REPUBLIC OF SOUTH AFRICA

CONTINGENCY FEES BILL

(As amended by the Portfolio Committee on Justice (National Assembly))

(MINISTER OF JUSTICE)

[B 33B—97]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP GEBEURLIKHEIDSGELDE

(Soos gewysig deur die Portefeuljekomitee oor Justisie (Nasionale Vergadering))

(MINISTER VAN JUSTISIE)

[W 33B—97]

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BILL

To provide for contingency fees agreements between legal practitioners and their clients; and to provide for matters connected therewith.

———

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—

(i) ''contingency fees agreement'' means any agreement referred to in section 2(1); (iii)

(ii) ''day'' means a court day; (ii)

(iii) ''legal practitioner'' means an attorney or an advocate; (v)

(iv) ''normal fees'', in relation to work performed by a legal practitioner in connection with proceedings, means the 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; (iv)

(v) ''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; (vi)

(vi) ''professional controlling body''—

(a) in respect of an attorney, means any body established by or under any law for the purposes of exercising control over the carrying on of the business of the attorneys' profession, and of which such an attorney is a member; and

(b) in respect of an advocate, means any body which is determined by the Minister of Justice by notice in the *Gazette* for the purposes of this Act, and of which such an advocate is a member. (i)

Contingency fees agreements

2. (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.

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

Form and content of contingency fees agreement

3. (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; and

(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.

(4) A copy of any contingency fees agreement shall be delivered to the client concerned upon the date on which such agreement is signed.

Settlement

4. (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.

Client may claim review of agreement or fees

5. (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 purposes 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 or fees are unreasonable or unjust.

Rules

6. Any professional controlling body or, in the absence of such body, the Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), may make such rules as such professional controlling body or the Rules Board may deem necessary in order to give effect to this Act.

Regulations

7. The Minister of Justice may make regulations prescribing further steps to be taken for the purposes of implementing and monitoring the provisions of this Act.

Short title and commencement

8. This Act shall be called the Contingency Fees Act, 1997, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CONTINGENCY FEES BILL, 1997

1. The Bill emanates from the recommendations of the South African Law Commission (''the Law Commission''), as contained in its report on speculative and contingency fees (Project 93).

2. The main object of the Bill is to provide for contingency fees agreements between legal practitioners and their clients. The basic premise of the fees structure of legal practitioners in South Africa is reasonableness, i.e. only reasonable fees may be charged. However, the fees structures applicable to attorneys are more regulated than those of advocates. Tariffs of fees for civil litigious work performed by attorneys are prescribed in various court rules, and for non-litigious performed work of attorneys by regulations made in terms of various laws, such as the regulations issued in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937). Where the tariffs of fees are not prescribed by either the court rules or in regulations, the Council of each Law Society is in terms of the Attorneys Act, 1979 (Act No. 53 of 1979), empowered to prescribe tariffs of fees. The costs in respect of both litigious and non-litigious matters are also taxable.

Unlike attorneys, advocates are not bound by statutory or prescribed fees and tariffs. However, the determination of advocates' fees are subject to guidelines similar to those considered by the Council of a Law Society when determining fees for non-litigious work which is neither taxable by an officer of the State nor covered by a statutory tariff. In order to determine whether fees are reasonable or not recourse is had to the various Bars' codes of conduct or the Bar Rules.

There are common law prohibitions on contingency fees agreements between legal practitioners and their clients. Case law has also expressed some doubt regarding the validity of contingency fees agreements.

3. Clause 1 of the Bill contains among others a definition of ''normal fees'' which in respect of attorneys covers fees prescribed by various court rules for civil litigious work or by the Council of each Law Society, if no fees were prescribed. In respect of advocates the said definition refers to reasonable fees that may be charged by individual advocates in accordance with the guidelines contained in the various Bars' codes of conduct or in the Bar Rules. In terms of the definition of the word ''proceedings'' contained in this clause it is intended that contingency fees agreements should be allowed only in respect of proceedings in courts of law, in tribunals that have similar powers to courts of law and in arbitration proceedings, but excluding any criminal proceedings and any proceedings on any family law matter. The Law Commission is of the view that in criminal law cases it is regarded as particularly important that a lawyer's duty to the court should not be compromised or appear to be affected by any influence that a fees agreement might have on the lawyer's judgment or conduct. In family law matters, contingency fees agreements would appear to be contrary to public policy, especially in divorce proceedings.

