Arthur van Coller

Associate Professor, Faculty of Law, University of Fort Hare, South Africa
ORCID: https://orcid.org/0000-0003-3362-6707

DOI: https://doi.org/10.38140/jjs.v49i2.8748

ISSN 2415-0517 (Online)

Journal for Juridical Science 2024:49(2):149-162

Date Published: 31 December 2024

THE ABUSE OF A CONTINGENCY FEES AGREEMENT – AN ANALYSIS OF *LEGAL PRACTICE COUNCIL V BULELANI RUBUSHE* (CASE NO 1004/2022) [2023] ZASCA 167 (1 DECEMBER 2023)

SUMMARY

This article explores the reasoning of the Grahamstown High Court and the Supreme Court of Appeal concerning the misconduct of a legal practitioner due to his non-compliance with the formalities for a valid contingency fees agreement. The Courts expressed concern at the "embedded" and "endemic" nature of misconduct by legal practitioners. Therefore, the Legal Practice Council and the Courts must deal with misconduct by legal practitioners consistently, predictably, and efficiently. The reasoning of the High Court and Supreme Court of Appeal reveals some similarities, but there are also apparent differences in tone and the sanctions imposed. The High Court found that an appropriate sanction was to suspend the legal practitioner. However, the Supreme Court of Appeal reasoned that the suspension from practice in isolation would almost certainly not transform a legal practitioner into a fit and proper person to practice in the future. The SCA thus determined that the name of the offending practitioner must be struck from the Roll of legal practitioners.

1. INTRODUCTION

The "long-term project" of transformative constitutionalism is intended to take advantage of the potential of the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*), to create a more just and democratic society.[1] However, the discriminatory impact of inequality and poverty has condemned many people to the margins of society and has, at times, even created new patterns of disadvantage.[2] The harmful effects of this bitter reality are especially apparent for those who

1 Klare 1998:146; *Constitution of the Republic of South Africa*, 1996, Chapter 1, Art. 1.

2 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC):par. 27; *MEC for Education: Kwazulu-Natal and Others v Pillay* 2007 (2) SA 106 (CC):par. 73.

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are isolated from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.[3]

The legal profession, through the collective and individual efforts of its members, is thus optimally situated to ensure that legal services are not simply accessible to "a tiny minority of the most privileged in our society".[4] To facilitate access to legal services, the legislature promulgated the *Contingency Fees Act*[5] (hereafter, the *Act*), thereby providing an avenue for legal practitioners to assist litigants in defending or exercising their rights in exchange for a percentage of the proceeds upon achieving a successful outcome in the legal proceedings.[6] Contingency fees agreements (CFAs) have subsequently become a primary method of funding various litigation forms.[7]

The prevalence of CFAs has regrettably also resulted in instances of unethical and harmful conduct that occurred with sufficient regularity to provoke the judiciary's anger and the public's distrust in the legal profession. An example of such dishonesty by a legal practitioner who, in the words of the High Court, descended "like a vulture on his client for his own personal, unjustified financial benefit"[8] was recently considered by the Supreme Court of Appeal (SCA)[9] on appeal from the Eastern Cape Division of the High Court ("the High Court").[10] Mr Bulelani Rubushe's (Rubushe) misconduct was uncovered when a settlement agreement between his client, Mr Zama Mfengwana (Mfengwana), and the Road Accident Fund (RAF) was placed before the then Grahamstown High Court (Mfengwana judgment).[11] Rubushe's non-compliance with the formalities for a valid CFA and the events that followed resulted in his initial suspension by the High Court and later being struck from the Roll of legal practitioners by the SCA.

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3 South African Law Reform Commission Report "Unreasonable Stipulations in Contracts and the Rectification of Contracts" Project 47 (April 1998):par. 2.2.2.8, quoting the Law Reform Commission of Hong Kong "Report on Sale of Goods and Supply of Services":37-38.

4 *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024):par. 26; *Cape Bar v Minister of Justice and Correctional Services and Others* 2020 (6) SA 165 (WCC):par. 2.

5 *Contingency Fees Act* 66/1997.

6 Sec. 2(1)(a) of the *Contingency Fees Act* 66/1997; *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 All SA 96 (GNP) 98; Khoza 2018:4; Van Eck 2023:201.

7 *Kedibone obo MK and another v Road Accident Fund (Centre for Child Law as Amicus Curiae) and a related matter* [2021] JOL 50051 (GJ):par. 86.

