



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO: 2975/2021
Delivered on 23 August 2021**

In the matter between:

LYNN MONIQUE ALLISON (OLIVIER)

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Bloem J

1. On 20 September 2021 the plaintiff instituted action against the Road Accident Fund, the defendant, for damages suffered by her as a result of bodily injuries she sustained in a motor vehicle collision on 8 September 2017. She alleged that the injuries were caused by or arising from the negligent driving of a motor vehicle. The action was set down for hearing on 28 July 2022. On the day of the hearing, counsel for the plaintiff and the defendant's attorney attended upon my chambers with a draft order. According to that draft order, the defendant conceded that the insured driver was the sole cause of the collision and accepted that it would accordingly pay 100% of the plaintiff's damages. The defendant furthermore agreed to make payment of R250 000.00 to the plaintiff in respect of loss of income, to furnish the plaintiff with an undertaking in terms of section 17(4)(1) of the Road Accident Fund Act¹ (the Act) and to pay the plaintiff's costs to date.
2. Counsel for the plaintiff also furnished me with an affidavit contemplated in section 4(2) of the Act. Attached to that affidavit was a copy of a contingency

¹ Road Accident Fund Act, 1996 (Act 56 of 1996).

fees agreement concluded on 17 February 2019 between Lucille Ronelle Allison on behalf of Lynn Monique Allison, and MA Fredericks & Associates.² That affidavit was not accompanied by an affidavit contemplated in section 4(1) of the Act.

3. I was satisfied with the terms of the draft order and made an order in accordance therewith. I was concerned about the provisions of clause 5.1 of the contingency fees agreement and accordingly issued the following orders, in addition to the terms of the draft order:

“IT IS FURTHERMORE ORDERED THAT:

8. *The plaintiff and her attorney file heads of argument, if they so wish, on or before 19 August 2022 on the validity of the contingency fees agreement that they signed on 19 February 2019, regard being had to the fact that clause 5 thereof (or the entire contingency fees agreement) does not set out the attorney’s normal fees, as required by section 2(1)(b) of the Contingency Fees Act, 66 of 1997.*
9. *Until this court has pronounced on the issue raised in paragraph 8 above, the plaintiff’s attorney shall be entitled to payment of his attorney and client fees from the plaintiff.”*

4. By letter dated 16 August 2022 addressed, not to the registrar who issued the order but, directly to me, the plaintiff’s attorney informed that:

- “1. Our client and the writer will not be filing heads of argument at this stage and will deal with paragraphs 8 and 9 of the order dated 28 July 2022 at the conclusion of the matter.*
- 2. The interim payment of R250 000 will be utilised to pay the disbursements in respect of the medical experts and counsel and the balance will be paid to client.”*

5. It is unfortunate that the plaintiff and her attorney have declined the opportunity of being heard on the issue raised in paragraph 8 of the order prior to this judgment. In my view, there is no justifiable reason for addressing the issue raised in paragraph 8 only at the conclusion of the action, when an offer in settlement of a portion of the claim has been accepted. Section 4(1)

² It is unclear from the contingency fees agreement and the plaintiff’s particulars of claim who Lucille Ronelle Allison is and why she concluded the contingency fees agreement on behalf of the plaintiff with a firm of attorneys. In paragraph 1 of the particulars of claim the plaintiff is described as a major female who was born on 3 July 2001. She was an adult when the action was instituted on 20 September 2021. The plaintiff’s attorney was not invited to address the issue of whether a firm of attorneys, as opposed to a legal practitioner, can enter into a contingency fees agreement with a client. No comment shall accordingly be made in that regard.

and (2) of the Act contemplates the acceptance of “*any offer of settlement*” after the filing of affidavits by a legal practitioner and the client. It is at that stage that the court is entitled to, and, in fact, must, exercise its supervisory role in respect of the contingency fees agreement to ensure compliance with the Act. In *Masango v Road Accident Fund*³ it was pointed out by Mojapelo DJP that courts have a duty to ensure that contingency fees agreements comply with the provisions of the Act and that courts should not allow agreements which are invalid to stand.

