Mlambo JP and Fabricius J concurring)

declaratory order to the effect that legal practitioners are under no A obligation to comply with the Act, but can also invoke their common-law right to conclude contingency fee agreements.

[7] Our courts have under the common law consistently recognised that contingency fee

agreements between legal representatives and clients were contrary to public policy, unenforceable and unlawful. [5] Thus in B *De la Guerre v Ronald Bobroff & Partners Inc and Others*, [6] which was heard by this court on the same day as the current matter, this court observed:

> '(C)ontingency fee agreements between a litigant and his attorney were unlawful at common-law. At common-law a legal practitioner was only entitled to a reasonable fee for work actually done. See Christie C *Law of Contract* 4 ed at 408 – 9. It is also clear that the first respondent and the second respondent were aware of this view as long ago as November 1992, when the former Chief Justice Corbett wrote a letter to the Natal Law Society [7] which was also considered with approval by the South African Law Commission in its report in para 3.9. For present purposes I deem it necessary to quote the relevant paragraph dealing with the common-law authorities: D
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> "I am prima facie of the view that any [contingency fee agreement] between an attorney and his client . . . would be unlawful at common-law. I list some common-law authorities which I have consulted in this regard and also some case law (I do not claim that my somewhat hurried research has been E at all exhaustive): Voet 2.14.18; Kersteman *Woorden-Boek* sv 'Conditie van Triumphe'; Grotius 3.1.41 and Schorer's note CCLXXV; Van der Keessel *Praelectiones* 3.1.41; Van Leeuwen *RD Law* 5.4.2; *Incorporated Law Society v Reid* (1908) 25 SC 612; *Goolam Mahomed v Janion* (1908) 29 NLR 304; *Hollard v Zietsman* (1885) 6 NLR 93, a judgment of Connor CJ F containing a full review of the common law authorities; *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287, where a number of the cases are [reviewed]. (See also Christie The Law of

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> A *Contract* 2 ed 423.) It is true that the decision in *Patz v Salzburg* 1907 TS 526 appears to run counter to the general trend, but this did not concern an arrangement between attorney and client.'

[8] Accordingly, in *De la Guerre* this court found that:

> B 'It is abundantly clear from all authorities that the common-law prohibited contingency fee agreements between lawyers and their clients. Certain authorities, some of which are unreported, are clear on this point as well, being of the view, as was the Supreme Court of Appeal in *Price Waterhouse Coopers Inc* supra, that any contingency fee agreement which does not comply with the Act is invalid.'

C [9] In surveying the common law it is important to distinguish between contingency fee agreements between lawyers and their clients, on the one hand, and other species of *pacta de quota litis* such as champerty agreements between litigants and third parties, on the other. There are some decisions which suggest that not all of the latter class of agreements D are contrary to public policy. [8] Whatever the correctness of these decisions, however, they relate only to champertous agreements between litigants and third parties — not to contingency fee agreements between legal practitioners and their clients — which have always been regarded as E against public policy and thus prohibited under the common law.

[10] There appears, however, to be only one case suggesting that a contingency fee agreement between a lawyer and his client might not be contrary to public policy. This is the *Headleigh* decision [9] of Cameron J in the Witwatersrand Local Division of the high court (as it then was). *Headleigh* was out of step with the rest of our jurisprudence on the F common-law status of contingency fee agreements between legal practitioners and their clients. Three years later Cameron JA (as he then was) seemingly acknowledged that *Headleigh* was wrongly decided when he concurred in the *Price Waterhouse* decision of the Supreme Court of Appeal, which held that the Act was —

> G 'enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common-law'. [10]

[11] Since *Headleigh* was overruled by *Price Waterhouse* there is no common-law basis for the contention that a contingency fee agreement H between a lawyer and a client is permissible. SAAPIL, however, argues that the uncompromising approach adopted in *Price Waterhouse*, holding contingency fee agreements between attorney and client to be invalid at common law, does not reflect current policy which has evolved in respect of such agreements, in line with the constitutional objective of access to I justice. SAAPIL contends that the exception recognised at common law

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in respect of champertous agreements between a litigant and a third A party applies in respect of contingency fee arrangements between attorney and client as well, and that the Act is not the only development in public policy, but that the public-policy consideration of increased access to justice underpins a further development in the common law.

[12] SAAPIL submits in this regard that public policy now recognises B instances at common law where a contingency arrangement between an attorney and client is not invalid, and that a contingency fee arrangement may be entered into between attorneys and clients, as the common law would permit a contingency fee arrangement as a matter of judicial discretion, provided that: *(a)* it relates to a case of assisting an C impecunious litigant (not meaning totally indigent) to assert his or her rights; *(b)* that the attorney's remuneration is fair; and *(c)* the agreement does not amount to gambling, speculation or trafficking in litigation.

[13] SAAPIL finds support for these contentions in the following authorities: *Headleigh*; *Mort NO v Henry Shields-Chiat*; [11] and D *Thusi v Minister of Home Affairs and 71 Other Cases.*[12] I am of the view that SAAPIL's reliance on these cases is misplaced. As alluded to above, *Headleigh* has been overruled by the Supreme Court of Appeal in *Price Waterhouse*. In *Mort NO v Henry Shields-Chiat* the court considered whether an agreement between an attorney and his client, to deduct fees from the E proceeds of a settlement in a claim for damages, complied with the requirements of bona fides. The agreement preceded the Act. The court remarked that: [13]

> 'A contingency fee arrangement has subsequently been recognised in s 2 of the Contingency Fees Act 66 of 1997, which provides that the F success fee may be twice the practitioner's normal fee, with a maximum threshold of 25% of the client's award. While s 3 sets a range of requirements designed to protect the client, there is no evidence before this court which suggests a contravention of these kinds of safeguards which even in circumstances which pertained prior to the introduction of the Act represents a useful checklist when investigating questions of good faith . . . the case made out by the applicant does not G justify judicial interference with the contract concluded between Hermanus Ellis and respondent.'

As indicated, SAAPIL's reliance on this case is misplaced, firstly because the court was not called upon to make determination regarding the validity of the agreement in terms of the Act or the common law and, in H fact, deliberately desisted from doing so. [14] The mandate at issue was also entered into before the Act came into operation. [15] Thus, *Mort* does not purport to alter the common-law prohibition against contingency fee agreements between legal practitioners and their clients. I

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A [14] In *Thusi v Minister of Home Affairs and Another and 71 Other Cases*[16] the court held, with reference to a claim where an attorney took cession of his client's claim for costs as compensation for legal fees and disbursements, that an order for costs may be granted in favour of a successful applicant where the litigant is indigent and is seeking to B enforce constitutional rights against an organ of state; that the legal representative acts on the litigant's behalf for no fee and accepts liability for all disbursements; and that the litigant agrees that the legal representative will be entitled to the benefit of any costs order made by the court on his or her behalf. Wallis J (as he then was) found: [17]

> C 'The constitutional right of access to courts favours the recognition of an exception. Allowing an exception does not appear to give rise to any greater scope for abuse than exists in other instances where attorneys are permitted to act on a speculative or contingency basis, and the courts and professional bodies will be alert to prevent abuse. I have pondered whether such an exception should rather be formulated in D legislation and accept that a revision of the Contingency Fees Act, long called for by the organised legal profession, would be desirable. However the exception I contemplate is narrow and consistent with other exceptions in allowing an order for costs even though there is no underlying liability by the litigant to the legal representative. It is subject to constraints both by the court and possibly through the E mechanism of taxation, although as I will show, that poses difficulties.'