8 *Legal Practice Council v Bulelani Rubushe* (Case no. 1004/2022) [2023] ZASCA 167 (1 December 2023):par. 17 (High Court judgment).

9 *Legal Practice Council v Bulelani Rubushe* (Case no. 1004/2022) [2023] ZASCA 167 (1 December 2023), Binns-Ward AJA (Petse DP and Mbatha JA and Musi and Kathree-Setloane AJJA concurring (SCA judgment).

10 High Court judgment.

11 *Mfengwana v Road Accident Fund* [2016] ZAECGHC 159; 2017 (5) SA 445 (ECG):par. 2 (Mfengwana judgment).

This note will start by summarising the facts of the Mfengwana, High Court and SCA judgments. Plasket J, in the Mfengwana judgment, and Jolwana J, in the High Court, expressed concern at the "embedded" and "endemic" nature of misconduct by legal practitioners.[12] These comments are justified, as the function of the legal profession can only be realised when its members conscientiously and meaningfully observe and adhere to the values of the *Constitution* and the functionally interrelated normative professional rules.[13] Any departure from these ethical obligations creates a negativity bias that significantly erodes public confidence and perceptions of the legal profession.[14] Therefore, the Legal Practice Council (LPC) and the Courts must deal with misconduct by legal practitioners in a consistent, predictable, and efficient manner. There were indeed some similarities in how the High Court and SCA approached the matter. However, there were also apparent differences in their tone and the sanctions imposed. The Courts' reasoning will thus be evaluated to establish why there are still instances where the Courts, when considering dishonesty by a legal practitioner, would disregard existing precedent. The note will also comment on the implications of the judgments for future instances of dishonesty concerning CFAs.[15]

2. THE MFENGWANA JUDGMENT

Mfengwana entered into a CFA[16] with Rubushe to finance the legal service required to pursue a personal injury claim against the RAF.[17] This claim was later settled after the close of pleadings in favour of Mfengwa in the amount of R904,889.17.[18] Rubushe calculated the fees due to him as R226,222.30, or 25% of the settlement amount. The matter was set down for the settlement to be made an order of Court.[19] Sec. 4 of the *Act* requires that Rubushe and Mfengwana[20] file affidavits confirming that the CFA complies with the

12 Mfengwana judgment:par. 29; High Court judgment:par. 1.
13 The Code of Conduct for Legal Practitioners (GN 168 GG 42364 of 28 March 2019; GN R 198 GG 42364 of 23 March 2019, published under the *Legal Practitioners Act* 28/2014) (the LPCC); *Vassan v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA):par. 538 G-I; *General Council of the Bar of South Africa v Geach & Others* 2013 (2) SA 52 (SCA); *Law Society of the Cape of Good Hope v Randell* [2015] 4 All SA 173 (ECG); Van Coller 2023:438.
14 Öhman *et al.* 2001:381-396; Vaish *et al.* 2008:383-403; Sarkin 2002:630.
15 For a discussion of the SCA's reasoning on honesty as an ethical duty of legal practitioners, see in general *Kekana v Society of Advocates of SA* 1998 (4) SA 649 (SCA).
16 Mfengwana judgment:paras. 17-18; SCA judgment:par. 7.
17 SCA judgment:par. 1.
18 Mfengwana judgment:par. 1; SCA judgment:par. 2.
19 *Contingency Fees Act*:sec. 4(3).
20 *Contingency Fees Act*:sec. 4(2)(a)-(c).

provisions of the *Act* (sec. 4 affidavits).[21] Rubushe was further obliged to file a complete copy of the CFA and the prescribed cost estimate with the sec. 4 affidavits as directed by the Rules made by the LPC to give effect to the *Act* (CFA Rules).[22]

Rubushe, on request, produced a sec. 4 affidavit, but no affidavit was filed on behalf of Mfengwana.[23] In his affidavit, Rubushe argued that he complied with the *Act* as the CFA entitles him to charge a fee of 25% or "double my fees and take whichever is lesser, which would not be more than 25% agreed fees".[24] Rubushe further stated that the success fee would be "calculated in terms of Rule 70 of the Rules of the High Court plus 100% thereof", excluding costs.[25] Plasket J regarded Rubushe's justification of the inconsistency between the CFA and the provisions of the *Act* as a unilateral and "transparently disingenuous" attempt to amend the CFA retrospectively.[26] The sec. 4 affidavit was deemed to be "wholly inadequate".[27] Rubushe was thus ordered to file sec. 4 affidavits that comply with the *Act* and to show cause at the next appearance as to why the CFA should not be set aside.[28] No further affidavits were filed, and Rubushe withdrew as Mfengwana's attorney.[29]

