THE PUBLIC, THE COURTS AND CONTINGENCY FEES.

Lawyers are now allowed to conclude Success fee agreements for non-litigious work, confirms the Supreme Court of Appeal.

The ordinary man in the street cannot always have his disputes resolved in a court of law, because of finances, logistics and time scales. The courts have been brought closer to the population through their having been restructured. Class Actions authorised by the Constitution have made it possible for a class of persons with the same interests to pool their resources and choose one person to take their matter to the courts.

The Supreme Court of Appeal has taken the access to the courts a step further by making it possible for an impecunious client to receive advice from his attorney as well as financial assistance on a success fee basis when the need for litigation arises, provided that his attorney does not then prosecute and manage the litigation process.

The Constitution provides in Section 34, that "everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court or, where appropriate, in another independent

and impartial tribunal or forum". This is one of the fundamental building blocks of democracy. The courts serve, the democracy by laying down the principles, which regulate the community in its diversity.

The question, however, is whether the courts are in practice, really accessible to all? The financial ability of members of the public is a large stumbling block to accessibility!

In terms of the Constitution, Section 165(4), places the burden on "organs of state" through legislative and other measures, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.

In terms of Section 173 of the Constitution, the courts have the power to develop the law. The Constitutional Court, Supreme Court of Appeal and the High Courts, have an inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice. The effluxion of time, within which justice is dispensed in the courts, taken together with the financial burden occasioned by the delay factor, makes it financially impossible for the ordinary litigant to have its dispute resolved in a court of law.

In terms of the Superior Courts Act, No. 10 of 2013, new courts have been created in bringing the courts closer to the people. Class actions, as envisioned in Section 38 of the Constitution, have been defined and the requirements therefore clearly described, in a well-reasoned judgment by Makgoba J, in the case of Pretorius vs. Transnet Benefit Fund 2014 (6) SA page 77 et seq.

The Contingency Fees Act, No. 66 of 1997 ("CFA Act"), makes provision for legal practitioners who assist in legal proceedings, to do so by rendering legal services, without immediate payment and in the event of success, such a practitioner is entitled to recover expenses, as well as their legal fees enhanced to double their legal and reasonable fee, subject to no more than 25% (twenty-five percent) of the amount recovered, provided that such an agreement is approved by the court.

In a recent Pretoria High Court judgment, it was found that this Act also applied to non-litigious work performed by a legal practitioner, in a decision given by Judge Tuchten. This judgment had the effect of curbing the ability of a legal practitioner to assist another person, to engage legal practitioners, to prosecute his, her or its dispute before a court of law, or in other proceedings and forums in order to have their dispute resolved.

Supreme Court of Appeal enhances the ordinary persons's ability to access the courts.

On 21 May 2018, the Supreme Court of Appeal, in the case of Mostert and Others vs. Nash and Others 2018 ZASCA 62 (hereinafter referred to as ("The Mostert Judgment"), found that the court, a quo was incorrect in finding that

the “CFA Act” also applied to non-litigious work. A lawyer, who performs the functions of a curator of a financial institution, is not a legal practitioner for the purposes of the “CFA Act”.

One has to look at the function the lawyer performs. A curator is not necessarily a lawyer but also a businessman, standing in the shoes of the institution, over which he curates. In this case pensioners, as individuals, would never have been able to enforce their entitlement in a pension fund, without the assistance of the curator, who took care of their collective interest both financially and administratively.

The mischief, which the principles of Roman law expressed in the adagio, pactum de quota litis, or champerty, as it is known in English Law, has been carefully managed with the introduction of refined civil procedure and legislation in South Africa and elsewhere, such as in the “CFA Act” and detailed pre-trial procedures under juridical oversight.

The common law rules, of reasonable bona fide assistance, by one person assisting another, to go to court and have their dispute resolved, also applies to lawyers, as explained by Southwood AJA in Price Waterhouse Coopers Inc. Vs National Potato Co-operative Ltd at page 75, paragraph 27.

“However, it is clear that the Courts acknowledged one exception. It was accepted that if anyone, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void (per Kotze CJ in Thomas Hugo and Fred F Moller NO v The Transvaal Loan, Finance and Mortgage Company (Supra at 340); Schweizer’s Claimholders Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd (Supra at 144); Patz v Salzburg 1907 TS 526 at 527)”.

