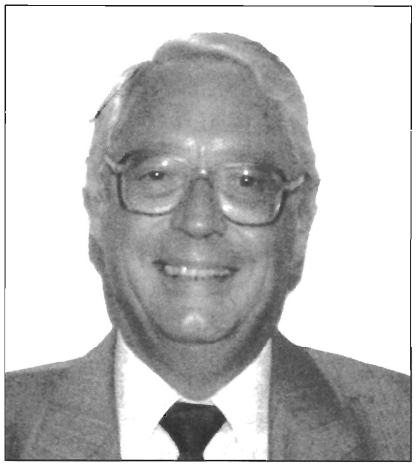

Derek Mitchell SC

Contingency fees. And justice for all?

Derek Mitchell SC
Cape Bar

The Contingency Fee Act of 1997 has been passed after a long and sometimes painful birth. It will come into operation once the Minister of Justice, after consultation with the legal fraternity, has finalised the standard form of contingency fee agreement as envisaged in s3(1) of the Act.

THE Contingency Fee Act 66 of 1997 has been passed after a long and sometimes painful birth. It will come into operation once the Minister of Justice, after consultation with the legal profession, has finalised the standard form of contingency fee agreement as envisaged in s 3(1) of the Act.

The Act provides that legal practitioners, both attorneys and advocates, will be permitted to accept litigation work on the basis that no fee will be charged if the litigation is unsuccessful, but that they will be entitled to a greater fee (up to 100% more than their normal or usual rate) if the litigation succeeds. Such fee arrangements may be entered into in relation to all work except criminal matters and family law matters. Work may be taken on contingency for both plaintiffs and defendants. The fee arrangement may not result in legal practitioners receiving more than 25% of the amount awarded or obtained by the client as a result of the proceedings. The fee arrangement must be recorded in writing and must comply with the standard form of agreement referred to above and must state the information prescribed by s 3(3). A client who is dissatisfied with such a fee arrangement may seek redress from the professional body of the practitioner concerned or, where such legal practitioner is not a member of a professional body, from the body or person designated by the Minister for such purpose.

The question of contingency fees was deliberated by the South African Law Commission for some time. Submissions from various quarters were considered.

Generally speaking, the attorney's profession was in favour of the proposals while the reaction from the Bar was mixed. The judiciary, again generally speaking, voiced reservations as to the advisability of adopting this system. Similar systems have been introduced in Australia and England, although the English system at present only permits such arrangements to be concluded with plaintiffs in personal injury litigation. Consideration is being given to broadening the categories of work in which such arrangements are permitted. The Act does not espouse the American system in which a share of the proceeds of the litigation may be stipulated as a contingency fee.

Justification for introduction

There are aspects of the system which deserve attention and consideration by all practitioners.

The justification advanced for the introduction of the contingency fees is the high cost of litigation which places such litigation out of the reach of all but the very wealthy or the impoverished who are able to procure legal aid. It is intended, as it was put to me by the Portfolio Committee on Justice during a hearing on the Bill, to shift the cost of litigation to the legal profession, where it properly belongs.

I question whether it will have this effect, and whether it will achieve the intended object of rendering justice accessible to all.

What is clear, is that the legal professionals, both attorneys and advocates, will have to be especially vigilant to ensure that the system is not abused. A contingency fee arrangement, particularly one which entitles the practitioner to greater than ordinary remuneration if successful, makes the legal practitioner all the more a party to the cause and gives him or her a substantial interest in the outcome of the litigation. The legal profession enjoys a high reputation in this country at present and it is a reputation which could easily be adversely affected. A contingency fee arrangement must inevitably place great temptations in the way of practitioners to secure success by other than ethical means. Tampering with and influencing the nature of evidence to be adduced at a trial is something which might easily be done, particularly when a matter appears to be heading for disaster after the investment of a considerable amount of time and effort.

I anticipate that situations will frequently arise where conflicts will develop between the client and his or her legal practitioners in relation to the conduct of the matter. While the legal practitioners may consider an offer of settlement which will secure payment of their fees to be attractive, the client, freed from the risk of carrying his own costs if the matter should fail, may wish to pursue the litigation in the hopes of greater returns at a later stage. I anticipate that, to avoid such conflicts, contingency fee agreements will be so structured as to effectively remove >

the control of the litigation from the client and place it in the hands of the legal practitioners. In the event of a dispute between the legal practitioner and the client, it will be difficult, if not impossible, to determine whether the legal practitioner is motivated by self-interest or the interests of his client.