[15] Mindful of the dictum of Southwood AJA in *Price Waterhouse*, that 'the Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law', and that '(a)ny contingency fee agreement between F such parties which is not covered by the Act is therefore illegal', [18] Wallis J found

that the cost arrangement between attorney and client is not one that would be prohibited by the common law. He found that an arrangement which involved the cession of costs to the attorney as a fee is simply one that, in the absence of an exception to the indemnity principle, would result in the client being unable to obtain an order for G costs and the attorney not recovering any payment. I am of the view that SAAPIL's reliance on *Thusi* is for this reason misdirected.

[16] Clearly *Thusi* concerns a narrow exception to the indemnity principle [19] that a costs order is intended to indemnify the winner (subject to limitation of the party and party costs scale) to the extent that it is out of H pocket as a result of pursuing the litigation to a successful conclusion, [20] and not an exception to the common-law prohibition against contingency fee arrangements between legal practitioners and their clients.

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Wallis J expressly pointed out that this was not a matter envisaged in the A Act, when he stated:

> 'Whilst the Contingency Fees Act contemplates non-monetary litigation, its provisions are directed at the arrangements between the legal practitioner and the litigant, rather than recovery from the other party. They deal with ''no win, no fee'' arrangements and the recovery of B success fees. The underlying assumption is that when success is achieved a liability to pay fees attaches to the successful litigant. That is not the case here.' [21]

[17] With reference to the other (three) exceptions to the indemnity principle, Wallis J stated that what is notable about them is that they C recognise that, in the area of assisting the indigent to obtain access to justice, there is no public-policy reason precluding the attorney from recovering costs on an order in favour of the client, and that the Contingency Fees Act and *Price Waterhouse* reflect that public policy and the right of access to justice require a relaxation of other restrictions that previously limited the range of fee arrangements that could be concluded D between clients and legal practitioners. [22]

[18] Accordingly, neither *Headleigh*, *Mort* nor *Thusi* support the view that the common law has developed to a point that it recognises the validity of a contingency fee agreement between a legal practitioner and his client outside the prescripts of the Act. As pointed out by the E Constitutional Court in *Carmichele*, [23] the major engine for law reform is the legislature, and not the judiciary:

> 'In exercising their powers to develop the common-law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and the not the Judiciary. In this regard it is worth F repeating the dictum of Iacobucci J in *R v Salituro* (1992) 8 CRR (2d) 173 ([1991] 3 SCR 654), which was cited by Kentridge AJ in *Du Plessis v De Klerk*:
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> > Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social G foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the Courts which has the major responsibility for law reform. . . . The Judiciary should H confine itself to these incremental changes which are necessary to keep the common-law in step with the dynamic and evolving fabric of our society.'

[19] What *Carmichele* in my view makes clear is that law reform is primarily the responsibility of the legislature, not the judiciary. Where I

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A the legislature has introduced such reform by enacting legislation such as the Contingency Fees Act, which provides for contingency fee agreements between legal practitioners and their clients to reflect the public- policy consideration of access to justice, now guaranteed in s 34 of the Constitution, there is no scope for the development of the common law B by the judiciary in relation to such agreements — more particularly where such arrangements between legal practitioners and their clients are prohibited under the common law. There cannot, therefore, be two systems of law regulating the same subject-matter. [24] Were it, perhaps, permissible for

legislation and the common law on the status of contingency fee arrangements between legal practitioners and their C clients to develop in tandem — how then would these two systems coexist?

The Contingency Fees Act 66 of 1997

[20] The Act seeks to strike a balance between the vices of contingency D fee agreements, on the one hand, and their virtue, on the other, and of making justice accessible to poor people who might otherwise not have access to justice. This is the consideration which prompted the South African Law Commission and ultimately parliament to make limited provision for contingency fee agreements in terms of the Act.

E [21] The compromise, recommended by the Law Commission and adopted by parliament, was to make an exception to the common-law prohibition by permitting contingency fee agreements in terms of s 2(1) of the Act, but to make the exception subject to and dependent on the limitations and controls imposed by s 2(2) to s 5. The Law Commission F made this clear in its report:

> 'Notwithstanding the danger of over-regulation, the Commission is not convinced that safeguards and requirements for valid contingency fee agreements should be excluded from its proposed draft Bill. As is evident from the comments received and discussed in this report, there is grave concern that contingency fee agreements may lead to abuse and G may disturb the high ethical standards maintained by the legal profession up to the present. The Commission concedes that there are dangers attached to the implementation of a contingency fee system and expressed the view, in Working Paper 63, that if such a system should prove to be desirable, contingency fee agreements should be H fortified in legislation, firstly, to remove common-law prohibitions thereupon and, secondly, to prescribe clearly the limitations and controls to which they should be subjected so as not to breach the relationship between lawyer and client and to impact adversely upon public policy. The safeguards contemplated by the Commission which were also embodied in the proposed draft Bill in Annexure A to I Working Paper 63, amounted to the following:

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- The exclusion of criminal law and family law cases from A contingency fee agreements. . . .
- The imposition of statutory limitations on the size of the proposed uplift and caps on the fees payable to legal practitioners. . . .
- Requirements to the effect that contingency fee agreements should only be entered into upon reasonable prospects of success and that B legal practitioners should advise their clients of other options of funding litigation.
- Requirements as to the form and content of contingency fee agreements. . . .
- Review of contingency fee agreements and fees by the controlling bodies governing the legal profession and the courts. C
- The Commission regards these safeguards as so important that they ought to have statutory force and should not be dealt with simply as recommendations of the Commission which do not have the force of law and may or may not be complied with by the professional bodies. . . .

> The Commission therefore concludes that any system of contingency D fees should be regulated statutorily and that, although practical experience with contingency fees may eventually require amendments to the proposed Act, which may be cumbersome, the safeguards, limitations and controls of contingency fee agreements are of such importance that it is deemed to be in the public interest that they cannot be altered easily.' [25] E

[22] It is clear from this extract that the Law Commission's recommendation, ultimately adopted by parliament, was to create a limited exception to the common-law prohibition, but strictly subject to the limitations and controls imposed by the Act. This has been recognised by the Supreme Court of Appeal in *Price Waterhouse*: F

> '(O)ur Legislature followed the English example of permitting contingency fee arrangements — no win, no fees and increased fees in case of success — but subject to strict controls. [26] . . .

The clear intention [of the Act] is that contingency fees be carefully controlled. [27] . . . G

The Legislature . . . has made [contingency fee] agreements legal within carefully circumscribed limits and subject to regulation by the professions' controlling bodies and the Minister of Justice.' [28]

The effect of the Act H

[23] The Act gives effect to its purpose in the following ways. Section 1 defines a 'contingency fee agreement' as any agreement of the kind described in s 2(1) of the Act which provides:

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A '(1) Notwithstanding anything to the contrary in any law or the common-law, a legal practitioner [29] 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 B 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 C out in such agreement.'

