THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 523/2015

In the matter between:

FLUXMANS INCORPORATED **Appellant**

and

LEVENSON STEVEN ZULLA **Respondent**

Neutral citation: *Fluxmans v Levenson* (523/2015) [2016] ZASCA 183 (29 November 2016)

Coram: Mpati AP, Theron, Zondi and Van Der Merwe JJA and Makgoka AJA

Heard: 16 August 2016

Delivered: 29 November 2016

Summary: Prescription begins to run as soon as the creditor acquires knowledge of the minimum facts necessary to institute action: knowledge that the relevant agreement did not comply with the peremptory provisions of the Contingency Fees Act 66 of 1997 is not a fact needed to complete cause of action.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Windell J, sitting as a court of first instance):

1. The appeal is upheld with costs.

2. The order of the High Court is set aside and is replaced with the following:

'The respondent's special plea of prescription is upheld with costs.'

JUDGMENT

Mpati AP (Makgoka AJA concurring):

[1] Until the introduction of the Contingency Fees Act 66 of 1997 (the Act), which came into operation on 23 April 1999, legal practitioners could not, in terms of the common law, conclude contingency fees agreements with their clients. As was said in *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA), the Act was enacted to legitimise contingency fees agreements between legal practitioners and their clients, which would otherwise be prohibited by the common law.[1] The Act requires a contingency fees agreement to be in writing and in a prescribed form (s 3(1)) and that it be signed by the client and the attorney representing him or her (s 3 (2)). This appeal originates from an application brought by the respondent, Mr Steven Zulla Levenson, against the appellant, Fluxmans Incorporated, a firm of attorneys, in the Gauteng Local Division, Johannesburg (the High Court), for an order, amongst others, declaring a contingency fees agreement (the agreement) concluded between them to be invalid, void and of no force and effect. The agreement, which, it is common cause, did not comply with the requirements of the Act, was in relation to fees payable by the respondent to the appellant in respect of the former's claim against the Road Accident Fund (the Fund)

[1] Paragraph 41.

following a motor vehicle accident in which he was involved and sustained certain injuries.

[2] The declaration of invalidity was sought on the basis that the agreement did not comply with the provisions of the Act. In addition to the order of invalidity, the respondent sought payment from the appellant of the sum of R844 994.57, being the amount by which he had allegedly been overreached, having paid costs in the amount of R1 119 625.62. The appellant denied that it had overreached the respondent or that the agreement was invalid. It alleged that the respondent's claim, 'if legally sustainable, has been extinguished by prescription'. The High Court came to the conclusion that the respondent's claim 'has not become prescribed' and referred the issue of the quantum for trial. It also declared the agreement invalid. With the leave of the High Court, this appeal is only against the order that the respondent's claim has not become prescribed.

[3] The facts are mainly common cause. On 1 February 2006 the respondent gave instructions to the appellant to institute action on his behalf for damages against the Fund in respect of injuries sustained in a motor vehicle collision that occurred on 8 October 2005. The appellant, represented by an experienced attorney, Mr Selwyn Perlman, accepted the instructions on a contingency fee basis. In terms of the agreement, which, according to the answering affidavit, was an 'oral contingency fee agreement', the appellant would be paid a contingency fee of 22,5 per cent of the amount that would be recovered as damages on behalf of the respondent. The agreement was confirmed by Mr Perlman by letter sent to the respondent by telefax, dated 13 June 2006. The claim was subsequently settled. The terms of the settlement were made an order of court on 23 May 2008. In terms of the order, the Fund was to pay to the appellant, on behalf of the respondent, 'the capital sum of R 4 862 561.40 . . . in delictual damages', with costs on the scale as between party and party, including the qualifying fees of four named medical practitioners. In addition, the Fund undertook to cover the respondent's future medical and hospital expenses.

[4] On 22 June 2008 the respondent wrote a letter to the appellant addressed to Mr Perlman, the first two paragraphs of which read:

'Regarding our discussion on Friday of my earlier request for a reduction in Fluxman's fee, I left the meeting feeling that I had not communicated clearly and that there was a need to put something in writing.

You mentioned that I had stated, at the time of my request, that I had not understood the contract. Whilst I was aware when signing the letter of engagement, that Fluxman's would earn a fee of 22,5% of any settlement, I did not at the time, understand the nature or extent of my injuries.'

It was alleged in the founding affidavit that the letter recorded a meeting held between the respondent and Mr Perlman 'to discuss this issue amongst others'. The 'issue' that was discussed clearly related to the contingency fees charged by the appellant, because the respondent went further to allege that Mr Perlman assured him 'that the fees charged were reasonable' and that he 'had no reason to doubt [Mr Perlman's] word at that time'.

