



**Access to Justice in Namibia:  
Proposals for Improving Public Access to Courts**

# **COSTS AND CONTINGENCY FEES**

**Paper No. 3**



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LEGAL ASSISTANCE CENTRE  
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Access to justice is both an independent human right and a crucial means to enforce other substantive rights. Namibia has a progressive, modern constitution, guaranteeing an impressive set of rights for the individual. Yet without a realistic means to enforce those rights, substantive guarantees can far too easily become merely a set of empty promises.

The Constitution of Namibia guarantees access to justice. But some legal procedures limit the ability of individuals, particularly marginalised populations, to access the courts. In this series of papers, the Legal Assistance Centre examines several discrete access to justice issues, including examples from other jurisdictions and arguments put forward by government, civil society and academia. On the basis of this information, we propose reforms to improve access to justice in Namibia.

This series of papers on access to justice covers the following four topics:

- (1) access to justice as a human right
- (2) *locus standi* (standing to bring a legal action)
- (3) costs and contingency fees
- (4) *amicus curiae* participation.

The paper on access to justice as human right includes a brief summary of our recommendations on the other three topics.

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# COSTS AND CONTINGENCY FEES

## Summary

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### 1. Costs

Under current costs rules, costs generally ‘follow the event’, meaning that the losing party must pay at least a portion of the winning party’s costs. This approach can discourage access to justice in public interest cases and for low-income litigants. A low-income litigant will probably not be able to afford legal representation and may be discouraged from litigating, even with a valid claim, due to the risk of paying the opposing party’s costs. A system that essentially punishes parties who bring marginal cases can over-deter novel litigation, including most public interest litigation. **In practice, Namibian courts sometimes decline to require public interest plaintiffs to pay the defendants’ costs, but this is discretionary from case to case and does not take place at the outset of the litigation.**

**The current system of costs also embodies some inconsistencies:**

- In the Supreme Court, High Court and Magistrates’ Courts, the unsuccessful litigant is normally liable for at least some of the costs of the successful litigant. But in the Labour Court, where most cases involve workers on one side and financially more advantaged employers on the other, the normal rule is that each party bears its own costs. Both approaches could in some instances result in unfairness or discourage some persons from utilising the courts.
- In terms of the court rules, both *in forma pauperis* litigants in the High Court and *pro Deo* litigants in the Magistrates’ Courts can receive free legal representation but, if awarded costs, are entitled to recover their legal practitioner’s fees and other costs.<sup>1</sup> But if any other litigant is represented *pro bono* by a legal practitioner or an organisation such as the Legal Assistance Centre, case law holds that no fees or disbursements may be recovered even if this litigant is successful.<sup>2</sup>

The normal system of costs assumes that the potential benefits of litigation as well as the costs will accrue to the party bringing the litigation. In private litigation, this assumption usually holds true, but public interest cases by their very definition seek to benefit the public at large. However, even if the general social benefit of the litigation might outweigh its costs and risks, the potential private benefit resulting to any single, individual plaintiff may not be worth the risk. Relieving public interest litigants from the burden of costs awards recognises that elaboration on

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<sup>1</sup> Rules of the High Court, Rule 41(7); Magistrates’ Court Rules, Rule 53(5)-(6).

<sup>2</sup> *Hameva and Another v Minister of Home Affairs, Namibia* 1996 NR 380 (SC). The issue was raised again in the 2005 case of *Uirab v Minister of Basic Education* Case No I 1257/2005 (High Court), without being definitively resolved.

matters of public law, and particularly on constitutional issues, benefits all of society and that it is unfair to require a single litigant to bear the costs alone.