The High Court, at the next appearance, found the settlement fair and granted the order.[30] However, the CFA was set aside due to non-compliance with the *Act*'s provisions.[31] Rubushe was, as a result, only entitled to a reasonable fee on an attorney and own-client basis.[32] Plasket J concluded that there was "clear and reliable evidence of serious professional misconduct".[33] The registrar was accordingly instructed to forward a copy of the judgment to the then Cape Law Society and inform and explain to Mfengwana its significance.[34] Despite Rubushe's withdrawal, Rubushe's correspondent attorneys issued a warrant of execution against the RAF for payment of the settlement amount.

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21 *Contingency Fees Act*:secs. 4(1)(a)-(g) and 4(2)(a)-(c): The sec. 4 affidavits must provide the terms of the settlement, an assessment of the implications should the matter proceed to trial, the difference between the fees for a trial and a settlement, that the motivation for the settlement was explained to the client, that the client understands and accepts the settlement. See, in general, *Road Accident Fund v MKM obo KM and Another*; *Road Accident Fund v NM obo CM and Another* 2023 (4) SA 516 (SCA).

22 CFA Rule 5 – Settlement. See also *Contingency Fees Act*:sec. 6.

23 Mfengwana judgment:paras. 2-3; SCA judgment:par. 3.

24 Mfengwana judgment:par. 22.

25 Mfengwana judgment:par. 22.

26 Mfengwana judgment:par. 22; SCA judgment:par. 8.

27 SCA judgment:par. 3.

28 Mfengwana judgment:par. 3; *Contingency Fees Act*:sec. 4.

29 Mfengwana judgment:par. 4.

30 Mfengwana judgment:paras. 30-32.

31 Mfengwana judgment:paras. 23, 25.

32 Mfengwana judgment:par. 26.

33 See the South African Judicial Code of Conduct 9 of 1994, sec. 12, GN R865 GG 35802 of 18 October 2012; JCC, Art. 16(1).

34 Mfengwana judgment:par. 32B; SCA judgment:par. 10.

The RAF transferred the settlement amount into Rubushe's trust account. Rubushe paid R700,000.00 to Mfengwana and retained R204,889.17.[35] The retention of the funds prompted Mfengwana to institute proceedings against Rubushe to recover the funds that Rubushe withheld.[36] Mfengwana obtained the order sought by default.[37]

3. THE DISCIPLINARY PROCEEDINGS AGAINST RUBUSHE BY THE LPC

The LPC, on its website, under 'Particulars of Disciplinary Hearings',[38] records various complaints lodged against Rubushe based on his alleged failure to treat the interests of his clients as paramount, honour his undertakings, account faithfully, accurately, and timeously, and keep the client's money separate from his own. It was further alleged that Rubushe created a conflict of interest with a client, failed to carry out work in a competent and timely manner, and did not reply to communications and requests that required an answer within a reasonable time.[39] These complaints were all investigated by the LPC Investigation Committee and referred for adjudication to the LPC Disciplinary Committee.[40]

Before the hearing, Rubushe forwarded three letters to the LPC. He argued that it was standard practice, upon settlement, for an attorney to charge 25% "as between attorney and client" in terms of a CFA. He maintained that he did not overreach Mfengwana, that Plasket J interfered with the CFA between him and Mfengwana and made defamatory remarks, thereby "prejudicing the Attorneys".[41] In the second letter, Rubushe said that he was in the process of filing an application for leave to appeal as the High Court had, among other things, "acted ultra vires in posing (sic) his nose of client contingency". He also argued that the actions of Placket J were "malicious, contradictory [and] contrary to the Act". [42] The appeal never materialised.[43] Rubushe, in the third letter, argued that case law allowed for a success fee of 25% in CFAs. He further stated that Mfengwana asked "who gave instructions to the Judge to challenge his agreement".[44] Rubushe later submitted that these letters reflected his subjective views, that he was upset and "wrestling with the true manner in which the Contingency Fees Act should be interpreted".[45] He also insisted that the "disastrous outcome" only happened as he genuinely