[5] It is not in dispute that in or about August 2008 the respondent received a statement of account from the appellant which reflected that he had been paid a total amount of R3 290 138.90, made up as follows: R3 103 449.39 in respect of capital and R186 689.51, being the costs recovered from the Fund. More than five years thereafter, on 9 April 2014, the respondent wrote a letter to the appellant in which he alleged that it had recently been brought to his attention that the contingency fees agreement entered into between him and the appellant, in February 2006, did not comply with the provisions of the Act. He referred to the judgment of the Gauteng Division in *De La Guerre v Ronald Bobroff & Partners Inc & others* [2013] ZAGPPHC 33 (delivered in February 2013), which was upheld, he said, by the Constitutional Court in February 2014.[2] That decision found, amongst others, he wrote, that 'any agreement outside the Act is invalid, null and void'. The respondent accordingly

[2] In *Ronald Bobroff & Partners Inc v De La Guerre* [2014] ZACC 2; 2014 (3) SA 134 (CC) the Constitutional Court dismissed an application for leave to appeal against the decision of the North Gauteng High Court.

invited the appellant, on the basis that the agreement was unlawful, to advise, by no later than 30 April 2014, what its proposed revised fee was and of 'the process that will be applied with regard to [his] reimbursement'. In all, the respondent sought to be reimbursed for moneys that had been incorrectly debited against his account with the appellant.

[6] In coming to the conclusion that the respondent's claim has not become prescribed, the High Court upheld the respondent's argument that he only acquired knowledge of the facts from which the debt arose 'when the Constitutional Court's judgment on contingency fees agreements was delivered in 2014'.[3] The High Court held that the date upon which the respondent acquired the requisite knowledge was 'when the minimum facts necessary to launch the present application came to his knowledge'. This meant, in the view of the Court, that the 'minimum facts necessary' for the debt to have become due was the respondent's knowledge that the agreement was unlawful and thus invalid.

[7] The question to be determined in this appeal is, therefore, whether the High Court correctly found that the respondent's claim had not become prescribed. This, in turn, requires a consideration of the provisions of s 12 of the Prescription Act 68 of 1969 (the Prescription Act), the relevant parts of which read:

'(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[3] Paragraph 17 of the judgment.

It has not been suggested that the appellant prevented the respondent from 'coming to know of the existence of the debt'. Section 12(2) is therefore of no application in the enquiry.

[8] In its answering affidavit, deposed to by Mr Perlman, the appellant said:

'The alleged debt asserted in this application would have become due on the date on which payment was made by the applicant to the respondent, upon which date (on the applicant's version) the amount was payable to the applicant. On the applicant's version he became aware (or should reasonably have so become aware) of his alleged cause of action and claim on 1 September 2008, the date from which interest is claimed. From that date (at the latest) the applicant had knowledge of the identity of the respondent as (alleged) debtor and of the facts from which his claim and the debt arises.'

This court, therefore, has to determine whether the respondent indeed had actual or deemed knowledge of 'the facts from which the debt arises' from 1 September 2008 as alleged by the appellant. That must have been the date on which the respondent became aware of the actual amount of the costs deducted from the money paid by the Fund in settlement of his claim, since the statement of account sent to him by the appellant was dated 20 August 2008. The respondent claimed interest on the sum allegedly due to him, calculated as from 1 September 2008. It is not in dispute that the identity of the debtor was known to him all along. The appellant, as a debtor who invoked the special defence of prescription, bore the onus of establishing 'both the date of the inception and the date of the completion of the period of prescription'.[4]

[9] In *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA), this court held that the term 'debt due' means a debt, including a delictual debt, which is owing and payable, and that –

[4] *Gericke v Sacks* 1978 (1) SA 821 (A) at 827H-828A; *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B; *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 256G.

'A debt is due . . . when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'[5] (Footnote omitted.)

And 'cause of action' for purposes of prescription was held to be-

'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary for the plaintiff to prove each fact, but every fact which is necessary to be proved.'[6] (Footnote omitted.)

[10] As has been alluded to above, the High Court found that '[t]he invalidity of a common law contingency fee agreement is a fact and not a legal conclusion' and that the respondent was not aware that an Act prohibiting the agreement existed. It also found that the respondent had been overcharged. Two things need to be clarified. The first is that the Act does not prohibit a contingency fees agreement. As has been mentioned above, it legitimises an agreement otherwise prohibited at common law. The second is that counsel for the appellant submitted, correctly so, that the High Court erred in its finding that the invalidity of the agreement is a fact and not a legal conclusion. In *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA) Lewis JA referred to *Truter*[7] and *Minister of Finance & others v Gore* NO [2006] ZASCA 98; 2007 (1) SA 111 (SCA)[8] as well as *Van Staden*,[9] where this court had left open the question whether the nullity of a contract (a legal conclusion) was a fact for purposes of s 12 of the Act, and said:

'These cases [*Truter* and *Gore*] clearly do not leave open the question posed and not answered in *Van Staden*. They make it abundantly clear that knowledge of legal conclusions

[5] Per Van Heerden JA para 16.
[6] Paragraph 19, quoting with approval from *McKenzie v Farmers' Co-operative Ltd* 1922 AD 16 at 23. See also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H.
[7] Paragraph 20.
[8] Paragraph 17.
[9] Footnote 4.

is not required before prescription begins to run. There is no reason to distinguish delictual claims from others.'[10]

Claasen was referred to by the High Court in its judgment, but regrettably, the court must have missed or misunderstood the authoritative statement just quoted.

