A SOUTH AFRICAN PERSPECTIVE ON THE JACKSON REPORT

Good afternoon. It is a privilege to have the opportunity to share a few ideas in this forum.

My South African and Scottish colleagues will appreciate me starting with a quotation (in translation) from the Roman Civil Law, and our colleagues from other jurisdictions will appreciate at least the content of the quotation:

> 'The calling of advocate is one which is praiseworthy and necessary to human life, and it should, by all means, be remunerated with princely generosity.'[1]

That reminds me of the question that I was asked just a few days ago here in Sydney: what is the difference between God and a barrister? – God does not think that he is a barrister. I don't get that one, do you?

It seems that our colleagues at the side-bar have taken the rule of the Civil Law as applying also to them, because whatever else might be said about civil litigation, it is certainly very expensive.

A concern about the costs of litigation should not arise from any coyness or embarrassment about the earnings of lawyers. It should be motivated by a concern for and interest in the consequences of high litigation costs for the access that ordinary people with legal rights have to the measures that have been put in place for them to have those rights vindicated. Much ink is spilt on the deep philosophical and political, and even economic, justifications for and

[1] *C* 2 8 4.

ramifications of legal rights, but all of that is wasted if the people in whose favour those rights are enacted have no means of enforcing them.

Indeed, understood in this way, the right of access to justice is an incidence of the rule of law. In the words of Mokgoro J in the *Chief Lesapo* case:

> 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance.'[2]

There is a further consideration. It is that the rule of law requires that all are equal before the law and that the law applies equally to all. If only the economically privileged can afford to vindicate their rights, and the less privileged have no way of vindicating their rights against the powerful, then there is one system of law for the powerful and no system of law for the rest. That is anathema to the rule of law.

Lord Justice Jackson's *Review of Civil Litigation Costs* covers in its breathtaking 584 pages a range of important issues in relation to the costs of civil litigation. But it is the section on funding civil litigation which is the impetus for this conference session, and it is in particular issues of defendant funded litigation that I wish to comment on.

In 2000 in England and Wales a rule was introduced whereby the success fee or uplift which a solicitor for a successful claimant earned under a conditional

[2] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 22.

fee agreement (CFA) could be recovered from the defendant as part of the costs order in the claimant's favour. The same is true for after-the-event insurance premiums – after-the-event insurance being primarily to fund an adverse costs order against a party. Lord Justice Jackson has recommended that success fees and after the event insurance premiums should no longer be recoverable as part of the costs awarded to the successful claimant.

I have to say that from a South Africa perspective the recoverability of the success fee from the unsuccessful party seems bizarre. The simple general rule is that the costs that are recoverable from the other side are the reasonable costs incurred in prosecuting or defending the suit, as the case may be. Those are described, as we all know, as the party and party costs. It is well recognised that a litigant can contract with his or her lawyer to pay more or to do more. The costs so incurred are the attorney and client costs. The unsuccessful party has to pay the successful party's attorney and client costs only in exceptional cases where as a punishment for the way in which the unsuccessful party has conducted itself the court so orders. For the unsuccessful defendant to have to pay the success fee that the claimant negotiated with her solicitor as a matter of course is to conflict with the general rule and is to condemn the defendant to punishment regardless of the reasonableness of the defence.

The effect of allowing the success fee to be recoverable from the opposing party includes, to pick only one consequence, that defendants are under pressure to settle early to avoid the risk of a crushing costs award. Whilst the encouragement of an early settlement might be regarded as positive, that

cannot be so where the merits are evenly balanced. If the pressure to settle affects one party far more acutely than the other justice is not done because many meritorious defences will not be ventilated. The defendant with a meritorious defence is in effect blackmailed into abandoning that defence to avoid the risk of a crushing costs order.

One would expect, therefore, that Lord Justice Jackson's recommendation will be welcomed in England and Wales. I certainly don't see any prospect that the recoverability rule will be introduced in South Africa.

That leads me to comment briefly on contingency fee agreements in South Africa. What in England and Wales are referred to as conditional fee agreements we would refer to as contingency fee agreements. I understand from the Jackson report that a contingency fee agreement in England and Wales is an agreement between the litigating party and his lawyer that the lawyer will earn a proportion of any award, as opposed to a conditional fee agreement where the lawyer earns a success fee.

Prior to the Contingency Fees Act of 1997[3] contingency fee agreements were void and unenforceable as being contrary to public policy as *pacta de quota litis* or champertous. However, (to cite the Privy Council in 1876) to *bona fide* lend pecuniary assistance to a poor suitor in her action, and thereby help her to obtain her just rights, and in return for which to earn a reasonable

[3] Act 66 of 1997.

recompense or interest in the suit, was not unlawful or void.[4] But, it was warned:

> 'that agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy – effect ought not to be given to them.'

The common law was thus concerned with two issues: (1) to give assistance to impecunious claimants with meritorious claims, and (2) to ensure that contingency fee agreements were kept within reasonably parameters.

There is obviously a fine line to be drawn here, and in South Africa the Contingency Fees Act was intended to simplify things. It makes contingency fee agreements lawful but subject to a number of conditions. Amongst these is a cap on success fees at double the normal fee but subject to a maximum of 25% of the total amount recovered. There are serious difficulties with regard to the interpretation of the relevant provisions,[5] and the machinery of compliance with the Act is cumbersome. The result is that as far as I am aware the Act is not much utilised. It is badly in need of an overhaul.

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4 *Hugo and Others v Transvaal Loan, F and M Co* (1894) 1 OR 336 at 340 citing *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) 2 App Cas 186, and *Price Waterhouse Coopers Inc v National Potato Co-Op Ltd* 2004 (6) SA 66 (SCA) para 27.