35 High Court judgment:par. 14.
36 High Court judgment:paras. 12-13.
37 SCA judgment:par. 17.
38 *Legal Practice Act* 28/2014, sec. 38(3), https://lpc.org.za/members-of-the-public/particulars-of-disciplinary-hearings/ (accessed on 1 June 2024).
39 LPCC, Rules 3.3, 3.4, 3.5, 3.8, 3.11, 3.15, 16.1, and 16.2.
40 High Court judgment:par. 3.
41 High Court judgment:par. 3.
42 High Court judgment:par. 4; SCA judgment:par. 11.
43 SCA judgment:par. 13.
44 High Court judgment:par. 5.
45 High Court judgment:at par. 20.

attempted to assist a "needy client".[46] The High Court later regarded the tone of these letters as aggravating.[47] The SCA labelled the letters as "grossly disrespectful and contemptuous [and] conduct unbefitting a member of the legal profession".[48]

The LPC requested copies of the CFA and the sec. 4 affidavits.[49] It further obtained a report from a cost consultant that illustrated in "graphic detail" the attempt to overreach Mfengwana.[50] Rubushe's fees included charges for work done after he withdrew as attorney of record and the expense of an advocate's opinion regarding the validity of the CFA.[51] The LPC found Rubushe guilty of all the charges preferred against him and recommended that he be removed from the Roll of legal practitioners. The Disciplinary Committee further advised the LPC to launch a High Court application for an order striking Rubushe and that he pay the LPC Disciplinary Committee's costs.[52]

4. THE JUDGMENT OF THE HIGH COURT

The LPC accordingly applied to the Eastern Cape Division, Makhanda, to give effect to its Disciplinary Committee's findings.[53] Rubushe, in his answering affidavit, conditionally accepted that the CFA was defective but again stated that his actions in drafting the CFA were "genuine and bona fide".[54] However, he still attempted to shift the blame for his conduct to his professional assistant, the legal secretaries, and the cost consultant.[55] At this time, Rubushe further argued that he did not overreach as Mfengwana "received everything he was entitled to".[56] The High Court, as a result, found that Rubushe sought to take unfair advantage of Mfengwana.[57] His conduct was described as "egregious", dishonest, deceitful, "rapacious", unapologetic,[58] and outrageously dishonourable for an officer of the Court.[59] The High Court also commented that Rubushe failed to comprehend just "how absolutely horrified" Plasket J was and that he refused to take responsibility for his actions.[60] The attack on Plasket J was deemed to be "despicable", "unwarranted", "derogatory",[61] and

46 High Court judgment:paras. 20-21.
47 High Court judgment:par. 27.
48 SCA judgment:par. 12.
49 High Court judgment:par. 6.
50 High Court judgment:paras. 8-9.
51 High Court judgment:par. 11.
52 LPA, sec. 40(3(iv)(aa)(bb) – The disciplinary committee may, where it finds a legal practitioner guilty of misconduct, advise the LPC to apply to the High Court for, among other things, an order striking the legal practitioner's name from the Roll or an order suspending the legal practitioner from practice.
53 High Court judgment:par. 2.
54 High Court judgment:par. 20.
55 High Court judgment:par. 18.
56 High Court judgment:par. 19.
57 High Court judgment:par. 11.
58 High Court judgment:par. 16.-17
59 SCA judgment:par. 15.
60 SCA judgment:par. 18.
61 High Court judgment:par. 24.

a part of his attempt to overreach Mfengwana.[62] The High Court accordingly found Rubushe guilty of "ethical deviance of a fundamental nature",[63] thereby bringing the profession into disrepute and rendering him unfit to practise.[64]

The High Court then shifted its focus to the appropriate sanction that should be imposed. Jolwana J reasoned that Rubushe only attempted to overreach Mfengwana. This perceived failure by Rubushe, which relates to only one of the instances of misconduct, was considered a mitigating factor justifying the imposition of a suspension as the appropriate sanction.[65] The High Court was of the opinion that the sanction would allow Rubushe to "re-educate [and] re-conscientise himself on the ethics of the attorneys' profession and court etiquette generally".[66] According to the High Court, the suspension would also protect the public from Rubushe's "deviant ethical predisposition while he undergoes proper introspection, training and the like".[67] Rubushe could, should he wish to be readmitted after the period of his suspension, bring a substantive application to the Court to show that he is fit for practice.[68] The LPA, not satisfied with the decision of the High Court, filed an appeal to the SCA.

