tydelike maatreël. NADEL en ander engelssprekende raadslede het dit ondersteun.

Die Voorsitter het egter besluit dat vanweë die uiteenlopende standpunte wat gestel is, die instansies wat by die LSSA verteenwoordig is, dié saak weer onderling moet bespreek en dat die aangeleentheid moet oorstaan tot die volgende vergadering op 30 Julie 2002.

Intussen het die Raad van die Prokureursorde van die Noordelike Provinsies ook die aangeleentheid bespreek op 21 Junie 2002. Aangesien die BLA gebonde is aan die standpunt van hulle nasionale verteenwoordigers, kon daar nie eenstemmigheid hieroor bereik word nie maar Raadslede het behoorlike geleentheid gekry om hulle standpunte te stel.

In hierdie tydperk waarin ons probeer om 'n Wet op Regspraktyk daar te stel wat eenheid in die professie en die belange van prokureurs sal bevorder, kan ons nie verdeeldheid oor taalkwessies bekostig nie.

JAN STEMMETT
PRESIDENT

WEER IETS OOR UITSLUITING VAN AANSPREEKLIKHEID EN STARE DECISIS

In die Junie 2002-uitgawe van *Ordenuus* op bladsy 8, bespreek ek die uitspraak van die Hof in die saak van *STRYDOM V AFROX HEALTHCARE BEPERK [2001] ALL SA 618*. Ek gee dadelik toe in die artikel dat ek nie weet wat presies die grondslag is van die Regter se bevinding nie. Ek wys egter daarop dat hierdie 'n uitspraak van 'n enkel Regter is, maar dat dit 'n aanduiding is daarvan dat ons Howe nie wegskram daarvan om die bepalings van die Gemenereg te ontwikkel in die lig van die bepalings van die Grondwet nie.

Die uitspraak van die Hof *a quo* is noutersyde gestel in die tot-op-hede ongerapporteerde uitspraak van die Hoëhof van Appél in die saak van *AFROX HEALTHCARE BEPERK en C G STRYDOM, SAAK NR 172/2001 HHA*.

In die uitspraak (paragraaf 6) wys *BRAND AR* daarop dat die Verhoorregter sekere beginsels verwar het. In paragraaf 36 van die uitspraak word daarop gewys dat vrywaringsklousules soos wat in hierdie saak ter sprake is, hedendaags in standaard kontrakte eerder die reël as die uitsondering is en nie ontoelaatbaar is nie.

Wat egter van die uiterste belang is, is die bespreking deur die Hof van hoe die beginsels van *stare decisis* toepassing vind waar *Artikel 39(2) van die Grondwet* aangewend word om te bepaal of die Gemenereg verander, uitgebrei of ontwikkel moet word in die lig van die bepalings van die Grondwet. Ten opsigte van die *stare decisis* beginsel, wil dit vir my voorkom asof daar verskillende moontlikhede is en ten opsigte van een van die moontlikhede kan die bevinding van die Hoëhof van Appél saamgevat word in die volgende aanhaling wat verskyn in *paragraaf 29 op bladsy 25* van die uitspraak: *"Die antwoord is dat die beginsels van stare decisis steeds geld, en dat die Hooggeregshof nie deur Artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- of post-konstitusioneel af te wyk nie. Artikel 39(2) moet saamgelees word met Artikel 173 van die Grondwet."*

Dit is nou baie duideliker oor hoe 'n laerhof te werk moet gaan om die Gemenereg aan te pas, te verander of te ontwikkel aan die hand van die bepalings van die Grondwet waar uitsprake van die Hoëhof van Appél (voorheen die Appélhof) bestaan wat oënskynlik 'n aanpassing regverdig.

DANIE OLIVIER
RAADSLID

CONTINGENCY FEE AGREEMENTS

It was, upon recommendation of the Court Practice Committee of the Law Society of the Northern Provinces, resolved by the Council on 23 February 2001 to support the principle of a percentage contingency fee.