In a number of these early cases, the Courts adopted and applied statements pertaining to maintenance and champerty, made by the Privy Council in Ram Coomar Coondoo and Another v Chunder Canto Mookerjee (1876) 2 App Cas 186 at 210). The Privy Council further said that:

“A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily opposed, in which it would be in furtherance of right and justice and necessary to resist oppression, that a suitor who had a just title to property and no means, except the property itself, should be assisted in this manner”.

In Canada, an agreement to be remunerated by the proceeds of litigation between an attorney and a client is acceptable, provided the fee remains reasonable and fair. See Edwards vs Camp Kennebec (Frontenac) (1979) Inc.

2016, a case in which the Conditional Fee Agreement did not comply with the legislation. It was declared void but the fee was reduced on a quantum meruit basis. The agreement was said to be void due to non-compliance with the applicable legislation but had it complied, it would have been in order.

In the United Kingdom, considerable thought went into the need to make the courts accessible to impecunious prospective litigants. The Courts and Legal Services Act 1990 in paragraph 58, authorised the conclusion of conditional fee agreements, provided those agreements comply with the requirements laid down by the quoted section, but criminal proceedings and family proceedings are excluded. Conditional Fee Agreements with regard to those matters are not possible. Specific provisions apply to damage based agreements.

Conditional Fee Agreements attracted the attention of the English Courts in a number of cases namely, in the England and Wales Court of Appeal (Civil Division) decisions, in the case between Gaynor and Central West London Buses Ltd, 2006 EWCA Civ 1120, it was found that the letter of engagement offering exploratory services, with a view to possible litigation by an attorney's firm without compensation, was conducive to making the courts accessible to prospective litigants and it did not constitute an unenforceable Conditional Fee Agreement.

Perusal of a case between David Rees and Gwyneth vs Gateley Wareing (a firm) and Gateley LLP [2] (formally Gateley Wareing LLP and HBJ Gateley Wareing LLP), [2014] EWCA Civ 1351, from the England and Wales Court of Appeal (Civil Decision) decisions, will show that a Conditional Fee Agreement which does not relate to the provision of litigation services, nor of advocacy, does not fall within the ambit of Section 58 of the English 1990 Act, quoted above and therefore not a Conditional Fee Arrangement. It falls outside of the Act, it is therefore enforceable, provided that it is reasonable. The facts of each case, will dictate, the reasonableness thereof.

The English common law with regard to champerty, will always apply. The need to have access to the settlement of disputes was the subject matter of the Jackson report, such accessibility, migrated to insolvency litigation.

In South Africa, the situation may be summarised as follows;

When a Contingency Fee Agreement is concluded between a legal practitioner and his client, with regard to the purpose to litigate, then that agreement must comply with the conditions of the Contingency Fee Act and approved by a court in the interest of transparency.

The meaning of litigation in terms of the Contingency Fee Act, includes all legal proceedings as defined, which may also include arbitration proceedings or proceedings before a tribunal, such as the Competition Commission. However,

if the agreement relates to non-litigious work and if reasonable, then such an agreement will be enforceable.

Attorneys, can conclude such agreements without fear that the agreements is susceptible to attack as unenforceable, taking into account the following factors;

- The duration in which such an attorney worked, for a normal fee, without remuneration.
- The risk accepted by such an attorney of not being paid by their clients.
- The advancement of expenses and other peculiar circumstances, will justify an enhancement fee, as long as it is reasonable and does not venture into the realm of overreaching the client.

An example of the latter is evident in the following situation and common to legal practice for attorneys in remote areas assisting their clients;

- In gathering information;
- Transfer or subdivision;
- Mortgaging of a property;
- Who renders legal advice, before commencing litigation and instructs another attorney, in closer proximity to the courts, to conduct litigation as a correspondent, in one or other of the court jurisdictions, without managing the litigation;
- Who has agreed with the client that the attorney will be paid a normal fee for his non-litigious services, only when the litigation is successful.

The Supreme Court of Appeal was unanimous in accepting that the CFA Act does not apply to non-litigious work performed by an attorney, provided that the work thus done is not contrary to public policy, such as, inter alia, the solicitation of causes of action with a view to trafficking in litigation.

In such instances solicitation of causes of action would be contrary to public policy. The majority of Judges, as well as Willis JA, who recognised in a powerful, well reasoned, dissenting judgment, the fact that a legal practitioner could make the payment of fees dependent on the happening of a future event, such as the success of the transaction by agreement, not being offensive to public policy.

Reference was made with approval to the case of Incorporated Law Society of Natal v JV and FM Hiller (1913) 34 NPD 237, as an example of an agreement in relation to fees which was held, per se, to be unprofessional.