5. THE JUDGMENT OF THE SUPREME COURT OF APPEAL

The SCA found that the High Court's reasoning was materially misdirected.[69] Binns-Ward AJA reasoned that the appropriate focus should be on Plasket J's conscientious exercise of his judicial oversight function, which prevented the outcome pursued by Rubushe. The SCA thus concluded that Rubushe's failure to overreach Mfengwana is not a mitigating factor.[70] It is unclear whether Rubushe merely retained the funds due to Mfengwana in his trust account or whether the funds had already been transferred to his business account.[71] The High Court merely stated that Rubushe "unlawfully" retained the funds and that his actions were dishonest.[72] Nonetheless, Rubushe's "dishonest character", not his degree of success, was relevant to whether he was fit and proper to remain on the Roll of legal practitioners.[73] The SCA further reasoned that the High Court's order of suspension was misconceived in fact and principle as it should have formulated appropriate conditions for the suspension.[74] The SCA concluded that the only appropriate order was to strike Rubushe's name from the Roll of legal practitioners.[75]

62 High Court judgment:paras. 27-28.
63 High Court judgment:par. 28.
64 High Court judgment:par. 31.
65 Together with a cost order on a punitive scale, High Court judgment:paras. 30, 35.
66 High Court judgment:par. 31.
67 High Court judgment:par. 32.
68 High Court judgment:par. 32.
69 SCA judgment:par. 20.
70 SCA judgment:par. 25.
71 High Court judgment:paras. 14, 16.
72 High Court:par. 16.
73 SCA judgment:par. 25.
74 SCA judgment:paras. 27, 28.
75 LPA, sec. 30(3); SCA judgment:paras. 24, 29.

6. CONTINGENCY FEE AGREEMENTS

The *Act* provides a mechanism whereby legal practitioners and their clients may legitimately and in good faith agree to a fee structure higher than the normal fee on a 'no win, no fees' basis.[76] The validity of a CFA depends on strict compliance by the legal practitioner with the prescriptive provisions set out in the *Act*[77] and the CFA Rules.[78] CFAs that do not strictly comply with these requirements are void and invalid.[79] Any contrived structures or attempts at subterfuge will also potentially expose the legal practitioner to disciplinary action by the LPC. A void CFA cannot be ratified after the fact.[80]

Legal practitioners are only entitled, in terms of a CFA, "to fees equal to or, … 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".[81] The success fees may not exceed the normal fees to which the legal practitioner is entitled "by more than 100 per cent". The fees in claims sounding in money "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".[82] The foundation of the fees charged under a CFA is the reasonable normal fee that the legal practitioner could have charged under the circumstances.[83] Therefore, the attorney-client fee agreement must incorporate a degree of consistency and certainty, which is measured and based on the Court tariffs applicable to legal fees.[84] It is thus imperative that legal practitioners observe their ethical and professional duties when determining their normal fees. Failing this, they may overreach when calculating their fees under a CFA.

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76 LPA, sec. 2(1)(a); *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 All SA 96 (GNP) 98; Khoza 2018:4-5; van Eck 2023:201; *Price Waterhouse Coopers Inc. & Others v National Potato Co-operative Ltd* [2004] 3 All SA 20 (SCA):par. 41; Mfengwana judgment:paras. 7, 12.

77 For a comprehensive assessment of instances of non-compliance with ethical and professional standards, as well as the formalities, capacity, rectification, and ratification of CFAs, see Van Eck 2023:201. See also the Mfengwana judgment:par. 9, and the *South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* 2013 2 All SA 96 (GNP) 98:par. 19; *De La Guerre v Ronald Bobroff & Partners Inc and Others* (22645/2011) [2013] ZAGPPHC 33 (13 February 2013):par. 14.

78 Rules made by the LPC in terms of sec. 6 of the *Contingency Fees Act* 66/1997 GN 525 GG 42739 of 4 October 2019 (CFA Rules).

79 See the use of peremptory language ('shall') in secs. 2 and 3 of the *Contingency Fees Act*.

80 *Bouwer obo v Road Accident Fund* 2021 5 SA 233 (GP) and *Vallaro obo v Road Accident Fund* 2021 4 SA 302 (GJ).

81 CFA, secs. 2(1)(a) and (b).

82 CFA, secs. 2(2); *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ):paras. 51-52.

83 *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ):par. 55; *Bitter NO obo De Pontes v Ronald Bobroff & Partners Inc* 2014 6 SA 384 (GJ).

84 *Sanelisiwe v The Member of the Executive Council for Health of the Gauteng Provincial Government* 2022 JDR 1506 (GP):par. 7.