5 Particularly with regard to: (1) whether the cap of 15% of the amount recovered is a global cap applicable to all the claimant's lawyers who are party to the agreement, or whether it applies to each individually, (2) whether the statutory cap of double the normal fee or 25% of the award, whichever is the lesser, applies to the total fees or only in respect of that portion which exceeds what the normal fees would have been, and (3) whether costs must be included in the total amount awarded or recovered in determining the statutory caps.

The dual concern for assisting impecunious claimants with meritorious claims and guarding against the excesses that can result remains. It has found its expression in recent cases in our jurisdiction and elsewhere in relation to so-called cottage industry claims. Insofar as South Africa is concerned I refer to two judgments by Mr Justice Wallis who spoke on this platform earlier today. *Cele v South African Social Security Agency and 22 Related Cases*[6] tells the sorry story of bureaucratic failure with regard to the payment of social security benefits. As a consequence attorneys started bringing cases to court for orders that the Social Security Agency pay the claimant his or her due, and in each case in which an order was made there was also a costs order. The orders were almost always by consent because the Agency had no defence – it was simply unable to process the claims and make the payments timeously. Even at the tariff rates, what was recoverable from the defendant in each case grossly over-compensated the lawyers for the little work that they had done printing-off standard form affidavits and taking consent orders in court. Multiplied by the hundreds and thousands of claims that they were bringing, the lawyers were making a proverbial killing and the State's resources which should have been going into fixing up the payment system were instead being spent on the claimant's lawyers.

The court identified three basic rules to guide its intervention in the conduct of litigation, and in particular litigation of this type. The first is that litigation should be a last resort after other appropriate measures have been taken to resolve the matter. The second is that costs should not be needlessly incurred when they can be avoided. The third is that when costs do have to be incurred

[6] 2009 (5) SA 105 (D).

they should be maintained within reasonable bounds.[7] The court then developed a practice directive to govern such matters in the future.

Faced with the obstacles created by the practice directive, the industry of the claimants' lawyers then moved on to a new seam of riches. *Sibiya v Director-General: Home Affairs and Others, and 55 Related Cases*[8] reveals similar excesses with regard to claims against the Department of Home Affairs for the issue of identity documents. Bear in mind here that under Apartheid everyone was formally classified by race. This meant that after the advent of democracy 16 years ago, a new race-neutral identification document had to be introduced and it has been a very slow process to issue it to all citizens. Once again a bureaucratic failure, which certainly justified, and even demanded, legal intervention on behalf of impoverished claimants led to the charging of excessive fees against the State – not excessive by the tariff, because the fees were based on the tariff, but excessive in relation to the production-line work that was done on the claimants' behalves. So once again the court had to intervene to try and ensure both justice to the claimants and the protection of the State from unjustified costs awards.

One can imagine how much worse the situations would have been in both the *Cele* and *Sibiya* cases if the rules had allowed the recoverability of a success fee from the unsuccessful defendant. That is illustrated by the case of *Birmingham City Council v Forde*[9] in the Queen's Bench Division in England which has been brought to my attention. It concerns council housing repair litigation. The firm

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7 Para 27.

8 2009 (5) SA 145 (KZP).

9 [2009] EWHC 12 (QB).

of solicitors involved specialised in that work. They employed a number of shrewd tactics, including delivering 300 demand letters a few days before the Easter long weekend to ensure that the council could not do the demanded repairs within the 21 day allowable period and thereby accrued compensation claims for their clients. One of those claims was settled at £500 but the recoverable costs (including a CFA success fee) came to £15,000. Just the appeal from the resultant costs litigation produced a judgment of more than 200 paragraphs. The appeal failed, by the way, so the costs were left undisturbed.

The case also demonstrates that cases of the *Cele* and *Sibiya* type are not peculiarly South African. I suppose that one might take some comfort from that.

As an aside, I mention that the *Sibiya* case documents the inadequacy of the work done by the lawyers, including false statements in the affidavits. In this context one paragraph of the judgment bears repetition for its calculated understatement:

> 'Lastly, there is the case of [Attorney] Soodyall who deliberately prepared and had sworn affidavits that contain statements of fact which he knew were not at the time truthful. I asked Mr Shaw QC [who appeared for Mr Soodyall] whether Mr Soodyall realised that this was gravely improper and his answer was: 'He does now, M'Lord.' Salutary though the admonitions of a counsel of Mr Shaw's standing may be, I nonetheless think that this question should also be referred to the KwaZulu-Natal Law Society.'[10]

[10] Para 62.

So far I have focussed on questions related to the funding of litigation. But there is another obstacle to meritorious claims being pursued. That is the risk that any particular claim will not succeed and it will carry with it an adverse costs order. This is because of the general rule that the costs follow the result. Obviously a relaxation of that rule would have a positive impact on access to justice.

That is exactly what has been recognised by the South African Constitutional Court in constitutional litigation. In the recent *Biowatch* case[11] it reviewed the earlier jurisprudence on costs awards in such cases and stated a number of principles. I draw attention to them here because they are indigenous and other jurisdictions may well find them attractive in trying to deal with the problem of access to justice. They are as follows:

- An unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.[12]
- Ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.[13]
- In cases between private parties but involving the State for having failed to fulfil its responsibilities for regulating competing claims between private parties – for example in licensing and tender cases – costs awards should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims.[14]

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11 *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).
12 Para 21.
13 Para 22.
14 Para 28.

The rationale for the general rule that the government pays if it loses but it does not get paid if it wins is threefold. First, it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure.[15]

I return to the question of CFAs in closing. There is perhaps one thing to be said for the recoverability of the success fee. That is to discredit the old definition of a contingent fee as being a fee where if you lose your lawyer gets nothing, and if you win you get nothing.

Thank you for your attention.

[15] Para 23.