4. Clause 2 of the Bill is aimed at removing common law prohibitions on contingency fees agreements. The nature of contingency fees agreements is also set out in this clause. According to the Law Commission a contingency fees agreement arises in a situation where a legal practitioner undertakes to charge no fee for litigation unless the litigation is successful. The provisions of clause 3(3)*(c)* leave it to the legal practitioner and the client to determine what will be regarded as success or partial success in proceedings. As in some jurisdictions abroad, where contingency fees agreements are allowed, clause 2 is aimed at regarding an uplift fee of up to a maximum of 100 per cent of the normal fee to be adequate compensation for a legal practitioner in successful cases. The reason advanced for the inclusion of such a provision is that in unsuccessful cases the legal practitioner stands to receive no compensation. For the prospective litigants, the attraction of an uplift fees agreement would lie in the fact that the legal practitioner's fees could be deducted from the proceeds of litigation. To avert the danger of the entire proceeds of successful litigation being swallowed up by attorneys' and counsel's fees, it is provided in clause 2 that the total of the uplift fees payable to both an attorney and an

advocate (if one is employed) be limited to 25 per cent of the proceeds of the litigation, excluding costs.

5. The form and content of contingency fees agreements are laid down by clause 3. The clause contains what the Law Commission regards as the minimum requirements for a valid contingency fees agreement. In terms of clause 6 the legal profession's controlling bodies may make such further rules as they may consider necessary, relating to the provisions of the Act, and they may thus add further requirements to supplement those laid down by the Act. The provisions of clause 3(3)*(c)* will obviate the need to be prescriptive, as it will be difficult to determine prior to the commencement of the litigation exactly how ''success'' will manifest itself or will be perceived by the parties in a particular case. Regarding the payment of disbursements, the intention is that it should be a matter of contract between the legal practitioner and the client, and the rule that costs follow the event should be retained because it would serve as a deterrent to the institution of unmeritorious claims and claims with little prospect of success, thereby eliminating, to a certain extent, fears that contingency fees agreements will lead to a flood of litigation. Clause 3 makes it explicitly clear that contingency fees agreements providing for the payment of success fees in the event of successful litigation should be capable of being entered into by both attorneys and advocates. It is also evident from the provisions of the clause that contingency fees agreements will be capable of being entered into by natural persons as well as juristic persons. Subclause (3)*(b)* contains an important safeguard in that, among other things, a prospective litigant can obtain advice from other sources on the question of whether a contingency fees agreement would in the particular circumstances be in his, her or the juristic person's best interests. The subsection also provides the client with a 14 days' cooling-off period, reckoned from the date of the agreement, to resile from such an agreement. The subclause also endeavours to exclude uncertainty in respect of costs incurred during the cooling-off period.

6. The provisions of clause 4, which address the aspect of settlement, were included in the Bill with a view to further protect the interests of the client.

7. Clause 5 envisages to make it explicitly clear that contingency fees agreements entered into between a client and a legal practitioner who is not a member of one of the controlling bodies governing the legal profession, may be reviewed by a person or body designated by the Minister of Justice.

8. Clause 6 empowers the professional controlling bodies referred to in clause 5 or in the absence of such bodies, the Rules Board for Courts of Law to make rules as they may deem necessary in order to give effect to the provisions of this Act.

9. The Law Commission in the course of its investigation received comments from the following interested parties:

* The Supreme Court of Appeal;
* Justice L van den Heever
* Judge-President E K W Lichtenberg
* Judge-President C F Eloff
* General Council of the Bar of South Africa:
  - Advocate P C van der Byl, SC
  - Advocate A J Louw
  - Advocate C H G van der Merwe
  - Advocate A W M Harcourt;
  - Advocate M Pillemer
  - Mr C J Olivier
* The Law Society of the Transvaal
* The Law Society of the Cape of Good Hope
* The Natal Law Society
* Cape Town Attorneys' Association
* Mrs S Harrylal via the Natal Law Society
* Venn Nemeth & Hart (Attorneys)
* Herstigte Nasionale Party
* Black Lawyers Association
* Deneys Reitz (Attorneys)

* Moritz C J Bobbert (Attorneys)
* Hutton B Cook (Attorneys)
* Cox Yeats (Attorneys)
* Mr S G Abrahams
* Mr R Mandelstam (Magistrate, Johannesburg)
* Mr P W Jordaan (Magistrate, Durban)
* Anglo American Corporation of South Africa Limited
* The Council of Southern African Bankers
* Mr F H Terblanche SC (Pretoria Bar)
* Mr A G Derksen (Pretoria Bar)
* Mr J Goodey (Pretoria Bar)
* Mr P J J Marais SC (Pretoria Bar)
* Ms C Pretorius (Pretoria Bar)
* Society of Advocates (Free State Division)
* Securities Regulation Panel
* Adv D Bosman (Academy for Mediation)
* Mr N Padayachi

10. In the view of the Department and the State Law Advisers the procedure set out in section 75 of the Constitution should be followed with regard to this Bill.