Millard and Joubert argue that CFAs should be drafted in plain language.[85] The concept of simplified, understandable, and user-friendly language was given prominence in the *Consumer Protection Act* of 2008.[86] This legislation states, among other things, that the person preparing a document in compliance with any law must draft and make it available to the consumer in the form prescribed by the relevant legislation or in plain language where no form is prescribed.[87] The formulation in the *Consumer Protection Act* implies that any prescribed form for a document must also comply with the plain language requirements. The Minister of Justice has published a prescribed form for a CFA (Form 1).[88] Form 1 incorporates partial provisions to be completed by the legal practitioner to record the specifics of the agreement between the parties. The parties are thus required to incorporate their agreement on issues such as the basis for calculating fees, their approach to disbursements and what would constitute success or partial success.

The prescribed form for a CFA and the parts completed by the legal practitioner must be recorded in plain language. This requirement will only be satisfied where it can be shown that an "ordinary consumer … with average literacy skills and minimal experience as a consumer" of a CFA could reasonably be expected, without undue effort, to understand the content, significance, and import thereof.[89] The legal practitioner must also consider the client's level of interest, expertise, literacy skills, and the context in which the agreement will be used. These requirements are contained in the draft of the International Organisation for Standardisation's (ISO) principles and guidelines on Legal Writing and Drafting (SANS 24495-2), which the South African Bureau of Standards may adopt in the future.[90] SANS24495-2 is a voluntary standard currently under review by the ISO Technical Committee. It deals with the use of plain language when drafting legal documents. SANS24495-2 confirms that the language used must result in improved compliance and the ability of persons to, among other things, make sound financial decisions, pursue and defend their legal rights, and reduce costs based on their understanding of contracts.[91]

85 Millard & Joubert 2015:566. For a discussion on the ethical duties of legal practitioners when drafting contracts, see van Eck 2022.

86 *Consumer Protection Act* 68/2008:sec. 22. See, in general, Stoop & Churr 2013:514.

87 *Consumer Protection Act*, sec. 22(1)(a)(b).

88 Form 1 as prescribed by the Minister of Justice under sec. 3(1)(a) of the *Contingency Fees Act*, being the form published in Government Notice No R547 of 23 April 1999 (*Government Gazette* No 20009). For the prescribed form, see Subordinate Legislation in terms of the *Contingency Fees Act* 66/1997, https://justice.gov.za/legislation/regulations/r2006/CONTINGENCY%20FEES%20ACTfin.pdf (accessed on 5 June 2024).

89 *Consumer Protection Act*:sec 22(2).

90 The International Organisation for Standardisation (ISO) 'Plain Language Governing Principles and Guidelines' for developing plain language documents (SANS 24495-1) as adopted by the South African Bureau of Standards (SABS) as a voluntary South African National Standard (SANS).

91 ISO/CD 24495-2, Plain language, Part 2: Legal communication, https://www.iso.org/standard/85774.html#lifecycle (accessed on 1 June 2024).

Form 1 is generally based on the provisions and language of the *Act* concerning the form and content of CFAs. It includes complicated terminology such as 'attorney and own client', 'claim sounding in money', 'premature termination', and 'agreements ancillary to this agreement'.[92] Form 1 still refers to the 'Law Society' and the 'Bar Council'. No reference is made to the Legal Practice Council. As a result, it would be prudent for the Minister to redraft and update Form 1 in compliance with new developments and the plain language requirements.

The plain language requirements may also be relevant as a necessary extension of the obligation on legal practitioners to make their clients aware, before entering into the CFA,[93] of alternative ways to finance the litigation,[94] the risk of adverse cost orders should the litigation be unsuccessful,[95] and the circumstances that would trigger the client's liability to pay the success fee.[96] The legal practitioner must further confirm that the client understood the meaning and purport of the CFA before signing the agreement.[97] As a consequence, Form 1 requires clients to warrant that they understand the meaning and purpose of the CFA.[98] In compliance with these obligations, legal practitioners must be able to produce evidence that reasonable and appropriate action was taken to educate and inform the client. It is submitted that this evidence will require proof that the information was provided and explained to the client in plain language.