[11] The respondent's claim is based on enrichment. He claims repayment of money paid by him in terms of an illegal and invalid contract (*condictio ob turpem vel iniustam causam*). As has now been authoritatively decided, lack of knowledge of the invalidity of a contract does not postpone the running of prescription,[11] which begins to run immediately after the payment was made.[12]

[12] But the respondent's case was not simply that he did not know that the agreement was invalid (which is a legal conclusion). It is set out as follows in his founding affidavit:

'I have since ascertained and been advised by my present legal representatives that the percentage fee agreement for 22.5% plus VAT in the circumstances of my case and my dealings with Fluxmans, as set out more fully hereunder, is known as a "common law contingency fee agreement" and is illegal and unenforceable *as it does not comply with the Contingency Fees Act* 66 of 1997.*'* (My emphasis.)

And:

'In the letter 'SZL4' I informed Fluxmans that I had become aware of the Judgments of the Constitutional Court and that on consideration of my Statement of Account annexure "SZL2", I was of the view that the agreement entered into between myself and Fluxmans was invalid *as it did not comply with the Provisions of the Contingence Fees Act 66 of 1995.*' (My emphasis.)

The letter and statement of account referred to were annexed to the founding affidavit. The second paragraph of 'SZL4' reads:

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[10] Paragraph 15.
[11] *Claasen* para 15 and *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* [2009] ZASCA 25; 2009 (3) SA 577 (SCA) para 37.
[12] *Van Staden*, at 215B, where Grosskopf JA quotes with approval (see 215F) De Wet & Yeats *Kontraktereg en Handelsreg* 4de uitgawe 263.

'It has recently been brought to my attention that the contingency fee agreement entered into between Fluxmans and myself in February 2006 *did not comply with the Contingency Fees Act 66 of 1997 (the Act).*' (My emphasis.)

Further down in the letter, 'SZL4', he states that the court (Constitutional Court) found that 'at common law a contingency agreement between an attorney and client is unlawful'. It therefore becomes necessary to consider the question: when did the debt arise (s 12(3) of the Act)?

[13] In its answering affidavit the appellant alleged that the respondent's claim 'is premised on an oral contingency fee agreement' concluded between the parties in February 2006. The deponent also alleged that at the time of the conclusion of the agreement he 'did not understand the terms of the contingency fee agreement to be in contravention of the [Act]' and said that the agreement was concluded in good faith. It was conceded during argument before us that the agreement did not comply with s 3 of the Act, the terms of which are peremptory. The agreement was therefore invalid, hence the order declaring it as such.

[14] In *Van Staden* the appellant (defendant) had, in terms of what was referred to as an 'Offer to Purchase', sold to the respondent (plaintiff) a share block in a share block scheme for R28 000. The share block entitled the owner thereof to the right of use of a flat and parking area (the premises) in a certain building. The plaintiff took occupation of the premises on 1 November 1981. He paid the deposit and thereafter the monthly instalments and levies in terms of the agreement. Disputes arose as a result of the plaintiff's failure to sign 'a proper deed of sale' which the parties had agreed would be drawn upon the fulfilment of a particular condition. That condition was fulfilled on 19 September 1982. The plaintiff vacated the premises more than three years after he had taken occupation. He thereafter issued summons in April 1985 claiming repayment, in terms of s 18[13] of Share Block Control Act 59 of 1980 (Share Block Act), of the amounts he had paid to the defendant. The defendant, in

[13] The relevant part of the section provides that 'any purchaser or seller who has performed partially or fully under a contract for the acquisition of a share which does not comply with the provisions of section 16 or 17, shall be entitled to reclaim from the other party what he has performed under the contract . . . .'

turn, counterclaimed, also in terms of s 18 of the same Act, for payment of reasonable compensation for the use of the premises which the plaintiff had enjoyed, as well as for damages he had caused to the premises. The parties were each partially successful in their claims. One of the defences raised by the defendant was prescription. It was alleged that the plaintiff's claim for repayment of moneys paid in respect of the months of December 1981 and January to March 1982, inclusive, had prescribed. This special defence of prescription was unsuccessful.