[24] Section 2(1) makes an exception to the common law by permitting contingency fee agreements '(n)otwithstanding anything to the contrary in any law or the common-law'. The Act governs all agreements of the kind described in s 2(1) of the Act. These are 'no win, no fees D agreements', [30] and an agreement in terms of which a legal practitioner is entitled to fees equal to or higher than his or her normal fee if the client is successful. [31] The latter agreement is subject to the limitations provided for in s 2(2) of the Act, which provides that:

''(2) Any fees referred to in subsection (1)*(b)* which are higher than E 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 F excess, include any costs.'

[25] Section 2(2) of the Act accordingly limits the 'success fee' by providing that it must not exceed the normal fees by more than 100% or, in the case of claims sounding in money, 25% of the total G amount awarded. The 'success fee' must not include costs. Sections 3, [32]

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4 [33] and 5 [34] then impose a range of further limitations on, and A requirements for, all contingency fee agreements. Professional

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A controlling bodies, or, in the absence of such bodies, the Rules Board for Courts of Law, may make such rules as they deem necessary, in terms of s 6 of the Act, in order to give effect to the Act. Finally, the Minister of Justice may, in terms of s 7 of the Act, make regulations prescribing further steps to be taken for purposes of implementing and monitoring B the provisions of the Act.

[26] The effect of the Act is twofold. First, it permits contingency fee agreements in terms of s 2(1) of the Act. Second, it makes all contingency fee agreements subject to the limitations and requirements of s 2(2) to s 5. By so doing, the Act leaves no room for lawful contingency fee agreements which do not comply with the limitations and requirements C in s 2(2) to s 5. Sections 2(2) to 5 apply to all contingency fee agreements. Any contingency fee agreement which does not comply with these provisions of the Act is unlawful and invalid.

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So-called common-law contingency fee agreements A

[27] So-called common-law contingency agreements are thus unlawful for two reasons. First, they are unlawful under the Act. The Act covers the field and applies to all contingency fee agreements. It requires all contingency fee agreements to comply with the limitations and requirements B laid down by ss 2(2) to 5 of the Act. Therefore, as held by this court in *De la Guerre*, [35] any contingency fee agreement not in compliance with the Act is invalid. Second, a contingency fee agreement which does not comply with the Act also falls outside the scope of the exception in s 2(1) of the Act. Hence, any contingency fee agreement which is not permitted by s 2(1) of the Act will fall to be dealt with under the C common law, which expressly prohibits such agreements and renders them invalid.

[28] The decision of the Supreme Court of Appeal in *Price Waterhouse Coopers* makes this clear. [36] Although the case did not concern a contingency fee agreement between a client and an attorney, but rather D a champertous agreement between a litigant and a third party, the court discussed in some detail the legal status of contingency fee agreements, and concluded as follows:

> 'The Contingency Fees Act 66 of 1997 . . . provides for two forms of contingency-fee agreements which attorneys and advocates may enter E into with their clients. . . . 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.' [37]

[29] The judgment was delivered by Southwood AJA (as he then was) F and was concurred in by Harms, Cameron, Conradie and Lewis JJA. Although it may be arguable that the view expressed in *Price Waterhouse* on the legal status of common-law contingency fee agreements is obiter, the thrust of the judgment was that the Act did not render lawful that which was up to the time of the enactment unlawful under the common G law — the Act introduced an exception and not an amendment to the common law. Hence in *De la Guerre*[38] this court made it clear that it was not persuaded to depart from the view expressed in *Price Waterhouse Coopers* when Fabricius J, writing for the court, stated:

> 'During argument it was contended that the latter dictum was obiter. H A real obiter is a judicial observation made in passing: one not necessary for the decision of the case. It is a stated thought that does not advance the reasoning by which the outcome is reached. See *De Kock NO and Others v Van Rooyen* 2005 (1) SA 1 (SCA) (2004 (2) SACR 137; [2006] 2 All SA 227) para 17. I do not agree that the said dictum is obiter, as it is clear from the judgment as a whole that the Supreme I

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> A Court of Appeal was dealing with a mosaic (if I can call it that) of contingency fee agreement validity in general, be it between a third party and a litigant, or be it between a litigant and a legal practitioner. Its so-called obiter dictum certainly did advance the reasoning by which it reached the particular outcome in that decision. In any event, even if B I am wrong in this view, it is of no consequence. The Supreme Court of Appeal itself has said that it will not lightly depart from a previous decision made by it, even if relevant dicta were obiter. See *Steenkamp v South African Broadcasting Corporation* 2002 (1) SA 625 (SCA) in para 12. I may also just add that I am of the view that if five judges of the Supreme Court of Appeal say that an act is illegal under certain circumstances, the high court will not easily, if at all, come to a different C view.'

[30] In *Mnisi*, [39] a more recent decision of Southwood J, in the North Gauteng High Court, he reiterated the view expressed by the Supreme Court of Appeal in *Price Waterhouse Coopers*[40] relating to the illegality of D contingency fee agreements between legal practitioners and their clients that are not covered by the Act. After discovering, during the course of considering a draft settlement in the matter, that the plaintiff and the attorney had entered into a contingency fee agreement, Southwood J found that the fees that the plaintiff agreed to pay to the attorney for the conduct of the case were 'clearly not covered by the Act and the E agreement appeared to be illegal'. [41] He stated:

> 'Although I hold a (strong) prima facie view that the contingency fee agreement offends against the Act and is not invalid I shall not make an order declaring that it is invalid.' [42]

F Southwood J nonetheless made an order directing the registrar to send a copy of the judgment, together with the exhibits and affidavits filed, to the President of the Law Society for the Northern Provinces to investigate the conduct of the attorney. [43]

[31] As discussed in *De la Guerre*, [44] the South Gauteng High Court has G also recently, on four occasions, reached the identical conclusion to the Supreme Court of Appeal in *Price Waterhouse Coopers.* In *Tecmed*[45] Van Rooyen AJ held that, for a contingency fee agreement to be valid, it had to comply with the Act. [46] In *Thulo*[47] Morison AJ concluded that once the Act was enacted it set the limits and methods whereby practitioners H could raise contingency fees, and a contingency fee must thus be raised

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in accordance with the Act or it is unlawful. He added that '(t)here is A accordingly no such thing as a common-law contingency fee'. [48]

[32] In *Mofokeng*, [49] decided in August 2012, Mojapelo DJP again concluded that a contingency fee agreement which did not comply with the Act was unlawful. He stated that: B

> 'The clear intention of the legislature is that the contingency fees be carefully controlled. The Act was enacted to legitimise contingency fees agreements between legal practitioners and their clients which would otherwise be prohibited by the common-law. Any contingency fees agreement between such parties which is not covered by the Act is therefore illegal and unenforceable.' [50] C

[33] In *Tjatji*, [51] the most recent of the four decisions of the South Gauteng High Court, Boruchowitz J again concluded that a contingency fee agreement that did not comply with the Act was unlawful and unenforceable. He held that:

> 'The phrase (n)otwithstanding anything to the contrary in any law or D the common-law, which appears in s 2(1), and the long title of the Act, make it plain that the Act was intended to be exhaustive of the rights of legal practitioners to conclude contingency fee agreements with their clients. There is no room whatever for a legal practitioner to enter into a contingency fee agreement with a client outside the parameters of the Act or under the common-law. . . . A contingency fee agreement which does not comply with the provisions of the Act is E illegal. [52]
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> . . .
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> Although the Act does not state in express terms that a failure to fulfil the statutory requirements will render the contingency fee agreement F null and void, there are clear indications that this was indeed the legislature's intention. The primary object of the Act was to legitimise contingency fee agreements which were otherwise prohibited by the common-law. The purpose was also to encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts but subject to strict control so as to minimise the G disadvantages inherent in the contingency fee system and to guard against its abuse (see the report of the South African Law Commission, chs 2, 3 and 4; KG Druker op cit, chs 6 and 7). The safeguards introduced to prevent such abuses include ss 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would undoubtedly have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions.' [53] H

[34] SAAPIL concedes that textually the Act appears to be exhaustive, since the constraints would have no valid sphere of operation otherwise.