In an effort to address this issue, the Act provides, in s 4, that a settlement offer may be accepted only after the legal practitioner and the client have deposed to and filed with the court affidavits dealing fully with the settlement proposed. The Act does not state what the result of failure to comply with these requirements would be. The question must arise of what the position of the other party to the litigation would be. Is the settlement void? Presumably not, as there is no requirement that the opposing party be informed that a contingency fee arrangement has been concluded. Generally speaking, an attorney has no authority to settle a matter without the consent of his client – *Goosen v van Zyl* 1980 (1) SA 706 (0). For the reasons already referred to, it is probable that the contingency fee agreements will be so structured as to confer such authority on the attorney. The client would, I suggest, be bound by the settlement concluded in those circumstances.

Conflict of interests

The system may well also lead to conflicts between the interests of risk-bearing attorneys and risk-bearing counsel. While the bulk of the attorney's fees is earned before the trial commences, the bulk of counsel's fees is normally earned during the course of a trial. Under the circumstances, it may well be that attorneys may wish to settle matters earlier than counsel would wish to settle them.

It is intended that the extent of what is called in the Act the success fee (that is the percentage by which the agreed fee will exceed a normal or reasonable fee) should be determined by the extent of the risk involved in the litigation. The higher the risk the higher the percentage of the success fee may be. Clearly the assessment of risks of litigation is a subjective matter. The profession will have to take care that less scrupulous practitioners do not exaggerate the risks of straightforward litigation in order to persuade their clients to agree to a higher percentage success fee.

The legislation will, of course, not make it easier for clients to run matters involving relatively small amounts. Indeed, such matters will be less amenable to contingency fee arrangements if the ordinary cost of litigation is already prohibitive.

Practitioners will also have to consider carefully how much work of this nature they will undertake. Smaller firms of attorneys and junior members of the Bar will have even greater difficulty with their cash flow if a substantial part of their practice consists of matters which will often entail years of work before a return can be expected.

The introduction of the Act will require various of the current uniform rules of professional conduct of the Bar to be amended. This is a matter currently under consideration by the GCB.

Does the Act in fact shift the burden of legal costs to the legal profession? I would suggest not. On the contrary, it would appear to shift the burden from the unsuccessful litigant and place it upon the successful litigant who will pay up to twice the normal fees in his or her litigation.

Does the Act render justice more readily available? To an extent, the answer must be yes. That extent will depend ultimately on the profession, which has, until now, rendered service to society by acting for many clients who cannot afford fees. The incentive of uplifted fees may well encourage more professionals to assist such litigants. It will, however, not make litigation involving small disputes more readily capable of resolution and may well have the opposite effect. 🕮

The Law Society of South Africa

Continued from page 15

was eventually overcome and all four provincial law societies approved the final draft of the constitution for its launch on 16 March 1998.

What does this mean to the profession?

The Association of Law Societies, because of its existing infrastructure, has changed its constitution and its name to the Law Society of South Africa. The previous membership of the Association of Law Societies was confined to the four provinces. The Law Society of South Africa makes prövision for nine provinces to be represented by the Association of Law Societies (one each) and NADEL and BLA together (one each). In addition to the nine representatives from each, both parties would appoint a co-chairperson. This arrangement entrusts the administration of the Law Society of South Africa to a twenty person committee consisting of ten persons from the Association of Law Societies (the four provincial units at this stage) and ten persons from both NADEL and BLA.

Whilst it may well be argued that this is not an ideal arrangement, it is an arrangement which was arrived at and agreed by all parties. The immediate task of the twenty person committee is to assist in the writing of a new attorneys act. This would be done in conjunction with the Ministry of Justice and will ensure that the present arrangement would then fall away and be replaced by whatever arrangement is arrived at in the new act. It is also envisaged that this would be carried out in the next two years.

The provincial law societies (all four) will adopt a similar arrangement in respect of representation on the councils of the provincial law societies. This would ensure that a proper working arrangement is followed from the councils to the Law Society of South Africa.

As one of those who was involved in the intensive negotiations and its eventual formation, I remain extremely confident that the Law Society of South Africa has the potential to make a significant contribution to the legal profession in this country.

Perhaps a single "Legal Practitioners Act" is what we should all start thinking about? 🕮