[15] Section 17 of the Share Block Act provides that a contract for the acquisition of a share 'shall state the matters required by Schedule 2 [to that Act] and be accompanied by the documents referred to in that Schedule'. On appeal to this court it was argued on behalf of the defendant that because of non-compliance with the provisions of s 17 the agreement ('Offer to Purchase') was void *ab initio* and that the plaintiff's claim for repayment of each instalment, that is the debt, arose immediately after payment of each such instalment. This court considered the provisions of s 12(3) of the Act and reasoned as follows (at 216B-E):

'Die probleem in die onderhawige geval draai om die toepassing van die woorde "die feite waaruit die skuld ontstaan" in art 12(3) van die Verjaringswet. Die respondent was klaarblyklik bewus van die basiese feite. Hy het geweet wat die aard en inhoud van die kontrak was. Uiteraard was hy bewus daarvan dat feitlik geen van die besonderhede vereis deur art 17 van die Wet daarin opgeneem was nie. Ook het hy geweet dat die stukke waarna in die artikel verwys word, nie die kontrak vergesel het nie. Hy was dus bewus van die feite wat aangetoon het dat art 17 van die Wet nie nagekom is nie. Hy het geweet dat hy betalings kragtens die kontrak gemaak het. Myns insiens was hy dus van meet af aan ten volle bewus van al die feite wat aanleiding gegee het tot die spesiale remedies voorgeskryf deur art 18 van die Wet. 'n Mens kan aanvaar dat hy eers later bewus geword het van watter vereistes deur art 17 van die Wet gesel word, en van watter regte hy verkry het toe die appellant nie hierdie vereistes nagekom het nie.'[14]

[14] Loosely translated the court said: 'The problem in the instant matter is the application of the words "the facts from which the debt arises" in s 12(3) of the Prescription Act. The respondent was plainly aware of the basic facts. He was aware of the nature and content of the contract. Naturally, he was aware that virtually none of the particulars required by s 17 of the Act were contained therein. He also knew that the documents referred to in the section did not accompany (or were not attached to) the contract. He was therefore aware of the facts that indicated that the provisions of s 17 of the Act were not complied with. In my view he was therefore fully aware from the outset of all the facts which lead (or give rise) to the special remedies prescribed by s 18 of the Act. One can accept that he became aware of the requirements prescribed by s 17 only later and of what rights he acquired when the appellant failed to comply with these requirements.'

This court accordingly held that the plaintiff had knowledge of the facts from which the debt arose when he made the first payment. The court therefore upheld the defendant's special plea of prescription.

[16] In *Claasen* the respondent (Bester) issued summons on 14 December 2007 seeking a declarator that a deed of sale, in terms of which he had sold a farm to the appellant (Claasen), was void or voidable and that he was entitled to the return of the farm. He tendered a refund of the purchase price of R175 000. The contract of sale was concluded in or about September 2001. The parties had agreed - and this was reflected in the deed of sale – that Bester could buy the farm back. Bester had been in financial distress and the farm was about to be sold at a sale in execution. The price at which he could buy back the farm was, however, not reflected in the deed of sale. The relevant clause in the deed of sale provided that the purchase price and the terms and conditions of such sale would be determined by the parties when the right to repurchase was exercised. Bester claimed not to have read the provision and that he had relied on the attorney who drew up the deed of sale to include a provision that the price would be market-related. He testified at the trial that when the sale was discussed at a meeting in the attorney's office on 25 September 2001 he had insisted that the price at which he would buy back the farm 'must be market-related'. He only realised when he obtained a copy of the deed of sale on 3 March 2004 that such a provision had been omitted. Attempts to have the 'right' to purchase back the farm registered against the title deed failed. Bester was informed on 11 January 2006 that the provision purporting to record the right to buy back the farm was a nullity.

[17] Claasen's special plea of prescription failed before the trial court. His appeal to this court was upheld on the basis that prescription began to run as from 3 March 2004, when Bester knew that no provision had been made in the deed of sale in relation to the price at which he could buy back the farm from Claasen. Thus, when Bester issued summons on 14 December 2007 his claim had become prescribed.