7. DISCUSSION

A CFA is a private contractual engagement between the legal practitioner and the client. However, there are broader considerations than simply the value of the fees that will be charged. Legal services are integral to the proper functioning of the legal system and have a direct bearing on the administration of justice. CFAs must thus be assessed against the public interest rather than the private interest of the parties to the CFA.[99] Nonetheless, Rubushe argued that Plasket J unjustifiably interfered with the CFA.[100] This argument is misdirected as provision is made for judicial oversight over CFAs in the *Act*.[101] It is important to note that Plasket J did not interfere with the settlement agreement but merely acted in compliance with the requirements of the *Act*

92 Subordinate legislation in terms of the *Contingency Fees Act* 66/1997:10; https://justice.gov.za/legislation/regulations/r2006/CONTINGENCY%20FEES%20ACTfin.pdf (accessed on 5 June 2024).
93 *Contingency Fees Act*:sec. 3(b).
94 *Contingency Fees Act*:sec. 2.
95 *Contingency Fees Act*:sec. 3(b)(ii).
96 *Contingency Fees Act*:sec. 3(3)(iii).
97 *Contingency Fees Act*:sec. 3(3)(iv).
98 Subordinate legislation in terms of the *Contingency Fees Act* 66/1997):10; https://justice.gov.za/legislation/regulations/r2006/CONTINGENCY%20FEES%20ACTfin.pdf (accessed on 5 June 2024).
99 For a discussion of the duties of a person drafting a contract, see Van Eck 2022.
100 High Court judgment:par. 3.
101 *Contingency Fees Act*:sec. 4(1).

when the settlement was made an order of Court. The High Court was thus entitled to raise concerns under the circumstances.[102]

The application to strike Rubushe from the Roll of legal practitioners is disciplinary in nature. The LPC's interest in disciplinary matters is focused on protecting the public's interests.[103] The Court should, therefore, focus on the likelihood of Rubushe repeating the misconduct.[104] In fact, the SCA found that a Court may reasonably accept that a legal practitioner guilty of dishonesty would likely act similarly in the future.[105] The High Court's reasoning is thus peculiar when Rubushe's actions to overreach Mfengwana in isolation are deemed to constitute a mitigating factor. Nonetheless, the High Court, at the same time, also considered the subjective dishonest intent of Rubushe, thus focusing on what the SCA referred to as Rubushe's "dishonest character".[106]

It is also necessary to consider whether the suspension imposed by the High Court constituted an appropriate sanction. A suspension from practice in isolation will almost certainly not remove the cause of the inability or transform a legal practitioner found unfit to practice due to dishonesty.[107] A suspension also implies that affected legal practitioners could formulate a rehabilitation strategy to produce the required evidence of profound positive changes in their behavioural patterns. Rubushe introduced no information on any available opportunities that could support the reform of his moral character. The High Court only referred to introspection and training that Rubushe could employ to re-educate and re-conscientise himself.

A search of the SCA precedents since the promulgation of the LPA reveals that only three decisions, including the Rubushe matter, dealt with misconduct by a legal practitioner relating to a CFA.[108] Nonetheless, the SCA reliably considered that misconduct by a legal practitioner represents an outward symptom of their dishonest character and lack of integrity. The SCA thus confirms that a Court should act decisively to protect the public and the legal profession's reputation. As a result, the SCA generally struck legal practitioners

102 See *Mafisa v Road Accident Fund and Another* (CCT 156/22) [2024] ZACC 4 (25 April 2024).

103 *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401:par. 4.

104 *Jasat v Natal Law Society* 2000 (3) 44 (SCA):par. 51H-I.

105 See the SCA judgment:par. 26, where the SCA refer to *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA):par. 28, where it was stated that "The enquiry before a court that is called upon to exercise that power [ie to strike a practitioner's name from the Roll or suspend him or her from practising] is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future".

106 SCA judgment:par. 25.

107 See *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 852E-G, where it was stated that "it is implicit … that any order of suspension must be conditional upon the cause of unfitness being removed".

108 *Law Society of the Northern Provinces v Mabaso* (20252/14) [2015] ZASCA 109 (21 August 2015); *Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018).

from the Roll where they acted dishonestly.[109] The precedents produced under the now-repealed *Attorneys Act*[110] that considered applications to strike or suspend attorneys due to dishonesty are also relevant. These judgments confirm that a dishonest legal practitioner should be struck from the Roll, unless exceptional circumstances dictate otherwise.[111] The reliance by the High Court on Rubushe's perceived failure to complete his dishonest act in one instance does not provide a compelling reason to distinguish the matter or deviate from the precedents. The High Court, as a result, failed to apply the appropriate law and the existing precedents in its judgment.[112] This outcome is unfortunate, as the Courts should consider themselves constrained to deal with the misconduct of legal practitioners in a predictable manner.[113]

