THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1024/2022

In the matter between:

HOUGH & BREMNER INC	**FIRST APPELLANT**
ANITA ERNESTO CHIAU	**SECOND APPELLANT**

and

THE ROAD ACCIDENT FUND	**RESPONDENT**

Neutral citation: *Hough & Bremner and Another v The Road Accident Fund* (1024/2022) [2023] ZASCA 179 (18 December 2023)

Coram: MOCUMIE and WEINER JJA and KOEN, CHETTY and KEIGHTLEY AJJA

Heard: Matter disposed of without oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII.

The date and time for hand-down is deemed to be 11h00 on 18 December 2023.

Summary: Civil procedure and practice – Contingency Fees Agreement Act 66 of 1997 – high court finding that the fees agreement concluded between the appellants was a contingency fee agreement, and setting it aside – refusing to make the settlement agreement between the second appellant and the Road Accident Fund an order of court and amending its terms without affording the parties a right to address it – whether the high court was empowered to grant orders not sought and against a party not cited in the proceedings.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'The settlement agreement concluded between the parties on 7 March 2022 is made an order of court.'

JUDGMENT

Weiner JA (Mocumie JA, Koen, Keightley and Chetty AJJA concurring)

Introduction

[1] This is an appeal against the judgment and order of the Mpumalanga Division of the High Court per Legodi JP (the high court), concerning a claim against the Road Accident Fund (RAF). The appeal is the fourth of the appeals [1] that have come before this Court on the same issue (fee agreements concluded between attorneys and their clients) since 2022 to date. All the appeals center around whether fee agreements concluded between attorneys and their clients, which make provision, *inter alia*, for fees to be paid at the conclusion of the

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[1] *Mucavele and Another v MEC for Health, Mpumalanga Province* (889/2022) [2023] ZASCA 129 (11 October 2023) (*Mucavele*)*; Majope and Others v The Road Accident Fund* (663/2022) [2023] ZASCA 145 (*Majope*); *Sibiya v Road Accident Fund: In the matter of Chiau v Road Accident Fund* (557/2016 1150/20) [2022] ZAMPMBHC 40 (2 June 2022) (*Sibiya)* – overruled by this Court in *Danny Joseph Sibiya and Others v Road Accident Fund* (1067/2022) [2023] ZASCA 171 (05 December 2023) (*Sibiya SCA*); three from Legodi JP and one from Roelofse J.

matter, are Contingency Fee Agreements (CFA), which can be set aside if they do not comply with the Contingency Fees Act 66 of 1997 (the Act). This appeal involves a claim against the RAF, where orders were made by the high court, *inter alia*, against the first appellant, Hough & Bremner (H&B) Inc, a firm of attorneys, and their client, the second appellant, Anita Ernesto Chiau (Ms Chiau). H&B, which was not a party to the proceedings, obtained leave from the high court to join in the proceedings and it and Ms Chiau applied for leave to appeal the judgment and order. The high court refused leave to appeal. As a result, the appellants petitioned this Court, which granted leave to appeal to it. The RAF does not oppose the appeal and abides the decision of this Court.

[2] The high court reviewed and set aside a fee agreement dated 11 September 2015 (the fee agreement) that was entered into between H&B and Ms Chiau on the basis that it was a CFA, which did not comply with the formal requirements of the Act. It also refused to make a settlement agreement, concluded between Ms Chiau and the RAF, an order of court, and made orders which were not sought by any of the parties. These included orders against H&B, which was not a party to the proceedings at that stage.

Background

[3] To arrive at the conclusion I have reached, a brief background is necessary. H&B represented Ms Chiau in a delictual claim instituted against the RAF in the high court for damages suffered as a result of injuries sustained in a motor vehicle collision that occurred on 20 July 2015 in Mpumalanga. The fee agreement was entered into on 11 September 2015, prior to the institution of the action.

[4] The action was settled between Ms Chiau and the RAF on 7 March 2022. In terms of the settlement, the RAF accepted liability to pay 100% of Ms Chiau's proven or agreed damages that resulted from the collision and undertook to:

(a) pay Ms Chiau an amount of R1 034 470.20, in full and final settlement, in respect of loss of earnings and general damages suffered as a result of the collision;

(b) provide Ms Chiau with an undertaking in terms of s 17(4)*(a)* of the Road Accident Fund Act of 1996 to cover her future medical expenses suffered as a result of the collision;

(c) pay her taxed costs, incurred in the action, on the scale as between party and party.

[5] The trial was set down for hearing in the high court for 14 March 2022. In view of the settlement, H&B filed the settlement agreement, Notice of Acceptance, and affidavits by both Ms Chiau and H&B confirming that no contingency fee agreement had been concluded. Legodi JP, concerned as to whether no contingency fee agreement was concluded, refused to allocate the matter to proceed on 14 March 2022.