After further careful consideration, which included taking opinion as to whether attorneys would be entitled to enter into valid contingency fee agreements in terms of the common law, notwithstanding the enactment of the Contingency Fees Act, 66 of 1997, it was resolved by the Council of the Law Society, on 21 June 2002, to accept:

1. Common law Contingency Fee Agreements may be validly entered into by Attorneys. That the Contingency Fees Act does not proscribe such agreements. It must however be accepted that such agreements will continue to be keenly scrutinised by the Courts. Such scrutiny by the Courts may even be raised *mero muto* by the Court.
2. A common law contingency fee agreement should meet the following criteria:
   - 2.1 It should relate to a genuine case of assisting an impecunious client to assert his rights. Impecunious does not mean totally indigent but in context it would refer to someone who, due to lack of means, is unable to assert his right to relief in the Courts; and
   - 2.2 The attorney's remuneration must be fair; and
   - 2.3 The agreement must not amount to gambling, speculation or trafficking in litigation.
3. The reasonableness of the percentage of the monetary proceeds retained as a success fee will be measured according to various criteria some of which are to be found in the opinion, but it seems more than likely that a Court will also have regard to the 25 % cap referred to in the Contingency Fees Act.
4. The restrictions to be found in the Contingency Fees Act will probably resonate in various guises in judicial scrutiny of a common law contingency fee agreement.

Colleagues may therefore henceforth enter into success / common law contingency / percentage contingency / contingency fee agreements in the knowledge of the acceptance by the Law Society of the Northern Provinces of such agreements. A step forward? For sure!

CP FOURIE
VICE PRESIDENT OF THE LAW SOCIETY OF THE NORTHERN PROVINCES
CHAIR PERSON OF THE COURT PRACTICE COMMITTEE

COMMON LAW CONTIGENCY FEE AGREEMENTS

It is now more than a year since the Law Society of the Northern Provinces gave the green light to its members to enter into common law contingency fee agreements with their clients. The feedback is that it was well received and that, by and large, it works well.

The other Provinces, however, have as yet not followed suit. During the Annual General Meeting of the Law Society of South Africa in March this year, an ad hoc committee was appointed to consider the matter and to make recommendations to the Law Society of South Africa. Two Councillors of the Law Society of the Northern Provinces serve on that ad hoc committee. We are awaiting the committee's recommendations, for consideration. Unless otherwise notified, members may continue to enter into common law contingency fee agreements with their clients.

However, kindly note the following:

1. A Common Law Contingency Fee agreement must be entered into. Such agreement will normally be entered into before commencement of the proceedings. If entered into thereafter, valid reason should exist. Common Law Contingency Fees cannot therefore be applied as a matter of course;

2. A Common Law Contingency Fee agreement should meet the following criteria:

   * It should relate to a genuine case of assisting an impecunious client to assert his/her rights. This refers to someone who, due to lack of means, is unable to assert his/her rights to relief in the Courts; and
   * The attorney's remuneration must be fair;
   * The agreement must not amount to gambling, speculation or trafficking in litigation.

3. The question of whether a Common Law Contingency Fee agreement withstands judicial scrutiny will depend on the facts of every matter. It can be assumed that reasonableness will remain the touchstone in respect of the percentage of the agreed success fee. Because the Courts will probably refer to the 25 % cap on success fees in the Contingency Fees Act, Act 66 of 1997, in determining the reasonableness, any agreed percentage in excess of that cap would be at risk. The percentage of the agreed success fee referred to is exclusive of actual disbursements of VAT.

Please note further that Council has considered the application of Common Law Contingency Fees to the value of an Undertaking, issued by the Road Accident Fund in terms of the relevant Act. Council's view is that Common Law Contingency Fees may not be applied against the value of an Undertaking. Members are therefore not allowed to apply the percentage of the agreed success fee to the value of such an Undertaking at all.

Please ensure adherence.

CP FOURIE
VICE-PRESIDENT
LAW SOCIETY OF THE NORTHERN PROVINCES

DRINGENDE NOTEVELEGGING AAN DIE GESINSADVOKAAT

Die kantoor van die Gesinsadvokaat doen hiermee 'n dringende beroep op prokureurs om Hofbevele met kort keerdatums te vermy aangesien die Gesinsadvokaat vind dat:

1. Dit soms ongewens is, indien nie onmoontlik nie, om 'n vaste standpunt in 'n komplekse aangeleentheid in te neem waar meer oorweging en navrae eenvoudig 'n beter resultaat sou opgelewer het;