Several jurisdictions – including Canada, the UK and Australia – have adopted approaches to costs in public interest cases which attempt to ameliorate this problem. For example, in Canada, courts have awarded costs to *unsuccessful* public interest litigants acting against government,<sup>3</sup> or awarded full litigation costs to public interest litigants from government *in advance* of the case outcome.<sup>4</sup> In the UK, the courts can issue protective cost orders at the outset of a public interest case, capping the costs which will be payable by an unsuccessful party.<sup>5</sup> Case law in South Africa has developed special guidelines for costs awards in constitutional cases,<sup>6</sup> and courts have awarded costs including legal fees in cases where the successful litigant was represented *pro bono* (and so would otherwise not have been liable to pay these fees).<sup>7</sup>

## RECOMMENDATIONS

- (1) **Protective cost orders**: We suggest that Namibia introduce and regulate protective cost orders which provide at the outset of a public interest case that the plaintiff will not be required to pay costs even if that plaintiff ultimately loses. The effect of protective cost orders would be restricted to cases raising novel or controversial issues, where the public would benefit from having the issues resolved.
- (2) **Costs awards for *pro bono* representation**: We propose that a party who is represented *pro bono* should be able to recover costs in the same way as a paying client.

## 2. Contingency fees

Litigation can be very expensive. Some jurisdictions – such as the UK, South Africa and Australia – utilise “no win, no fee” arrangements. These can include **conditional fee agreements**, where the legal practitioner’s payment in the event of success is based on normal hourly rates often topped up with an extra “success fee”, or **contingency fee agreements**, where the legal practitioner in a successful case collects a percentage of the award rather than an hourly rate.

<sup>3</sup> See, for example, *Singh v Canada (AG)* [1999] 4 FC 583.

<sup>4</sup> The leading case is *British Columbia (Ministry of Forests) v Okanagan Indian* [2003] SCR 371; see also *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue)* [2007] 1 SCR 38.

<sup>5</sup> *R v Lord Chancellor Ex p. Child Poverty Action Group and R v DPP Ex p. Bull (for and on behalf of Amnesty International UK)* [1999] 1 WLR 347; *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600; *R (on the application of Compton) v Wiltshire Primary Care Trust (Compton)* [2008] EWCA Civ 749; *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209.

<sup>6</sup> The leading case is *Trustees, Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).

<sup>7</sup> See, for example, *Zeman v Quickelberge and another* [2010] ZALC 122 and *Thusi v Minister of Home Affairs and Others* 2011 (2) SA 561 (KZP).

The UK allows conditional fee agreements in terms of the Courts and Legal Services Act 1990 (sections 58-58B), with the “uplift” or “success” fee capped at double the usual hourly rate. This is combined with a cap pegged to a set percentage of the damages award in certain categories of cases. The use of conditional fee agreements combined with “after-the event” insurance for legal fees has essentially replaced government-funded legal aid for personal injury claims in the UK. However, the use of such fee arrangements has also been criticised for leading to high-pressure marketing tactics; benefiting only high-value cases with strong chances of success; eating up the lion’s share of damages when coupled with expensive legal insurance premiums; and contributing to a “compensation culture” marked by an increase in frivolous claims and an excessively risk-adverse climate.

South Africa similarly allows conditional fees (confusingly termed “contingency fees”) with an uplift capped at double the normal hourly rate or 25% of the total damages award, whichever is lower. The Contingency Fees Act 66 of 1997 includes detailed requirements on the contents and procedures relating to such agreements. They are primarily used in Road Accident Fund claims and other personal injury cases, or in cases involving a large number of similar forms of government maladministration. It is alleged that repeated litigation in similar matters can lead to sloppy, assembly-line claims and exaggerated fees in relation to the work done. It is also alleged that this approach to fees had led to a mushrooming of medical malpractice claims, and higher settlements in such cases.

In Namibia, such agreements might improve access to justice for a certain segment of litigants who cannot afford attorneys and cannot run the risk of paying both their own legal practitioner’s fees and the opposing party’s costs if they lose. On the other hand, such agreements will do little for litigants in cases seeking declaratory orders or challenging the constitutionality of litigation, or in cases where the anticipated awards are too small to make such fees worthwhile. Such arrangements also introduce troubling ethical concerns regarding conflicts of interest between lawyers and their clients.

**RECOMMENDATION**

**We do not recommend the adoption of conditional or contingency fee agreements.** However, should a move be made in this direction, we would suggest that only conditional fee agreements be allowed, and that the use of such agreements be regulated by a law which provides safeguards to protect clients and strict caps on “success fees”.