A It, however, then goes on to argue that the Act exhibits no intention to oust the legitimacy of common-law agreements if they can be recognised by law or should, by dint of the development of the common law, be recognised in the future. I am of the view that this argument is manifestly unfounded and completely irreconcilable with the seven judicial decisions, B including the decision of the Supreme Court of Appeal in *Price Waterhouse,* to which I have referred. As is demonstrated by these decisions, the language, history and purpose of the Act all indicate that parliament's intention was to cover the field and to provide that a contingency fee agreement would only be lawful where it complied with the Act. There is thus simply no basis for the contention that a C contingency fee agreement can be valid, even though it does not comply with the Act. Accordingly, as held by this court in *De la Guerre*: [54]

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

D <u>The constitutional challenge to the Act as a whole</u>

[35] SAAPIL's alternative approach is to contend that the entire Act is unconstitutional. The thrust of SAAPIL's constitutional challenge is that the Act 'irrationally, disproportionately, unreasonably and unfairly discriminates against [legal practitioners] and their clients'. SAAPIL's E argument is that legal practitioners and their clients are treated unfavourably relative to ordinary people who enter into champertous or speculative litigation agreements. It accordingly contends that the Act violates s 9 of the Constitution, as well as the principle of legality under s 1*(c)* of the Constitution.

F Test under s 9 of the Constitution

[36] In *Harksen v Lane*[55] the Constitutional Court set out the test to be followed in determining whether s 9 of the Bill of Rights is violated. *Harksen* makes clear that there are two different tests to be applied — one in relation to s 9(1) and one in relation to s 9(3). Section 9(1) of the G Constitution guarantees 'equal protection and benefit of the law to everyone' and s 9(3) prohibits unfair discrimination.

[37] The enquiry under the *Harksen* analysis commences with the guarantee of equality under s 9(1) of the Constitution. The first question is whether the Act differentiates between people or categories of people? H If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does, then there is no violation of s 9(1), and that is the end of the enquiry. If it does not, there is a violation of s 9(1) and the enquiry moves onto the prohibition of discrimination under s 9(3) of the Constitution.

I [38] The Act no doubt 'differentiates' between legal practitioners and ordinary persons. As indicated, s 9(1) of the Constitution requires that

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this differentiation be 'rational'. The same requirement is imposed by the A principle of legality in s 1*(c)* of the Constitution, which provides that South Africa is founded on the value of 'the supremacy of the Constitution and the rule of law'.

The rationality requirement B

[39] Both ss 1*(c)* and 9(1) of the Constitution require that the differentiation occasioned by the Act be 'rational'. In *Law Society v Minister of Transport*[56] the Constitutional Court observed as follows in respect of the constitutional requirement of rationality:

> 'The constitutional requirement of rationality is an incident of the rule C of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that State actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a D rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant to promote the need for governmental action to relate to a defensible vision of the public good and to enhance the coherence and integrity of legislative measures.'

The test for rationality in relation to s 9(1) of the Constitution, in E particular, was reiterated by the Constitutional Court in *Weare v Ndebele*:

> 'The test for determining whether s 9(1) is violated was set out by the court in *Prinsloo v Van der Linde* and *Harksen v Lane*. A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The F question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.' [57]

[40] For SAAPIL's constitutional challenge to succeed, it is required to G demonstrate that there is no rational basis for differentiating between legal practitioners who enter into contingency fee agreements with their clients, on the one hand, and lay persons who enter into champerty agreements with other lay persons, on the other. It is important to bear in mind, in this regard, that the requirement of 'rationality' is not the H same as the requirement of 'reasonableness'. Rationality is a lower standard than reasonableness. The Constitutional Court has made this clear on numerous occasions:

'Decisions as to the reasonableness of statutory provisions are ordinarily I matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of Courts

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A in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. . . . If the legislation defining the scheme is rational, the Act of Parliament cannot be B challenged on the grounds of unreasonableness. Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of s 36 of the Constitution and it is only as part of this s 36 enquiry that reasonableness becomes relevant. It follows that it is C only at that stage of enquiry that the question of reasonableness has to be considered.' [58]

[41] SAAPIL, however, repeatedly conflates and confuses the question of rationality with issues of disproportionality, unfairness and unreasonableness. Rationality is, however, not the same as or even linked to D disproportionality, unfairness or unreasonableness. The Constitutional Court has made this expressly clear in the *Law Society v Minister of Transport* case:

'It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is E it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.' [59]

[42] The Constitutional Court adopted the same approach in *Merafong*:

F 'The fact that rationality is an important requirement for the exercise of power in a constitutional State does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying G the conduct of the legislature.' [60]

[43] SAAPIL's fundamental complaint is that it is irrational for parliament to have enacted a different regime for contingency fees for legal practitioners, in comparison to agreements of champerty and maintenance H which may be entered into by ordinary members of the public.

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This argument, however, overlooks the obvious and fundamental A differences between legal practitioners who enter contingency fee agreements, on the one hand, and lay persons who enter into champerty and maintenance agreements, on the other. As pointed out by the Fund, there are four fundamental and overlapping differences. First, legal practitioners are responsible for conducting the litigation concerned. B They run the case and are responsible for advising on and taking the litigation decisions. Lay persons who enter into champerty and maintenance agreements do not engage in any of these activities.

[44] Second, legal practitioners have specialised knowledge and training C which equip them to conduct litigation. They are perceived by their clients as being experts on the decisions to be taken. This puts lawyers in a powerful position to influence the actual conduct of litigation. Lay persons who enter into champerty and maintenance agreements do not possess any of these skills or characteristics. Third, legal practitioners are bound by a range of ethical duties to their clients. [61] These duties may D well come into conflict with their own pecuniary interest in the litigation when contingency fee agreements are concluded. Lay persons who enter champerty and maintenance agreements have no such ethical or other duties. There is, therefore, no possibility of a conflict of interest in this regard. Lastly, legal practitioners are bound by a range of ethical duties to the court. [62] Again, these duties may well come into conflict with their E own pecuniary interest in the litigation when contingency fee agreements are concluded. Lay persons who enter into champerty and maintenance agreements owe no such ethical duties to the court or to litigants. There is, therefore, no possibility of a conflict of interest in this regard.