2. Die dringende Hofbevele vereis uit die aard van die saak spesiale reëlings wat dikwels beteken dat afsprake wat reeds geskeduleer is gekanselleer of verskuif moet word. Dringende sake is nie noodwendig altyd meer belangrik as ander sake nie en dit is onbillik om voorkeurbehandeling af te dwing onder dekmantel van 'n Bevel;

3. Baie van die dringende sake het 'n geskiedenis met duidelike gevaartekens lank voor die tyd wat daarop dui dat aandag daaraan gegee moet word. Deur die sake betyds na die Gesinsadvokaat te verwys kan baie van die krisisse afgeweer word;

4. Die dringende Bevele bevat dikwels instruksies dat sielkundige evaluasies gedoen moet word. Die Gesinsadvokaat beskik nie oor sielkundiges in-huis nie en maak dan van buite deskundiges gebruik, oor wie hulle werklik geen beheer het, sover dit betref wanneer die partye gesien word of hoe gou 'n verslag beskikbaar gemaak word nie;

5. Sommige keerdatums is eenvoudig onrealistiese kort in omstandighede waar daar geen vooraf konsultasie met die Gesinsadvokaat se kantoor plaasvind nie;

6. Heelwat dringende bevele kom nie dadelik onder hul aandag nie. Dit is onwys om sondermeer te aanvaar dat die Griffier altyd sal toesien dat die Gesinsadvokaat die Bevel ontvang en dit is in praktyk veel beter indien die prokureur self daarna omsien; en

THE LAW SOCIETY OF THE NORTHERN PROVINCES

DIE PROKUREURSORDE VAN DIE NOORDELIKE PROVINSIES

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MEMORANDUM

To: Deputy Judge President
Mr Justice W J van der Merwe
North Gauteng High Court
Pretoria

PRACTICE DIRECTIVE: PARAGRAPH 6.16 – SETTLEMENT AGREEMENTS AND DRAFT ORDER

1. The Council of the Law Society has noted the above new practice directive which was implemented with effect from 25 July 2011 and specifically paragraphs 6.16.2 and 6.16.3, which provide as follows:

"6.16.2. Where the parties to a civil trial have settled on the terms set out in a draft order, a judge will only make such draft order an order of court if-

2.1 counsel representing all the parties to the trial are present in court and confirm that the draft order correctly reflects the terms agreed upon; or

2.2 proof to the satisfaction of the presiding judge is provided that the draft order correctly reflects the terms agreed upon.

6.16.3. In both 1 and 2 above, if-

3.1 a contingency fees agreement as defined in the Contingency Fees Act, 1997 (the Act), was entered into, the affidavits referred to in s 4 of the Act must be filed.

3.2 no contingency fees agreement was entered into, affidavits by the legal practitioner and his/her client must be filed confirming such fact."

2. We initially understood paragraph 3.2 to mean a contingency fee agreement under the Contingency Fees Act, 1997, but we have been advised that the interpretation on the side of the Bench is that it relates to any contingency fee agreement. In view of this, we would like to address the issue of contingency fee arrangements generally.

3. Due to pressure exerted on attorneys and the profession by major commercial institutions, it was already in October 1995 (i.e. prior to the introduction of the Contingency Fees Act, No. 66 of 1997 on 23 April 1999) resolved by the Council of the Law Society of the Northern Provinces (LSNP) to allow its members to only in the case of debt collections (liquid claims not being opposed) charge contingency fees (i.e. to agree with a creditor / client to undertake collection on the basis that fees will be levied on a percentage of the amount collected). This ruling was however subject to the condition that a debtor shall never pay more than the amounts determined as a guideline in this regard Rule 81 (attorney and client fees).

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4. The Contingency Fees Act, No. 66 of 1997 has proved to be impractical to the extent that the onerous mandatory agreement and reporting functions resulted in very few members making use thereof and utilising the statutory common law agreements provided for under this Act.

For example, to refer to just one aspect of this Act, if the 25 % cap should apply to both attorney and Counsel's fees, given the level at which Counsel's fees presently stand, any balance available for the attorney who would have carried the risk and the substantial expense of what is usually years of litigation, would be nugatory.