[18] It has been held, in the context of s 12(3) of the Act, that the appellant (in this case) must show what the facts are that the respondent was required to know before prescription could commence running and that it must also show that the respondent had knowledge of those facts on the date prescription is alleged to have commenced running.[15] The respondent made the allegation, in his founding affidavit, that he 'did sign a written fee agreement' confirming that the appellant would accept instructions from him 'on a contingency on the basis that [he] would pay a fixed 22.5% plus VAT of the damages recovered' on his behalf. He also stated that he signed various documents on the day that he consulted at the appellant's offices – it appears this was on 1 February 2006. He was, however, unable to recall whether a copy of what he had signed was given to him, but said that despite a diligent search he was 'unable to locate a copy of such written fee agreement'. Although the appellant asserted in its answering affidavit that the respondent did not sign various documents on 1 February 2006, it was not suggested that he never signed any document. It is true, according to the answering affidavit, that Mr Perlman did furnish the respondent with a motor vehicle claim form which the latter had to complete. But, as early as 22 June 2008, the respondent, in a letter to the appellant to which he never received a response, mentioned that 'when signing the letter of engagement' he was aware of the percentage fee that the appellant would earn. In my view, this clearly supports his version that he signed 'a written fee agreement' confirming that the appellant would accept his instructions 'on a contingency on the basis that [he would] pay a fixed 22.5% plus VAT of the damages recovered'.

[19] It was not argued or suggested in this court, nor could it be so argued, in my view, that the respondent knew, or must have known, at any stage before he stumbled across the *Bobroff* decision, that what he said he signed in the appellant's offices was some other document and not a written contingency fees agreement contained in a prescribed form as required by s 3(1)(a) of the Act, and that he therefore knew that the agreement was not in writing. It was also not suggested that the respondent knew, or must have known, that the document which he believed was the contingency fees agreement did not contain other information as required in

[15] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC) para 24.

terms of any other provision of s 3 of the Act. Nor was it suggested that the respondent could not reasonably have believed that the document he signed contained a contingency fees agreement that complied with the provisions of the Act. A finding that a copy of the document which the respondent believed to be the written contingency fees agreement was made available to him cannot be made on the papers. And if the document he signed was not one confirming the terms of the contingency fees agreement as he said it was, it could, in any event, not be argued that he knew that the agreement was not in writing as required by s 3(1)(a) of the Act. It could not be suggested, therefore, that the respondent had knowledge from the inception, or at any time before February 2014, of the basic facts from which the debt arose.

[20] I disagree, therefore, with the finding (in paragraph 41 of the judgment of the majority, which I have had the privilege to read) that the respondent knew that the fees which he paid to the appellant were calculated on the basis of 'the *oral* contingency fees agreement which he concluded with the appellant (Perlman)'. (My emphasis.) Stripped of all excesses, the appellant's case was that from 1 September 2008, at the latest, the respondent 'had knowledge of the identity of the [appellant] as (alleged) debtor and of the facts from which his claim and the debt arises'. No attempt was made in the answering affidavit to show what the facts are that the respondent was required to know, and in fact knew on or before 1 September 2008, before prescription could commence running.[16] The general statement that the respondent's claim 'is premised on an oral contingency fee agreement' does not assist the appellant in this regard. The respondent's claim was premised on an invalid written contingency fees agreement.

[21] Counsel for the appellant only dealt, in their heads of argument and before us, with the issue relating to the invalidity of the agreement and ignored the second part of the respondent's case, namely, that the agreement did not comply with the provisions of the Act, that is, that the respondent was aware of facts that indicated

[16] *Ibid*.

that there was no compliance with the provisions of s 3 of the Act. This was probably because of the finding of the High Court that the invalidity of a common law contingency fees agreement is a fact and not a legal conclusion. The issue of non-compliance was, however, squarely raised in the founding affidavit.

[22] There was some suggestion in the appellant's heads of argument that even if the law required knowledge of the invalidity or voidness of an agreement in order for prescription to commence running, the respondent would still not be able to rely on s 12(3) of the Prescription Act. It was submitted that on his own version the respondent would be 'deemed to have such knowledge' as by the exercise of reasonable care he could have acquired it. The matter of *Price Waterhouse Coopers Inc & others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) para 41, in which it was held that any contingency fees agreement that is not covered by the Act is illegal, was decided in 2004 and, so it was contended, the respondent could, by the exercise of reasonable care, have acquired knowledge of the fact of the invalidity of the agreement. Although a different finding has been made, I suspect that these submissions would still have been advanced.

[23] In his founding affidavit the respondent averred that he is a lay person and that he relied on the appellant to represent his interests and to advise him properly and fairly. It is clear that he placed his trust in the appellant, who, he would have thought, were the experts on matters legal and would handle his claim professionally. He referred to Mr Perlman, who handled his claim, as 'a very experienced attorney', and felt confident that he 'would be properly advised and represented in all respects'. There is nothing in the papers to suggest that he should at any stage have realised that there had been non-compliance with the provisions of the Act and which should have led him to believe that he should seek legal advice elsewhere. It is true that he was not happy with the amount of the fees that he paid in terms of the agreement, but that was no reason for him to even suspect that there had not been compliance with the provisions of the Act. He merely felt that, because of the nature and extent of his injuries, the percentage fees he was required to pay should be less than 22.5 per cent. There can be no basis, therefore, for a submission

that the respondent could, by the exercise of reasonable care, have acquired knowledge, at an earlier stage, of facts that would indicate non-compliance with the Act. It follows that prescription did not begin to run until the respondent acquired knowledge, during February 2014, that the appellant had not complied with the provisions of the Act. I would accordingly dismiss the appeal.