# PART A: COSTS

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## 1. Current Namibian rules on costs

*This section will provide an overview of the basic principles which currently govern costs in the Namibian courts, with a focus on issues which are particularly relevant to improving access to justice. While the rules on costs will undoubtedly be familiar to legal practitioners, this overview may be instructive to policy-makers.*

**Litigation can be very expensive.** For example, in South Africa, the Constitutional Court recently remarked on the debate around rising legal fees:

No doubt skilled professional work deserves reasonable remuneration, and no doubt many clients are willing to pay market rates to secure the best services. But in our country the legal profession owes a duty of diffidence in charging fees that [go] beyond what the market can bear. Many counsel who appear before us are accomplished and hard-working. Many take cases *pro bono*, and some in addition make allowance for indigent clients in setting their fees. We recognise this and value it. But those beneficent practices should find a place even where clients can pay ...<sup>8</sup>

**Costs rules are designed to reimburse successful parties for their expenses in the court case, at least in part.**

**As a general rule, costs in Namibian courts follow the event, meaning that the losing party must pay at least some portion of the legal fees and disbursements of the winning party.** However, an award of costs is an exercise of judicial discretion which is guided by the circumstances of each case.<sup>9</sup> If neither party is substantially successful, then the court may order that the parties each bear their own costs.<sup>10</sup>

**Namibian courts normally award costs “as between party and party”.** Party and party costs are “amounts which the successful party has paid, or becomes liable to pay, in connection with the due presentment of his case” and include only “costs which are *prima facie* directly and

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<sup>8</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2012] ZACC 17 at para 11. The Court cited the following recent literature on legal fees in a footnote to this paragraph: “Compare Rogers “High fees and questionable practices” (April 2012) vol 25 (1) *Advocate* at 40-2. See, too, Gravett “‘I am not overcompensated enough’: the moral compass of the American lawyer” (April 2012) vol 25 (1) *Advocate* at 43-8; Rautenbach “Compromising counsel’s fees” (April 2012) vol 25 (1) *Advocate* at 48-9; Mlambo “The reform of the costs regime in South Africa: Part 1” (April 2012) vol 25 (1) *Advocate* at 50-2; and Mlambo “The reform of the costs regime in South Africa: Part 2” (August 2012) vol 25 (2) *Advocate* at 22-33. See also Wallis, “Some thoughts on the commercial side of practice” (April 2012) vol 25 (1) *Advocate* at 33-6.”

<sup>9</sup> AC Cilliers, *Law of Costs* (3d ed) at 2-4; Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 2009 at 955-956. See *Ferreira v Levin, Vryenhoek v Powell* 1996 (2) SA 621 (CC) at 625, which refers to two basic principles in respect of costs: “the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions...” [footnote omitted].

<sup>10</sup> See Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 2009 at 957-ff. For a recent application of this principle, see *Matheus v Namwater Corporation Ltd and Another* [2012] NAHC 89.

necessarily incurred in connection with the due presentment of the case”.<sup>11</sup> These costs are assessed by the taxing master based on schedules of fees annexed to the rules of the various courts.<sup>12</sup>

A legal practitioner is entitled to remuneration for his or her services, regardless of whether these are included in the schedule of fees and regardless of whether the action succeeds. If the case succeeds, a portion of that remuneration – the party and party costs – will normally be paid by the unsuccessful litigant. **The balance will be attorney and client costs payable by the client.**<sup>13</sup>

**“Party and party costs** are those costs that have been incurred by a party to legal proceedings and that the other party is ordered to pay. They do not include all the costs that a party to a suit may have incurred, but only those costs, charges and expenses that appear to the taxing master to have been necessary or proper for the attainment of justice or for defending the rights of any party.”<sup>14</sup>

**“Taxing”** in this context refers to assessing the appropriateness and validity of the costs claimed with reference to tariffs set by the rules of court. It does not have anything to do with “tax” in the sense of a levy paid to the state.