5. Following lengthy and considered debates and legal advice obtained from senior Counsel as well as some authority under the case law, it was in July 2002 decided by the Council of the LSNP to support the principle of common law percentage contingency fees and members of the Law Society were advised accordingly, subject to the following cautionary comments which were conveyed to them:

5.1 A common law contingency fee agreement must be entered into. Such agreement will normally be entered into before commencement of the proceedings. If entered into thereafter, valid reason should exist. Common law contingency fees can not therefore be applied as a matter of course;

5.2 A common law contingency fee agreement should meet the following criteria:

- It should relate to a genuine case of assisting an impecunious client to assert his/her rights. This refers to someone who, due to lack of means, is unable to assert his/her rights to relief in the courts; and
- The attorney's remuneration must be fair;
- The agreement must not amount to gambling, speculation or trafficking in litigation.

5.3 The question of whether a common law contingency fee agreement withstands judicial scrutiny, will depend on the facts of every matter. It can be assumed that reasonableness will remain the touchstone in respect of the percentage of the agreed success fee. Because the courts will probably refer to the 25 % cap on success fees in the Contingency Fees Act, Act 66 of 1997, in determining the reasonableness, any agreed percentage in excess of the cap would be at risk. The percentage of the agreed success fee referred to is exclusive of actual disbursements or VAT.

Please note further that the Council has considered the application of common law contingency fees to the value of an undertaking, issued by the Road Accident Fund in terms of the relevant Act. Council's view is that common law contingency fees may not be applied against the value of an undertaking. Members are therefore not allowed to apply the percentage of the agreed success fee to the value of such an undertaking at all.

6. The Council again in 2005, following the judgment given in the PricewaterhouseCoopers Inc./ National Potato Co-operative Ltd. by the Supreme Court of Appeal consulted two senior Counsel on the question of the legality of common law contingency fee agreements. After careful consideration of the legal advice obtained, reference was made to the judgment in Society News for the information of members, who were referred to the *obiter dictum* with respect to contingency fee agreements with clients.

7. It has therefore been practice for many years that attorneys practising under the jurisdiction of the LSNP in all forms of monetary litigation, including personal injury and medical negligence, to accept instructions on a contingency basis. The reason being that most litigants are not able to afford to pay legal fees and disbursements in respect of the litigation process for civil claims, as the fees for experts' reports, investigators. Counsel's fees are substantial, even in relation to relatively simple matters.

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Although numerous complaints have over the years been received by the Law Society relating to attorneys' fees, very few if any, have in fact been received in respect of percentage common law contingency fees since the Council had authorised members to accept instructions on this basis.

8. The usual format of percentage contingency fee agreements is that the attorney will deduct a percentage fee plus vat from the damages recovered. All disbursements, including Counsel's fees, are then paid. The residue is either retained in trust or paid to the client. Invariably party and party costs form part of the settlement or judgment and all amounts recovered in this regard are then paid to the client who receives an appropriate accounting.

9. To hold such agreements unenforceable when same have become the customary basis on which the public instructs attorneys in such matters will cause chaos. This will probably result in large numbers of claimants being left without legal representation as attorneys have demonstrated since 1999 that they are simply not prepared to contract in terms of the cumbersome and invasive provisions of the Act.

10. Reports received from members of the LSNP is that one of the first questions asked by prospective personal injury claimants when telephoning or first consulting attorneys is as to whether the attorney will accept instruction on a straight percentage basis and if so, at what percentage.

The public rightly perceive that to the extent that an attorney's fees depend on and are linked to the extent of the success obtained, the attorney will focus on efficiency in speedily processing the claim and will also strive for the best possible result. This is widely regarded as a win-win solution.

11. The Law Society understands that common law contingency fee agreements have become widespread in many areas of practice other than personal injury work. It is utilized in debt collections, commercial damages claims, expropriation claims and so on, where clients are reluctant to embark on litigation unless the attorney agrees to accept instructions on a contingency basis. In most instances, the fee is a percentage of the monetary result obtained, although time charged contingency fees are also utilised.

12. The Council of the LSNP has given serious consideration to an appropriate amendment of the Act:

12.1 An amendment to replace the ambiguous current provisions of Section 2 with a straight percentage fee in claims sounding in money.

12.2 The onerous provisions of Section 4 requiring intrusive disclosure of what is often confidential and privileged attorney and client information should be deleted.