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L Mpati
Acting President

Zondi JA (Theron and Van der Merwe JJA concurring):

[24] I have read the well reasoned judgment prepared by Mpati AP. However, I regret that I cannot agree with my learned colleague that the appeal should be dismissed. In the judgment (paras 18 and 19) Mpati AP concludes that the respondent's claim had not become prescribed because the respondent did not have knowledge from the inception, or at any time before February 2014, of the basic facts from which the debt arose. I disagree with his conclusion. It is based on the finding that the respondent's version that he concluded a written fees agreement, is correct. In my view, the appeal should succeed and the appellant's special plea of prescription should have been upheld by the High Court.

[25] The background facts have been set out in detail in the judgment by Mpati AP, for which I am grateful and support his narration. It is common cause that on 2 February 2006 the appellant, a firm of attorneys, concluded a percentage-based contingency fees agreement with the respondent in terms of which the appellant agreed to represent the respondent in the institution and prosecution of an action against the Road Accident Fund (the RAF) for damages for personal injuries suffered by the respondent in a motor vehicle collision on 8 October 2005. The parties agreed that the appellant would charge the respondent a contingency fee of 22.5 per cent plus VAT of the damages that the respondent recovered from the RAF. This

agreement did not comply with the requirements of the Act[17] and neither were its provisions discussed prior to, and at the time that it was concluded.

[26] The RAF subsequently settled the respondent's claim and the terms of the settlement were made an order of court on 23 May 2008. In terms of the order, the RAF, among others, was to pay to the appellant, on behalf of the respondent, the capital amount of R4 862 561.40. Upon receipt of the capital amount and legal costs from the RAF the appellant deducted from that amount a sum of R1 109 101.02 representing a contingency fee of 22.5 per cent plus 14 per cent VAT and paid the balance to the respondent on 20 August 2008.

[27] More than 6 years later on 9 April 2014, the respondent wrote a letter to the appellant in which he claimed that he had recently became aware that the appellant had overcharged him because the contingency fees agreement, on the basis of which the fees were calculated, failed to comply with the Act and was therefore null and void. For this proposition the respondent referred to the judgment of the Gauteng Division in *De La Guerre v Ronald Bobroff & Partners Inc & others* unreported case no 22645/2011 delivered on 13 February 2013, which he said, was upheld by the Constitutional Court in February 2014.[18] In that case the Gauteng Division found, on the authority of a decision of this Court in *Price Waterhouse Coopers*,[19] that the contingency fees agreement which is not covered by the Act, is illegal. The respondent accordingly demanded that the statement of account rendered by the appellant to him on 20 August 2008 be debated or that the reasonable fees be agreed upon.

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[17] Section 3(2) of which provides as follows:
'A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorized 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.'

[18] *Ronald Bobroff & Partners Inc v De La Guerre* [2014] ZACC 2; 2014 (3) SA 134 (CC) para 14, in which the two applications for leave to were dismissed for having no prospect of success on appeal.

[19] *Price Waterhouse Coopers Inc and others v National Potato Co-Operative Ltd* [2004] ZASCA 64; 2004 (6) SA 66 (SCA) para 41.

[28] The appellant rejected the respondent's demand and contended that it had acted according to 'both the spirit and requirements of the Contingency Act'.

[29] The appellant's refusal prompted the respondent to launch an application in the High Court seeking, among others, an order declaring that the common law contingency fees agreement concerned be declared invalid, void and of no force and effect and that the appellant be ordered to pay to him the sum of R844 994.57. The appellant opposed the application and contended among others that the respondent's claim had become prescribed.

[30] The High Court dismissed the appellant's special plea of prescription holding that the respondent only acquired knowledge of the facts (that common law contingency fees agreements are unlawful) from which the debt arose when the Constitution Court's judgment[20] on contingency fees agreements was delivered in February 2014 and that before that date the respondent was not aware that an Act, prohibiting such agreements existed and that he was overcharged. It held that the invalidity of a common law contingency fees agreement is a fact and not a legal conclusion. The appeal is with the leave of the High Court.

[31] Before setting out my reasons for reaching a different conclusion, I must agree with Mpati AP that the issue before us is whether the High Court correctly found, when it did, that the respondent's claim had not become prescribed. That issue, in turn, requires a consideration of the provisions of s 12 of the Prescription Act 68 of 1969 (the Prescription Act).