[45] The Law Commission was mindful of precisely these sorts of F considerations and concerns

when it adopted its report on contingency fees, which ultimately led to the enactment of the Act. The Commission articulated these concerns as follows:

> 'As far as the relationship between lawyer and client is concerned, it is G the Commission's opinion that contingency fee arrangements involve the question of a lawyer's professional ethics. These ethical concerns may be taken back to our common-law and case law. In litigation a professional lawyer's role is to advise his or her client with a clear eye and unbiased judgment. Furthermore, a lawyer retained to conduct litigation is not merely the agent and adviser to the client, but also an H officer of the court with a duty to the court to ensure that the client's case is presented and conducted with scrupulous fairness and integrity. A lawyer who acquires a personal financial interest in the outcome of litigation may obviously find himself or herself in a situation in which that interest conflicts with those obligations.' 63

The Commission showed particular concern for conflict of interests, I when it stated thus:

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> A 'Another argument against contingency fees is that the financial interest of lawyers in the outcome of litigation may adversely affect their ability to give dispassionate, objective and disinterested advice at all stages of the proceedings. For example, lawyers might advise their clients to accept settlement offers, even though a settlement offer is lower than B the judgment likely to be gained at the trial, in order to secure their fees and avoid the additional expense of the trial — which the lawyer might, depending on the nature of the agreement entered into, have to meet if unsuccessful. It is also argued that the personal involvement with the client in the outcome of the litigation is likely to place the lawyer in direct conflict with his duty to the court.
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> C . . .
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> In addition it is said that a lawyer who has a financial interest in the recovery may take charge of the litigation and disregard the desires of the client. The lawyer can use his or her position of superior knowledge to persuade the client to pursue a course of action that is more in line D with the lawyer's interests and desires than those of the client. Although this conflict may be present in every professional relationship, it is submitted that it is especially dangerous under a contingency fee arrangement because under such an arrangement the client surrenders the principal means of controlling how much the lawyer works, or does not work, on the client's behalf.' 64

E [46] The Law Commission concluded as follows regarding the danger inherent in the system of contingency fees:

> 'The dangers inherent in a system of contingency fees are that it may create a conflict of interests in terms of a lawyer's responsibility to his F or her client and the lawyer's duty to the court, may result in fees out of proportion to the work actually done by lawyers on behalf of their clients, may give rise to an increased load of frivolous, spurious and unmeritorious litigation and may encourage ambulance chasing.' 65

The Commission considered these to be serious concerns. It considered, G however, that they should be dealt with by way of statutory regulation, rather than a ban on contingency fees:

> 'In the Commission's view the potential of contingency fees creating a conflict of interests between lawyers' duty towards their clients and to the courts would raise a serious concern. However, this inherent danger H of contingency fees would appear to be insufficient, per se, to warrant the rejection of contingency fee arrangements. In order to maintain the balance between a lawyer's duty to the court and to his or her client, which balance has been referred to by the Chief Justice, care should be taken not to disturb the prevailing ethical standards maintained by the legal profession. Sufficient safeguards should essentially be built into I any system of contingency fees to minimise the disadvantages of the system and to guard against its abuse.' 66

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[47] The vast majority of the Commission's concerns, understandably, A apply to legal practitioners. The Commission displayed no such concerns in relation to lay persons who enter into champerty and maintenance agreements. In the circumstances I am of the view that the Act manifestly satisfies the rationality requirement. There is a clear rational connection in the differentiation between legal practitioners and their B clients, and other lay persons who may enter into champertous agreements, and a legitimate governmental purpose. The purpose is to cater for the particular risks inherent in contingency fee agreements between legal practitioners and their clients. The Act does not, therefore, impermissibly infringe upon the guarantee of equality under s 9(1) of the Constitution. C

[48] SAAPIL, no doubt, seeks to buttress its 'irrationality' argument by relying on the fact that legal representatives are subject to the rules and disciplinary decisions of their professional bodies. Whatever the effectiveness or ineffectiveness of these self-regulatory regimes, it cannot be D that parliament's decision, to legislate safeguards rather than leaving them to the professional bodies, is irrational. Parliament's objective in enacting the Act was not merely to put the right of a practitioner to charge contingency fees beyond doubt. Had that been the case, then there would have been no need for the Act to be as detailed as it is. As is apparent from the answering affidavit of the Minister, the intention of E parliament, for good reason and in compliance with the recommendations of the Law Commission, was to properly regulate such agreements — something that is starkly absent from the ruling of the Law Society of the Northern Provinces, permitting its members to enter into 'so-called contingency fee agreements' outside the prescripts of the Act. I agree. F

[49] The Law Society of the Northern Provinces has to date not put in place rules aimed at addressing the pertinent risks of overreaching by its members, which may result from contingency fee arrangements. It has also not promulgated a cap to the percentage of the capital that may be G recovered by attorneys. Nor has it promulgated a cap on the uplift of the normal fees. The only guideline of any note promulgated by the Law Society of the Northern Provinces is that the attorney's remuneration must be fair. In my view, however, what is to be regarded as fair, in the context of contingency fee arrangements between attorney and client, is not easily determinable in the absence of proper guidelines relating to the H nature and form of contingency fee agreements.

[50] It is important to bear in mind that, by the time a case goes to court, the attorney has paid out on average tens of thousands of rands [67] and has worked for years without debiting any fees from the client. Naturally, by the time the trial is conducted, the attorney is eager to recover his fees I and close the book in order to maximise his or her cash flow. If the matter is unable to be settled there will be no recovery of fees for yet

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A another year or so. Therefore, unsurprisingly, matters of this nature invariably settle. The possibility of a conflict of interest, in this context, is thus very real. There is, moreover, no detailed accounting by attorneys under the 'so-called common-law contingency fee' arrangement system. There is apparently also no attempt to establish whether the attorney's B fee, calculated as a percentage, exceeds a 100% increase of the normal fees of the attorney, or not. Lastly, the percentage at which attorneys undertake to work on contingency invariably exceeds 25%. In my view the imposition of limitations and safeguards by means of statutory measures, in so tenuous a context that is arguably open to abuse, can only be for the public good.

C [51] The issue of self-regulation by professional bodies versus statutory regulation was fully considered and addressed by the Law Commission in its report:

> '(T)hose not in favour of the introduction of a contingency fee system providing for the payment of an uplift fee, hold the view that the D legislation governing speculative fees . . . are unnecessary and contend that the regulation of such fees should be left in the hands of the profession. . . .
>
> Notwithstanding the danger of over-regulation, the Commission is not convinced that safeguards and requirements for valid contingency fee E agreements should be excluded from its proposed draft Bill. As is evident from the comments received and discussed in this report, there is a grave concern that contingency fee agreements may lead to abuse and may disturb the high ethical standards maintained by the legal profession up to the present. The Commission concedes that there are dangers attached to the implementation of a contingency fee system and expressed the view, in Working Paper 63, that if such a system should F prove to be desirable, contingency fee agreements should be fortified in legislation, firstly, to remove common-law prohibitions thereupon and, secondly, to prescribe clearly the limitations and controls to which they should be subjected so as not to breach the relationship between lawyer and client and to impact adversely on public policy. . . .
>
> G The Commission regards these safeguards as so important that they ought to have statutory force and should not be dealt with simply as recommendations of the Commission which do not have the force of law and may or may not be complied with by the professional bodies. The Commission's view was reiterated by Advocate AJ Louw of the H Pretoria Bar who stated that a system of contingency fees must be regulated strictly, in the form of legislation, in view of the possibility that different sets of rules might be agreed upon

by different Bars and different Law Societies who may not even agree among themselves as to what precisely the acceptable arrangements should be. Moreover, persons who are not members of, for instance, the Bar, might take the I view that they are not bound by any rules laid down by the various Bars in this respect. . . . The Commission is also of the opinion that statutory measures will contribute to establishing uniformity of the law in all parts of the country. . . .