12.3 Counsel's fees should be specifically dealt with as a disbursement in the normal way.

12.4 Given the current satisfactory way in which common law agreements are clearly working there seems little reason for concern that Counsel's fees would become problematic, if dealt with in a similar way in terms of the Act.

13. Having dealt with the views of the Law Society on common law contingency fee arrangements, the question arises why contingency fee agreements have to be specifically subject to judicial scrutiny by the Bench. Historically, attorney and client fees have been subject to the regulatory authority of the Law Society under the Attorneys Act, 1979 and its rules (as well as the Taxing Master). Such arrangements are in fact similarly subject to the disciplinary authority of the Law Society on the same basis as all other attorney and client fees.

The question may then also be raised why Counsel's fees and any other fees between attorney and own client, e.g. on an hourly tariff basis, should then not also be the subject of scrutiny by the Bench.

14. The Council would however welcome an opportunity of working with the Deputy Judge President in refining guidelines for common law agreements and which could thereafter result in the Council recommending such guidelines to its members.

M J S GROBLER
Director

1 August 2011

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Your ref/U verw: Mr Grobler / djp / 05/10/2011

Our ref/Ons verw: MJSG / sl / 109/10

12 October 2011

His Honourable Judge W J van der Merwe
Deputy Judge President
North Gauteng High Court
PRETORIA

Fax: 086 640 1361

Dear Mr Justice Van der Merwe,

PRACTICE DIRECTIVE: PARAGRAPH 6.16 – SETTLEMENT AGREEMENTS AND DRAFT ORDER

A separate letter was addressed to you on 1 September 2011 confirming the willingness of the Law Society to participate in the stated case to determine the validity of common law contingency fee agreements, which included a proposed model common law agreement on which you still have to comment.

A further memorandum will be furnished to you shortly on the proposed stated case to convey the suggestions of the Law Society in this regard.

With reference to your letter dated 5 October 2011, the Law Society believes it is important to deal separately with agreements purporting to be in terms of the Contingency Fees Act, 1997, but which, in the view of the Court, do not comply with the Act.

Given the peremptory agreement which is required to be used in terms of the Act as proclaimed in 1999, there is limited scope for variation and/or amendment to such agreement. To the extent that the Courts encounter amendments or variations not provided for under this Act, the Law Society is obliged in terms of the Act and its statutory duty to consider complaints in this regard. It will most definitely do so, which can however only realistically be done when a complaint is received in terms of our disciplinary procedures.

Common Law Contingency Agreements

The Council has been of the view since 2002 and remains of the view that it will not be unprofessional conduct for attorneys to make use of common law contingency fee agreements outside the Act. Whilst the Council published suggested guidelines for such common law agreements, the guidelines were simply just that i.e. guidelines, and did not seek to prescribe what a common law agreement could or could not include.

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For example, although no minimum or maximum percentage is prescribed and given that attorneys and their clients are free to negotiate a contract in the same way as any other contract between competent parties, we indicated to our members that should the 25 % cap referred to in the Act, be exceeded, it will have to be justified, having regard to the various aspects which will have to be considered. This will *inter alia* include the complexity of the matter, the overhead cost structure of the firm, the extent of the disbursements to be covered by the attorney, the anticipated period that the attorney would have to carry such disbursements and wait for payment of fees, as well as other criteria such as those referred to in Rule 80 of the Law Society's rules.

Following the judgment given in the matter of *PricewaterhouseCoopers Inc./ National Potato Co-operative Ltd.* by the Supreme Court of Appeal and the lack of certainty as to whether a Court would uphold common law contingency fee agreements as a result thereof, we have cautioned our members to provide for alternative fee agreements with clients in the event that the common law agreement was disputed or ruled invalid by a Court.

The Council understands that most attorneys utilising common law contingency agreements also contract in the alternative with clients on a stralght rate per hour basis and/or in terms of the Contingency Fees Act, 1997.

For all the above reasons, the Council very much welcomed your kind undertaking to consider a proposed model common law agreement which the Council truly believes is fair and workable and which will obviate many of the criticisms you have raised in your letter under reply. We would very much welcome engaging with you on this agreement.

The Council will of course investigate and seriously consider any matter referred by any Court. We believe an approved model common law agreement may address many of the issues raised by you.

I shall communicate with you again with regard to this matter as soon as circumstances permit.

Regards,

M J S GROBLER
Director