[32] I also agree with Mpati AP's conclusion that the High Court erred in finding first, that 'the invalidity of a common law contingency fees agreement is a fact and

[20] *Ronald Bobroff & Partners Inc v De La Guerre* (above). There the Constitutional Court was merely required to determine whether the Contingency Fees Act was unconstitutional and the questions of whether the common law contingency fees agreements were invalid, did not arise.

not a legal conclusion' and secondly, that the Act prohibits contingency fees agreements. I am in full agreement with the reasons that Mpati AP advances in support of that conclusion. I wish to emphasise in relation to the High Court's second finding, that it is incorrect that the Act prohibits the conclusion of a 'common law' contingency fees agreement. The Act permits the parties to conclude such agreement. It in fact allows them to do something that would otherwise be unlawful under the common law. In other words, the Act was enacted to overcome the prohibition which existed under the common law (*Price Waterhouse Coopers Inc* para 41), which is quite the opposite of the High Court's second finding.

[33] The relevant parts of s 12 of the Prescription Act are set out fully in para 7 of Mpati AP's judgment and I consider it unnecessary to repeat them. But to the extent that it is necessary, s 12(1) provides that subject to the provisions of subsecs (2), (3) and (4) of s 12, extinctive prescription commences to run as soon as the debt is due. The term 'debt' is not defined in the Prescription Act and the courts have held that it must be given a wide and general meaning.[21] The courts have also held that the words 'debt is due' must be given their ordinary meaning and that it is due when it is immediately claimable by the creditor and it is immediately payable by the debtor.[22]

[34] This court in *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16 said that:

'For the purposes of the [Prescription] Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.' (See, for example, *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H; and *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H-I. See

[21] *African Products (Pty) Ltd v Venter* [2007] 3 All SA 605 (C) 612d.
[22] *Benson & another v Walters & others* 1984 (1) 73 SA (A) at 82C, where Van Heerden JA quotes with approval the dicta in *The Master v I L Back and Co Ltd & others* 1983 (1) SA 986 (A) at 1004.

further M M Loubser *Extinctive Prescription* (1996) para 4.6.2 at pp 80-81 and the other authorities there cited.)

[35] In terms of s 12(3), a debt is not deemed to be due until the creditor has or ought to have had knowledge of the identity of the debtor and the facts from which the debt arises. In the founding affidavit, the respondent, in setting out the facts from which the debt (his claim) arises, alleges as follows:

'9. I have since ascertained and been advised by my present legal representative that the percentage fee agreement for 22.5% plus VAT in the circumstances of my case and my dealing with Fluxmans, as set out more fully hereunder, is known as a "common law contingency fee agreement" and is illegal, invalid and unenforceable as it does not comply with the Contingency Fees Act 66 of 1997 ("the Act").

. . .

20. I am a layman and it was only after I read of the Constitutional Court Judgment of 20 February 2014 that I decided thereafter to write to Fluxmans to obtain clarity in regard to the basis upon which I had been charged in my case.

. . .

24. After the handing down of the Judgments in the *De La Guerre* and *SAAPIL* [2013 (2) SA 583 (GSJ)] cases on 20 February 2014 I addressed a letter to Selwyn Perlman at Fluxmans dated 9 April 2014, a copy of which is annexed hereto marked "SZL4" . . .

25. In the letter "SZL4" I informed Fluxmans that I had become aware of the Judgments of the Constitutional Court and that on consideration of my Statement of Account annexure "SZL2" I was of the view that the agreement entered into between myself and Fluxmans was invalid as it did not comply with the Provisions of the Contingency Fees Act 66 of 1997".

[36] The respondent says the agreement he concluded with the appellant was in writing and that he was given a copy to sign, which he did. He alleges, however, that he is unable to produce a copy of the agreement as he cannot locate it after a diligent search. On the evidence, such agreement does not exist. The deponent to the appellant's answering affidavit denies that the agreement he concluded with the

respondent was in writing and in substantiation of that denial refers to a letter he addressed to the respondent on 13 June 2006 embodying the terms upon which the appellant accepted the respondent's instruction. The letter reads:

'This serves to confirm the arrangement that we have in regard to our fees is as follows:-

We shall charge you 22½% plus VAT thereon on whatever amounts we recover from the Road Accident Fund alternatively R1 500.00 plus VAT for the time spent per hour by the writer on the matter, whichever of the two is the greater.

. . .

Obviously the above is on the contingency that we recover the moneys from the Fund.'

The appellant's version that the agreement between the parties was a verbal one is not denied by the respondent in the replying affidavit. To the extent that there is a dispute on whether or not the agreement was in writing that dispute in accordance with the *Plascon Evans* principle[23] must be resolved in the appellant's favour.

[37] It is clear from the aforegoing that the agreement the parties concluded, did not comply with the peremptory requirements of s 3 of the Act which, among others, require a contingency fees agreement to be in writing and signed by the client and an attorney representing such client. The agreement, the parties concluded, is therefore invalid.