The Commission therefore concludes that any system of contingency fees should be regulated statutorily and that, although practical experience J with contingency fees may eventually require amendments to the

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proposed Act, which may be cumbersome, the safeguards, limitations A and control of contingency fee agreements are of such importance that it is deemed to be in the public interest that they cannot be altered easily.' 68

[52] I am of the view that, far from being irrational, this approach is both laudable and sensible. As maintained by the Fund, SAAPIL's rather B remarkable proposition, that parliament has no right to put in place special statutory protections to prevent abuse by lawyers acting on contingency — and that parliament was constitutionally obligated to leave the regulation of contingency fees to the professional bodies concerned — is therefore unsustainable as a matter of constitutional law. SAAPIL's primary rationality challenge to the Act as a whole, under C s 9(1) and s 1*(c)* of the Constitution, is, accordingly, without merit.

Enquiry under s 9(3) of the Constitution

[53] What remains then is the argument based on unfair discrimination. D However, as indicated earlier, having established that there is a rational connection between the distinction (between legal practitioners and their clients, and other lay persons) and a legitimate governmental purpose, there is no violation of s 9(1), and that is the end of the s 9 enquiry. There would, therefore, be no need for the court to consider whether there has been a violation of s 9(3) of the Constitution. However, in view E of SAAPIL's repeated assertion that the Act discriminates between legal practitioners and their clients, and other lay persons, it is important to examine SAAPIL's challenge to the Act on this ground.

[54] Turning then to the application of the prohibition on unfair discrimination under s 9(3) of the Constitution, the first question for F consideration is whether the Act unfairly discriminates. If it differentiates on a ground specified in s 9(3), then it is presumed to be unfair discrimination. However, in a case such as this one, where the differentiation is not on a ground specified in s 9(3), the question for consideration is whether the differentiation is made on the basis of 'attributes and characteristics which have the potential to impair the fundamental G human dignity of persons as human beings or to affect them adversely in a comparably serious manner'. If it does, then this constitutes discrimination. The court must then consider whether the discrimination is 'fair' or 'unfair'. The right to dignity is central to this enquiry. The Constitutional Court reiterated this in *Weare*:

'Whereas the core of s 9(1) is the idea that no one is above or beneath H the law and that all persons are subject to law impartially applied and administered, the core of the right against discrimination in s 9(3) is dignity. Differentiation becomes unfair discrimination when it is based on grounds that have the potential to impact upon the fundamental dignity of human beings. As the court has held, these are grounds that — I

"have the potential, when manipulated, to demean persons in their inherent humanity and dignity . . . . In some cases they

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A relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.' 69

B [55] SAAPIL contends that the Act discriminates between legal practitioners and lay persons. To demonstrate this, SAAPIL is required to show that the differentiation is on a ground specified in s 9(3) of the Constitution or that, objectively, the ground of differentiation was —

'based on attributes and characteristics which have the potential to impair the fundamental human dignity of

persons as human beings or C to affect them adversely in a comparably serious manner'. [70]

[56] SAAPIL concedes that the differentiation does not occur on any of the listed grounds set out in s 9(3). It must, therefore, in order to succeed with its challenge to the Act under s 9(3) of the Constitution, demonstrate D that the Act as a whole discriminates unfairly because it differentiates in a manner that impairs the fundamental human dignity of legal practitioners and their clients, or affects them adversely in a comparably serious manner. SAAPIL, however, barely suggests that this is the case. It makes only a peripheral reference to the right to human dignity in a E single paragraph in its heads of argument, and then only in relation to s 4 of the Act, not the Act as a whole. The right to human dignity was also barely touched upon in argument, despite the fact that SAAPIL's main constitutional attack on the Act is based on an assertion of 'discrimination'. The differentiation in the Act between legal practitioners and their clients, on the one hand, and lay persons who may enter F into champertous agreements, on the other, does not in my view constitute unfair discrimination. It does not have the potential to impair the fundamental human dignity of legal practitioners and their clients as human beings, or to affect them adversely in a comparably serious manner. The Act consequently does not violate the prohibition on unfair G discrimination in s 9(3) of the Constitution.

The challenge to s 2 of the Act

[57] SAAPIL contends that s 2 of the Act is unconstitutional. Section 2 of the Act sets out the limits regarding what fees may be charged under a H contingency fee agreement. SAAPIL contends that s 2(1) and s 2(2) of the Act violate the right to a fair hearing in s 34 of the Constitution. It claims that s 2(2) caps fees at 'too low a level', but gives no indication of what the correct level of the cap should be. Its second complaint is that the prevailing cap is far too inflexible because it sets a single threshold for the maximum contingency fee, which applies to all types of cases. I SAAPIL, therefore, contends that currently the Act leaves the practitioner with little choice but to turn the prospective client away or to enter into a common-law contingency fee agreement.

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[58] There is in my view no evidence on SAAPIL's papers to support A these contentions. It does not claim that its members have turned away clients because of the restrictions in s 2(2) of the Act or, for that matter, that they would do so if the present application were dismissed. Without such positive factual averments, the suggestion that ss 2(1) and 2(2) of the Act violate s 34 of the Constitution is entirely speculative and B unfounded. Moreover, in the analogous context of time-bar provisions, the Constitutional Court has emphasised that s 34 of the Constitution does not allow litigants an unbounded and indefinite right to institute legal proceedings. It merely requires that they be afforded a 'real and fair' opportunity to do so. [71] There is simply no evidence before the court to suggest that ss 2(1) and 2(2) of the Act prevent litigants from having a C 'real and fair' opportunity of instituting legal proceedings. SAAPIL has accordingly not demonstrated any limitation to s 34 of the Constitution.

[59] Moreover, it is notable that s 2 of the Act was adopted by parliament and the Law Commission only after the Commission paid D close attention to comparative experience. In adopting the proposal that the maximum surcharge should not exceed 100% of ordinary fees, the Commission noted that such a surcharge had been introduced in England and Wales and advocated in Australia. It adopted the reasoning of the Australian Access to Justice Advisory Committee: E

> '(W)e think that a maximum 100% uplift bears a sufficient relationship to the chances of success and failure over a range of cases to encourage lawyers to offer contingency fee arrangements to their clients, while protecting clients from excessive fees.' [72]

The Law Commission also viewed the 25% maximum limit on fees as F being an important safeguard in order to 'prevent that all proceeds are swallowed up in legal fees'. [73] In this respect, too, the Commission relied on the fact that England and Wales had imposed a maximum limit on fees, of 25% of the proceeds of an action. [74]

[60] In adopting the limits in s 2(2) of the Act, parliament sought to give G effect to the need for access to justice. It recognised correctly, in my view, that access to justice would not be promoted by unlimited contingency fees. On the contrary, in order to protect members of the public and ensure that they benefited from litigation conducted on their behalf, it was necessary to impose certain limits on contingency fees. Without such limitations the right of access to court for many litigants might be H

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A rendered meaningless because, even if they were able to get to court and succeed, they would derive little or no financial benefit from such court proceedings.