[6] This was followed by a directive from Legodi JP removing the matter from the roll and requesting certain information from H&B, under oath, relating to the funding of the legal fees in the case. The questions revolved around whether the fee agreement between H&B and Ms Chiau constituted a CFA within the ambit of the Act. The query related to the following:

'The suggestion that no contingency fee agreement has been concluded pre-supposes that the plaintiff and his or her attorney agreed on a specific amount of a fee for the litigation when the instructions were taken and that the agreed fee was so paid by the plaintiff…'

[7] In response to the list of questions, Mr Eastes of H&B, the attorney who acted on behalf of Ms Chiau, on 8 March 2022, filed an affidavit in which he set out in detail the background to his firm and Ms Chiau entering into the fee agreement, which he attached to the affidavit. The fee agreement contained, inter alia, the following provisions;

'…

3.4.3 that the fee agreement is not a contingency fee agreement as defined in the Contingency Fee Act, Act 66 of 1997;

3.4.4 plaintiff shall at all times be liable for payment of the attorney's fees and disbursements, including VAT, unless otherwise agreed in writing and signed by plaintiff;

3.4.5 that the accounts shall be delivered to plaintiff in respect of disbursements as soon as they are incurred, and interim accounts in respect of attorney's fees from time to time as well as comprehensive accounts at the conclusion of the matter, unless otherwise agreed in writing and signed by plaintiff;

3.4.6 plaintiff shall be liable upon demand by me to pay a deposit in respect of attorney's fees and/ or disbursements…'

Mr Eastes went on to state:

'3.11 On 15 February 2022, I consulted with the plaintiff and the plaintiff confirmed under oath that she did not enter into a contingency fee agreement as defined in the Contingency Fee Act, 1996 with myself and I append hereto a copy of the plaintiff's affidavit, dated 15 February 2022 marked annexure "C";

3.12 I confirm that a copy of the affidavit by the plaintiff, mentioned in paragraph 3.11 above was served on the State Attorney…;

3.13 I respectfully submit, that the fee agreement entered between the plaintiff and Hough Bremner Inc, annexure "B" hereto, represents my normal fee, taking cognizance of my years of experience and expertise, as I dealt with the matter from the outset;

3.14 I respectfully submit that the payment of the professional fees are not subject to the successful completion of a claim against the defendant and I respectfully refer the above Honorable Court to paragraph 2 of the agreement of fees as between attorney and own client,

dated 11 September 2015, annexure "B" hereto and therefore it is not a contingency fee agreement, as contemplated in the Contingency Fee Act, 66 of 1997.'

[8] Further directives emanated from Legodi JP. The pertinent ones which formed the basis of his judgment were:

'2.1. When was such fee agreed upon?

2.2. When was such fee paid in total?

2.3. What is the amount of the fee agreed upon?

2.4. If no fee was paid or was paid in part, when was such a fee or remaining part thereof supposed to be paid?

2.5. If no fee was paid, what is the basis upon which it is alleged no contingency fee agreement was concluded?'

H&B responded that the firm was to deliver a comprehensive account at the completion of the matter, at which time, irrespective of the outcome of the litigation, Ms Chiau would be liable to pay the fees.

[9] Legodi JP, *mero motu*, determined the present matter together with that of *Danny Joseph Sibiya and Others v Road Accident Fund* (*Sibiya*)[2] in which a settlement agreement had been concluded between the parties, and handed down one judgment in respect of both matters. The reasons for this approach are unclear save for the finding that the fee agreements in both matters were in breach of the Act. Despite evidence from Mr Sibiya and his attorneys that the fee agreement entered into was a party and party agreement, the high court found otherwise. In *Sibiya* the high court made a number of far reaching orders, none of which had been sought by the parties. This Court, in setting aside the judgment of the high court, held that there was no basis to interpret the fee agreement as a CFA nor was there any basis to invoke rule 70(5A)*(d)(*ii) in the absence of any misconduct on

[2] Fn 1 above.

the part of Mr Sibiya or his attorney at the taxation. This Court in *Sibiya SCA,*[3] overruled the high court on a similar basis - lack of *audi alteram partem* for the parties before the court made far reaching orders affecting attorneys who were not a party to the action. *Sibiya* was decided together with this case by Legodi JP in chambers.

[10] On 02 June 2022, the high court delivered the judgment (the subject of this appeal) and ordered that:

'84.1 The fee agreement concluded between [plaintiff] and [her] attorneys is hereby reviewed and set aside for the reasons set out in this judgment;

84.2 The defendant to pay the costs of litigation to the [plaintiff] on a party and party scale as agreed between the parties;

84.3 An amount of R1 034 470.00 awarded to the plaintiff by the defendant to shall be paid directly to the plaintiff within 90 days from date of this order and the Road Accident Fund to take reasonable steps to ensure that the capital amount is directly paid to the plaintiff;

84.4 The Legal Practice Council to consider the appropriateness or otherwise of the conduct of the plaintiff's attorneys of record;

84.5 The plaintiff's attorneys of record to bring this judgment to the attention of the plaintiff by explaining the contents thereof to the plaintiff and to provide an affidavit by not later than Friday 10 June 2022 confirming that the order in this paragraph has been complied with.'