8. CONCLUSION

CFAs contribute to achieving social justice for individuals who cannot afford legal services. On the other hand, they also offer an opportunity for exploitation. Legal practitioners' ethical and professional duties are thus central to the validity and success of CFAs. Unfortunately, Rubushe, as the agent of Mfengwana, did not act in a manner that was reasonably calculated to advance Mfengwana's lawful objectives.[114] He abused the disparity in bargaining power between him and Mfengwana and drafted the CFA to achieve an outcome that undermined the intentions of the *Act*.[115] Rubushe effectively created a personal financial interest in the successful outcome of the litigation.[116] The

109 *Law Society of the Northern Provinces v Mabaso*:par. 23, quoting from *Summerley v Law Society, Northern Provinces* [2006] ZASCA 59; 2006 (5) SA 613 (SCA):par. 21 and referring to Vassen v Law Society of the Cape of Good Hope [1998] ZASCA 47; 1998 (4) SA 532 (SCA):par. 538G-H.

110 *Attorneys Act* 53/1979:sect. 22(d); see *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Malan and Another vs Law Society, Northern Provinces* 2009 (1) SA 216 (SCA); *Law Society of the Cape of Good Hope v C* 1986 (I) SA 616 (A); *Law Society of the Cape of Good Hope v Berrange* 2005 (5) SA 160 (C); see also *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenthout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA).

111 *Malan and Another vs Law Society, Northern Provinces* 2009 (1) SA 216 (SCA):221D-H; *Summerley v Law Society of the Northern Provinces* 2006 (5) SA 613 (SCA):par. 21; SCA judgment:par. 22; *General Council of the Bar of South Africa v Geach & Others* 2013 (2) SA 52 (SCA):par. 87.

112 *South African Norms and Standards for the Performance of Judicial Functions* GN R147 GG 37390 (28 February 2014): par. 5.2.1(1); *South African Judicial Code of Conduct*, art. 10(1)(c), issued in 2012, pursuant to the *Judicial Service Commission Act 9/1994*, sec. 12, GN R865 GG 35802 (18 October 2012).

113 Van Coller 2023:12.

114 See LPCC, Rule 3.3, which requires that legal practitioners treat "the interests of their clients as paramount subject to their duty to the court; the interests of justice; observance of the law; and the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession".

115 See the comments of Ngcobo J in *Barkhuizen v Napier* (CCT72/05) 2007 (5) SA 323 (CC):par. 65 regarding unequal bargaining power when entering into contracts.

116 Millard & Joubert 2015:558.

situation violates the Code of Conduct for Legal Practitioners, which stipulates that legal practitioners must not commit any "act prohibited by law or by the code of conduct" that may cause a conflict of interest with their clients.[117]

Rubushe's moral convictions and ethical obligations, or lack thereof, thus became an impediment to furthering Mfengwana's best interests. He apparently regarded himself as an altruistic professional who merely attempted to assist a "needy client".[118] This misdirected understanding of the context and capacity in which he acted allowed him to engage in an escalating series of ethically indefensible acts to pursue his selfish financial interests.[119] Rubushe ultimately failed to represent Mfengwana loyally, thus betraying Mfengwana and bringing the legal profession into disrepute.

Plasket J described Rubushe's conduct as reprehensible.[120] The LPC clearly articulated its belief that Rubushe should be struck from the Roll of legal practitioners.[121] The High Court also considered Rubushe's conduct "shockingly unethical" and concluded that Rubushe's actions did not comply with the cluster of obligations, permissions, and aspirations that apply to him by virtue of his professional role.[122] Thus, the High Court seemed to agree with the LPC regarding the sanction to be imposed.[123] The decision to suspend Rubushe only was thus unexpected and, as determined by the SCA, wholly inappropriate. Based on the evidence, the High Court should have adopted a conservative approach to guard against the erosion of professional values and to protect the public.[124] Fortunately, the SCA has again provided guidance concerning the appropriate sanction for legal practitioners found guilty of dishonesty.

117 LPCC, Rule 3.5.
118 High Court judgment:par. 20.
119 Tranter *et al*. 2010:33-35.
120 Mfengwana judgment:par. 27.
121 *Legal Practice Council v Rubushe* (1004/2022) [2023] ZASCA 167 (1 December 2023).
122 High Court judgment:par. 12.
123 SCA judgment:par. 15.
124 *Incorporated Law Society Transvaal v Goldberg* 1964 (4) SA 301 (T):par. 304 A-F.

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