[61] SAAPIL contends for a situation where the level of contingency fees, permitted by the Act, would depend on arrangements which may be B struck between a legal practitioner and his or her client 'under a flexible system that is impossible under the rigid system of maximum fees' created by the Act. Quite how the legislature could ever hope to achieve this without abolishing the limits on contingency fees altogether is not clear. It thus appears that, for SAAPIL's argument to succeed, it must C demonstrate that the Constitution requires that the limits on contingency fees be abolished altogether. This argument is in my view unsustainable. Apart from the United States, where contingency fees are largely unregulated, I am unaware of any comparable jurisdiction which allows contingency fee arrangements without any limitations on the D amount that may be charged. As Druker explains in his book *The Law of Contingency Fees in South Africa*, after having conducted a survey of the comparative international position:

> 'In order to combat the abuse of such agreements and to conserve the lawyer/client relationship, a substantial number of safeguards have either been introduced or are being considered by other jurisdictions. E These include provisions as to the limit to be placed on increased fees (ranging from about 15% to 100%), the particulars that the contingency fee agreements should contain, provision for cooling-off periods and review of such agreements by the watchdog bodies concerned and the courts. The limits on increased fees are, in some instances, statutorily prescribed and in others merely regulated by the rules of the F appropriate law societies.' [75]

[62] In the circumstances I am of the view that there is no limitation of any right occasioned by s 2 of the Act. Even if there were, this would amount to a permissible and justifiable limitation in terms of s 36 of the Constitution, as contingency fee arrangements, as envisaged in the Act, G serve to facilitate access to justice, as opposed to denying litigants such access, where they may otherwise not be able to afford to litigate. As recognised by Fourie & Sarkin:

> '(C)lose regulation of contingency fee agreements is clearly essential both to safeguard individual clients and to ensure that the public H interest is served by allowing contingency agreements into our law.' [76]

Challenge to s 4 of the Act

[63] Section 4 of the Act deals with the issue of settlement when a contingency fee agreement has been entered into. It provides, in essence, that such a matter may only be settled after affidavits from the legal I practitioner and client have been filed, with court or, if the matter is not before court, with the relevant professional body. The affidavit of the

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legal practitioner must set out: *(a)* the full terms of the settlement; *(b)* an A estimate of the amount or other relief that may be obtained by taking the matter to trial; *(c)* an estimate of the chances of success or failure at trial; *(d)* an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial; *(e)* the reasons why the settlement is recommended; *(f)* that the matters set out above were explained to the B client, and the steps taken to ensure that the client understands the explanation; and *(g)* that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement. The affidavit of the client must state that: *(a)* he or she was notified in writing of the terms of the settlement; *(b)* the terms of the settlement were explained to him or her; *(c)* he or she understands and agrees to C them; and *(d)* his or her attitude to the settlement.

[64] SAAPIL contends that s 4 constitutes an infringement of s 10 (the right to human dignity); s 14 (the right to privacy); s 30 (the right to a fair public hearing); s 35(1)*(a)*, *(b)* and *(c),* and 35(3)*(h)* and *(j)* (the D right to remain silent and the privilege against self-incrimination) of the Constitution. SAAPIL contends that s 4(1)*(e)* of the Act is especially drastic and far-reaching because, in personal-injury cases, the explanation of the reasons why the settlement is recommended may entail the disclosure of private medical details, such as an individual's HIV status. It contends further that, in a conventional commercial case, the litigant may prefer to settle than have his or her finances subject to scrutiny in E open court, particularly if he or she has been less than scrupulous in filing tax returns. Lastly it contends that an opposing party, armed with the information contained in the settlement affidavit required to be filed in terms of s 4 of the Act, is in a position to retract the offer if he or she so chooses, once it is recognised that there has yet to be acceptance of the F offer of settlement that is being presented to the court. These difficulties, it argues, render s 4 of the Act 'unworkable in practice'.

[65] SAAPIL's contention, that s 4 of the Act constitutes an infringement of the rights to remain silent and the privilege against self-incrimination G under s 35(1)*(a)*, *(b)* and *(c)*, and s 35(3)*(h)* and *(j)* of the Constitution, respectively, is completely unsustainable, as s 1(v) [77] of the Act makes it abundantly clear that the Act has no application to criminal proceedings. Furthermore, in relation to the challenge to the Act, on the grounds that it infringes upon the rights to dignity, privacy and to a fair trial, SAAPIL has once again failed dismally to put up evidence, on its H papers, to support these challenges. Nor has it provided a single actual

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A example to demonstrate any such infringements. SAAPIL's claims are, therefore, entirely speculative and unfounded. Moreover, even if these facts had been established, they would not demonstrate any limitation of the rights concerned. As submitted by the Fund, s 4 does not preclude courts and parties from resolving these concerns if they were ever truly B to arise. Thus, for example, if a given client was truly concerned about the disclosure of private medical information, the attorney could ask the court to direct that the affidavit containing such information be sealed and not be made available to the public. Similarly, if the real concern of the plaintiff is that a particular defendant might retract a settlement offer C upon sight of the affidavit, the plaintiff could insist that the offer be kept open until after the court has considered the affidavits. Accordingly, I am of the view that there is nothing in s 4 of the Act that impermissibly limits any constitutional right under s 36 of the Constitution.

[66] Finally, even if SAAPIL were to establish a limitation of constitutional rights, this court is required to have regard to the critical D importance of protecting clients subject to contingency fee agreements in the context of settlements. The Law Commission drew specific attention to this danger in its report:

> 'Another argument against contingency fees is that the financial interest of lawyers in the outcome of litigation may adversely affect their ability to give dispassionate, objective and disinterested advice at all stages of E the proceedings. For example, lawyers might advise their clients to accept settlement offers, even though a settlement offer is lower than the judgment likely to be gained at the trial, in order to secure their fees and avoid the additional expense of the trial — which the lawyer might, depending on the nature of the agreement entered into, have to meet if unsuccessful'. [78]

F Similarly, in proposing its version of s 4 of the Act (which is different to the final version adopted by parliament), the Law Commission recorded that:

> 'The judges of the Appellate Division expressed concern that, as in the USA, it may often be financially more advantageous to a lawyer to settle G a case quickly without spending too much time on it.' [79]

[67] It was these risks, in the context of settlement, that led to s 4 of the Act being introduced. As Mojapelo DJP observed in *Mofokeng*, the purpose is to ensure that the supervisory or monitoring process of the court is present when contingency matters are settled. [80] It also does H everything possible to ensure that the client is made aware of the prospects of success, fee options, and so on. These are plainly laudable and important measures which outweigh the marginal limitation of rights contended for by SAAPIL. Accordingly, the challenge to s 4 of the Constitution is patently lacking in merit and falls to be dismissed.

I [68] For the reasons stated, SAAPIL's constitutional challenge to the Act as a whole is without merit and falls to be dismissed in its entirety.

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[69] In the result I make the following order: The application is A dismissed with costs, which costs shall include the costs consequent upon the employment of two counsel.