[11] Thus, contrary to the averments of H&B and Ms Chiau that the fee agreement was not a CFA within the ambit of the Act, the high court found that it was and that it was unlawful because it did not comply with the formal requirements of the Act. The high court thus reviewed and set it aside on that basis. There are at least three anomalies which arise from the above orders which were not sought by any of the parties. One, the RAF has no obligation to pay the costs to

[3] Fn 1

Ms Chiau as ordered. Two, these orders were made against H&B, when it was not a party to the proceedings and without it being given an opportunity to be heard on these issues. Three, it is thus deprived, not only of its right to claim its fees from its client, but also of its right to recover the costs from the RAF. The high court also refused to make a settlement agreement, concluded between the parties, an order of court.

[12] As stated by this Court in *Majope,* 'even if the fee structure agreement was an agreement that was hit by the Contingency Fees Act, as the high court found, that in itself was not a proper basis to deprive [the attorneys] of the right to recover their fees for the services rendered to Ms Majope and Mr Machabe. It is particularly concerning that these extraordinary orders were against [the attorneys] when they were not parties to the case before the high court.'[4]

[13] The approach of the high court appears to be that any agreement, not providing for payment of fees by the litigant prior to the finalisation of litigation, constitutes a CFA within the ambit of the Act. On authority of the two precedents referred to (*Mucavele* and *Majope*), this approach is clearly wrong. Legodi JP was entitled to enquire whether there was a CFA and to have sight of the fee agreement, in order to exercise judicial oversight as contemplated by s 4 of the Act.[5] He was not, however, entitled to ignore the responses he received, clearly

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[4] *Majope* fn 1 para 11.

[5] **4. Settlement**
'(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

stating that the fee agreement was not a CFA and, without affording the parties an opportunity to be heard, declare that the fee agreement was a CFA, and set it aside.

[14] Both merits and quantum had been settled and the matter had been removed from the roll. Accordingly, what was before the high court? A settlement agreement between the parties to the action to be made an order of the court. Despite this, the high court disregarded the principle expressed in *Fischer and Another v Ramahlele and Others* (*Fischer*),[6] where this Court cautioned that it was for the parties to 'define the nature of their dispute and it is for the court to adjudicate upon those issues'.[7] *Fischer* also stated that, in certain instances, a court may *mero motu* raise a question of law if it arises from the evidence and is required for a decision in the case. But as held in *Mucavele:*

'The legality of the contingency fee arrangement was not such a question. Most recently, in the *Road Accident Fund v MKM obo KM and Another*; *Road Accident Fund v NM obo CM and Another,* this Court clarified that a contingency fee agreement 'is a bilateral agreement between the legal practitioner and his or her client. It has nothing to do with a party against whom the client has a claim.' Furthermore, an invalid or unlawful contingency fee agreement would not necessarily invalidate the underlying settlement agreement. The high court failed to consider whether the validity of the contingency fee agreement was severable from the rest of the settlement agreement.'[8]

(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.'

[6] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA).

[7] Ibid para 13. See also *Bliss Brand (Pty) Ltd v Advertising Regulatory Board NPC and Others* [2023] ZACC 19; 2023 (10) BCLR 1153 (CC) and further authorities cited in that judgment; *De Nysschen v Government Employees Pension Fund and Others* (864/2022) [2023] ZASCA 147 (09 November 2023*)*.

[8] *Mucavele* fn 1 paras 15 and 16

[15] The high court erred in the same manner in this case. For this and the other reasons set out above, the order by the high court ought to be set aside. It is opportune after four appeals from the same court, on more or less the same facts,[9] to state that there is at this stage sufficient authority that, first, a fee agreement that provides that the fees and disbursements due to an attorney be paid on the finalisation of a matter is not necessarily a CFA which stands to be set aside for non-compliance with the Act. Second, and, as stated in *Mucavele*, in any event, 'an invalid or unlawful contingency fee agreement would not necessarily invalidate the underlying settlement agreement'.

[16] In the result, the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

> 'The settlement agreement concluded between the parties on 7 March 2022 is made an order of court.'

S E WEINER
JUDGE OF APPEAL

[9] Cases referred to in fn 1.

Appearances

For the appellant:	Heads of Argument prepared by J G Cilliers SC
Instructed by:	Hough & Bremner Inc, Mbombela Pieter Skein Attorneys, Bloemfontein
For the respondent:	No opposition was filed by the Respondent
Instructed by:	State Attorney, Nelspruit State Attorney, Bloemfontein.