6. In any event, when an officer of the court is ordered by the court to do something by a certain date, it is not open to such an officer to ignore that order and instead elect to do what he or she has been ordered to do only when he or she wishes to do so.

7. Section 2 of the Act provides for the circumstances under which a legal practitioner, who entered into a contingency fees agreement, may be entitled to his or her fees. Section 2(1) reads as follows:
 - “2. *Contingency fees agreements.*
 - (1) *Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed—*
 - (a) *that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
 - (b) *that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.”*

8. What is apparent from section 2(1)(b) is that in the contingency fees agreement, the legal practitioner and the client must agree that the legal practitioner shall, in the event of the client being successful in such

³ *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ) at par 54.

proceedings to the extent set out in such agreement, be entitled to fees, either equal to or higher than his or her normal fees. Either way, those normal fees must be set out in such agreement.

9. The provisions of the Act must be complied with strictly. A contingency fees agreement that does not comply with the Act is invalid and unenforceable.⁴ In *Mkuyana v Road Accident Fund*⁵ van Zyl DJP set out the reason for demanding strict compliance with the provisions of the Act as follows:

“The reason for demanding strict compliance with the provisions of the Act is that a contingency fees agreement is otherwise unlawful as it is prohibited at common law. Another reason, according to Plasket J in Mfengwana v Road Accident Fund,⁶ is that it is –

‘necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients – a phenomenon that is in my experience, unfortunately all too common’.”

10. Against the above background it is appropriate to look at clause 5 of the contingency fees agreement in this case, which reads as follows:

“5.1 The attorney shall be entitled to an amount equal to the normal fees of the attorney on attorney and own client scale prevailing from time to time plus all disbursements plus an additional success fee equal to 100% of the normal fees of the attorney prevailing from time to time, conditional to the success fee portion not exceeding 25% of the full enforceable value, excluding the client’s entitlement to recover costs from any counterparty.

5.2 The parties agree that, if the client is successful or partially successful in the aforementioned proceedings, the attorney shall be entitled to its normal fee.

5.3 All such fees are inclusive of Value-Added Tax.

5.4 The attorneys and advocate shall be entitled to raise interest on any outstanding debt at the legal rate from the date of such debit to the date of final payment.”

⁴ *Tjatji v Road Accident Fund and two similar cases* 2013 (2) SA 632 (GSJ) at paras 21 and 22.

⁵ *Mkuyana v Road Accident Fund* 2020 (6) SA 405 (ECG) at 414G – 415B.

⁶ *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) at par 12.

11. Nowhere in the contingency fees agreement is the attorney's normal fee set out. The agreement refers simply to "*the normal fees of the attorney on an attorney and own client scale prevailing from time to time*". It is clear from the definition of "normal fees" in section 1 of the Act, that a distinction is drawn between reasonable fees charged by a legal practitioner, being the normal fee, and fees charged by such a practitioner in terms of a contingency fees agreement. That definition reads as follows:

"normal fees", in relation to work performed by a legal practitioner in connection with proceedings, means the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney and own client basis, in the absence of a contingency fees agreement;"

12. As the fees, to which the attorney would be entitled for services rendered, have not been set out in the contingency fees agreement, as required by section 2(1)(b) of the Act, that agreement is invalid and accordingly unenforceable.
13. In the result, it is ordered that:
 1. The contingency fees agreement concluded on 19 February 2019 between Lucille Ronelle Allison, on behalf of Lynn Monique Allison, and MA Fredericks & Associates be and is hereby declared invalid and accordingly unenforceable.
 2. The plaintiff's attorney is entitled, in relation to services rendered by him to the plaintiff in connection with proceedings under the above case number, to fees on an attorney and own client basis.

GH BLOEM
Judge of the High Court