Applicant's Attorneys: *Rötgen & Röntgen*, Pretoria.

Respondent's Attorneys: *State Attorney*, Johannesburg. B

Intervening Party's Attorneys: *Lindsay Keller*, Johannesburg.

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1 The Council of the Law Society of the Northern Provinces made this ruling on 21 June 2012. The Law Society of the Free State followed soon thereafter.

2 The 'so-called common-law contingency fee agreement' had to meet the following criteria: *(a)* it should relate to a genuine case of assisting an impecunious client assert his or her rights; *(b)* the attorney's remuneration must be fair; and *(c)* the agreement must not amount to gambling, speculation or trafficking in litigation.

3 *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) (2007 (5) BCLR 457) para 23.

4 Section 3 of the RAF Act.

5 Contingency fee agreements are a species of *pacta de quota litis*, which were looked upon with disfavour at common law because they were considered to encourage speculative litigation and consequently amounted to an abuse of the legal process. Contingency fee agreements were singled out for particular censure because they are a form of *pacta de quota litis* between a lawyer and his client, which has additional undesirable features. The first is that they compromise the lawyer's relationship with his client by introducing conflicts of interest, and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with a financial interest in the outcome of the case, which may adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding desire to secure a successful outcome may tempt him or her into practices which may compromise his or her duties to the court, such as coaching witnesses, misleading the court, falsifying evidence, etc.

6 GNP case No 22645/2011, 11 February 2013.

7 Letter from former Chief Justice Corbett to the Natal Law Society, dated 9 November 1992, at 2.

8 Eg *Patz v Salzburg* 1907 TS 526.

9 *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others* 2001 (4) SA 360 (W) at 369E – 371J.

10 *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) (2004 (9) BCLR 930) para 41.

11 2001 (1) SA 464 (C) ([2002] 2 All SA 515).

12 2011 (2) SA 561 (KZP).

13 At 476G – J.

14 *Mort* at 476I – J.

15 Ibid at 467H – I, 476I – J and 476G – H.

16 2011 (2) SA 561 (KZP).

17 *Thusi* paras 110 – 111.

18 *Price Waterhouse* para 41.

19 *Thusi* para 109.

20 *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) ([2002] 4 All SA 723) para 18; *Taylor v Mackay Bros and McMahon Ltd* 1947 (4) SA 423 (N) at 431.

21 *Thusi* para 106.

22 Ibid para 108.

23 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22) para 36.

24 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) para 22.

25 South African Law Commission Project 93 'Speculative and Contingency Fees' November 1996 paras 4.95 – 4.97. See also paras 1.19, 2.19, 3.23 and 4.101.

26 Ibid para 40.

27 Ibid para 41.

28 Ibid para 45.

29 '(L)egal practitioner' is defined in s 1 of the Act to mean an attorney or advocate.

30 Section 2(1)*(a)* of the Act.

31 Section 2(1)*(b)* of the Act.

32 Section 3 of the Act provides:

'(1)*(a)* A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the *Gazette*, after consultation with the advocates' and attorneys' professions.
(b) The Minister of Justice shall cause a copy of the form referred to in paragraph *(a)* to be tabled in Parliament, before such form is put into operation.
(2) A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement.
(3) A contingency fees agreement shall state —
(a) the proceedings to which the agreement relates;
(b) that, before the agreement was entered into, the client —
(i) was advised of any other ways of financing the litigation and of their respective implications;
(ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;
(iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and
(iv) understood the meaning and purport of the agreement;
(c) what will be regarded by the parties to the agreement as constituting success or partial success;
(d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;
(e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
(f) either the amounts payable or the method to be used in calculating the amounts payable;
(g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;
(h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and
(i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.
(4) A copy of any contingency fees agreement shall be delivered to the client concerned upon the date on which such agreement is signed.'

33 Section 4 of the Act provides:
'(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating —
(a) the full terms of the settlement;
(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;
(c) an estimate of the chances of success or failure at trial;
(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
(e) the reasons why the settlement is recommended;
(f) that the matters contemplated in paragraphs *(a)* to *(e)* were explained to the client, and the steps taken to ensure that the client understands the explanation; and
(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.
(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating —
(a) that he or she was notified in writing of the terms of the settlement;
(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and
(c) his or her attitude to the settlement.
(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.'

34 Section 5 of the Act provides:
'(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the *Gazette* for the purpose of this section.
(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision of fees are unreasonable or unjust.'

35 *De la Guerre* para 13.
36 Supra n10.
37 Ibid para 41.
38 *De la Guerre* para 11.
39 *Mnisi v RAF* [2010] JOL 25857 (GNP).
40 Ibid para 12.
41 Ibid para 13.
42 Ibid para 26.
43 Ibid para 27.

44*De la Guerre* para 12.
45*Tecmed (Pty) Ltd v Hunter and Another* 2008 (6) SA 210 (W).
46 Ibid para 29.
47*Thulo v Road Accident* Fund 2011 (5) SA 446 (GSJ).
48 Ibid paras 49 – 50.
49*Mofokeng v Road Accident Fund and Two Other Cases* [2012] ZAGPJHC 150.
50 Ibid para 41.
51*Tjatji and Others v Road Accident Fund* 2013 (2) SA 632 (GSJ).
52 Ibid paras 12 – 13.
53 Ibid para 21.
54*De la Guerre* para 13.
55*Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489; [1997] ZACC 12).
56*Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) (2011 (2) BCLR 150) para 32.
57*Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC) para 46.
58*New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) (1999 (5) BCLR 489; [1999] ZACC 5) para 24, quoted with approval in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3) para 8. See also *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2) paras 45 – 46.
59*Law Society* para 35.
60*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) (2008 (10) BCLR 969; [2008] ZACC 10) para 63.
61 Eg *S v Hollenbach* 1971 (4) SA 636 (NC).
62 Eg *Ex parte Swain* 1973 (2) SA 427 (N).
63 Law Commission Report para 1.19.
64 Ibid para 3.8 – 3.10.
65 Ibid para 3.19.
66 Ibid para 3.23.
67 In *De la Guerre* it amounted to an amount of R120 000, which the attorney of record had carried for a period of two years.
68 Commission Report para 4.94 – 4.97.
69*Weare* para 72.
70*Harksen* para 54.
71*Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559) para 12; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere* 2001 (11) BCLR 1175 (CC) para 6; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) (2001 (8) BCLR 765) para 14; and *Engelbrecht v Road Accident Fund* (supra n3) in para 31.
72 Law Commission Report para 4.40 and 4.41.
73 Ibid at p x.
74 Ibid paras 4.15 and 4.111.
75 Druker *The Law of Contingency Fees in South Africa* (Highwick 2007) at 91.
76 J Sarkin & N Fourie 'The Contingency Fees Bill: Opening the Doors of Justice or Pandora's Box?' (1997) 12 *SA Public Law* 214 at 219.
77 Section 1(v) of the Act provides that —
'proceedings means any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity, and includes any professional services rendered by the legal practitioner concerned and any arbitration proceedings, but excludes any criminal proceedings or any proceedings in respect of any family law matter'.
78 Law Commission Report para 3.8.
79 Ibid at 91.
80*Mofokeng* paras 54 – 61.