[38] In respect of its defence of prescription the appellant avers that the debt asserted by the respondent became due on 20 August 2008, the date on which the respondent paid fees to the appellant. It contends that from that date the respondent had knowledge of the identity of the appellant and the facts from which his claim arose.

[23] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[39] In its opposing affidavit the appellant did not rely upon the proviso to s 12(3) of the Prescription Act. But in the heads of argument the appellant submitted in the alternative that, to the extent that knowledge of the invalidity of a common law contingency fees agreement was a 'fact' for the purposes of s 12(3), the respondent could, by the exercise of 'reasonable care', have acquired knowledge of such 'fact'. In the light of the conclusion I have reached it is not necessary to decide on the appellant's alternative defence.

[40] The respondent's case therefore is that prescription did not commence to run against its claim before 20 February 2014 because he did not by that date have knowledge of the facts from which the debt arose. He says he did not know that the percentage fee agreement he concluded with the appellant is a 'common law contingency fees agreement' and *is illegal and unenforceable as it does not comply with the Contingency Fees Act.* . .' (My emphasis).

[41] The question, therefore, is whether before February 2014 the respondent had knowledge of the facts from which his claim arose. In my view, the respondent did have knowledge of such facts. Immediately after he paid the fees to the appellant on 20 August 2008 the respondent knew all the facts even though he did not know the legal conclusion flowing from those facts. The respondent knew that fees which he paid to the appellant on 20 August 2008 were calculated on the basis of the oral contingency fees agreement which he concluded with the appellant (Perlman). On his own evidence, the respondent then also knew all the other facts that he relied upon in his founding affidavit for the conclusion that the contingency fees agreement was invalid. He knew that the appellant's fees were not limited to double their normal fee or 25 per cent of the amount awarded, whichever was the lower. He also knew that before the agreement was entered into; he was not advised of any other ways of financing the litigation and of their respective implications; he was not informed of the normal rule that in the event of him being unsuccessful in the proceedings he may be liable to pay the taxed party and party costs of the RAF in the proceedings; he was not advised that he would have a period of 14 days, calculated from the date of the agreement, during which he would have the right to withdraw from the agreement by

giving notice to the appellant in writing. He knew that none of this formed part of the contingency fees agreement. Therefore, even if the contingency fees agreement should be regarded as a written agreement, by 20 August 2008 the respondent knew all the facts that he relied upon for his claim in his founding affidavit. According to him, what he did not know, however, was the legal conclusion flowing from these facts, namely that it was invalid because of its failure to comply with the Act. In para 20 of the judgment Mpati AP states that counsel for the appellant only dealt in their heads of argument and before us with the issue relating to the invalidity of the agreement and ignored the second part of the respondent's case, namely, that the agreement did not comply with the provisions of the Act. I disagree.

[42] Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This Court stated in *Gore NO* para 17[24] that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require

[24] *Minister of Finance & others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA).

knowledge of the legal conclusion (that the known facts constitute invalidity) (*Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA).

[43] If the respondent's claim had become prescribed in the interim because of the lapse of the prescriptive period of three years, knowledge of invalidity of the common law contingency fees agreement allegedly acquired thereafter following the Constitutional Court judgment in *Bobroff* cannot revive such a prescribed claim.

[44] In my view, the respondent's cause of action arose on 20 August 2008 when he paid fees to the appellant which he now contends were incorrectly calculated. The action should have been instituted in August 2011 which is three years from the date on which the cause of action arose. When the respondent therefore instituted these proceedings in July 2014 his claim had become prescribed. The High Court erred therefore by dismissing the appellant's special plea of prescription. The appeal must accordingly succeed.

[45] With regards to costs, the appellant's counsel sought costs of two counsel to be awarded as the matter, according to him, involves a consideration of legal issues of utmost importance. Counsel for the respondent submitted that the matter does not warrant the employment of two counsel and that costs to be awarded should be limited to the costs of one counsel. The issue for determination, both in the High Court and in this Court, was a narrow one, namely whether the respondent's claim had become prescribed which in my view, despite its importance, was not complex. The matter did not therefore deserve the services of two counsel and in the circumstance costs of only one counsel should be awarded.

[46] In the result, I make the following order:

1. The appeal is upheld with costs.

2. The order of the High Court is set aside and is replaced with the following:

‘The respondent’s special plea of prescription is upheld with costs.’

_____

D H Zondi

Judge of Appeal

APPEARANCES

For the Appellant:	A Subel SC (with him S Stein SC) Instructed by: Fluxmans Inc, Johannesburg Lovius Block, Bloemfontein
For the Respondent	J J Bitter Instructed by: Norman Berger & Partners Inc, Johannesburg McIntyre & van der Post, Bloemfontein