**“Attorney and client costs** are the costs an attorney is entitled to recover from a client for the disbursements made on behalf of the client, and for professional services rendered. These costs are payable by the client whatever the outcome of the matter for which the attorney’s services were engaged and that have been incurred by a party to legal proceedings and are not dependent on any order of costs by the court. In the wide sense, it includes all the costs that the attorney is entitled to recover against the client on taxation of the bill of costs, but in the narrow and more technical sense, the term is applied to those costs, charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party.”<sup>15</sup> This is now more properly referred to as **“counsel and client costs”**.<sup>16</sup>

The purpose of awarding costs is “to create a legal mechanism whereby a successful litigant may be fairly reimbursed for the reasonable legal expenses he or she was compelled to incur by either initiating or defending legal proceedings as a result of another litigant’s unjust actions or omissions in the dispute”.<sup>17</sup> Costs awards are intended neither as “punishment to the litigant

<sup>11</sup> *Mouton and Another v Martine* 1968 (4) SA 738 (T) at 744B-D.

<sup>12</sup> Rules of the High Court, Rule 70(1); Rules of the Supreme Court of Namibia, Rule 11(4). Prior to the fusing of the legal profession, when there was a formal distinction between attorneys and advocates, payments to advocates were treated as “disbursements” in respect of the taxing of costs. However, after the advent of the Legal Practitioners Act 15 of 1995, the Supreme Court held that all legal practitioners must be treated alike for the purposes of taxation of costs under the Rules of the Supreme Court, with the fees of instructed counsel, like those of instructing counsel, being treated as fees in bills of costs and taxed in accordance with the prescribed tariffs, rather than being included under the category of disbursements – but with the taxing master retaining discretion to allow appropriate fees and charges not specifically addressed in the tariffs. *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC). The same holding was made with respect to the Rules of the High Court in *Kaese v Schacht and another* [2009] NAHC 95 at para 23. See also *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd and Others* [2011] NAHC 307, which agreed that the fees of instructed counsel should be taxed as fees and not disbursements, but found that Rule 69(4) of the Rules of the High Court allows for some differentiation between the approach to fees of instructing and instructed counsel.

<sup>13</sup> See AC Cilliers, *Law of Costs* (3d ed) at 4-4.

<sup>14</sup> Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 2009 at 952-953 [emphasis added].

<sup>15</sup> *Ibid* [emphasis added].

<sup>16</sup> Attorneys and advocates are both legal practitioners in terms of the Legal Practitioners Act 15 of 1995, and Rule 1 of the Rules of the High Court, as amended by GN 81/1996, defines counsel as “a legal practitioner admitted, enrolled and entitled to practice as such in the court”.

<sup>17</sup> *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) at para 27.

whose cause or defence has been defeated” nor as “an added bonus to the spoils of the victor”.<sup>18</sup> The rationale is to “indemnify” the prevailing party “for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation”.<sup>19</sup> This principle has been criticised; for example, it was observed in a South African case that “[i]f there is a genuine dispute between two parties which is a proper one for arbitrament by a court of law, it is difficult to see why the loser should bear all the costs. It is rare that the fault is all on one side”.<sup>20</sup>

**Despite the general rule restricting costs awards to party and party costs, Namibian courts will sometimes award costs on an ‘attorney and client’ (‘counsel and client’<sup>21</sup>) basis, holding the unsuccessful party responsible for the full amount of the professional services rendered by the winning party’s legal practitioner as well as all disbursements.** However, it is unusual for a court to award costs on an attorney and client basis, as this could be viewed as penalising a person for exercising a right to seek a judicial decision. This may be done where a party has behaved dishonestly or fraudulently; where a party had vexatious or malicious motives; where a party committed grave misconduct, either in the action which gave rise to the court case or in the conduct of the case; or where there are other special circumstances which warrant such costs.<sup>22</sup>

There are also exceptions to the general rule that costs will be awarded to a successful party. **These generally penalise misconduct by a party, exorbitant claims, some flaw in the conduct of the proceedings (such as causing unnecessary litigation or raising unnecessary defences, failing to take proper steps to limit or curtail the proceedings or utilising the wrong procedure).**<sup>23</sup>

**There are also certain categories of cases where courts are unlikely to award costs:**

- where a public officer or public body comes to court in good faith as part of its official duties;
- in legal proceedings concerning a deceased estate, or a curator, where costs normally come out of the relevant estate;
- in sequestration proceedings, where costs are charged against the insolvent estate;
- costs *de bonis propriis* (costs against the personal property of an administrator or executor who is acting for an estate, or some other person acting in a representative capacity, usually awarded only if there is some negligent or improper conduct).<sup>24</sup>

Furthermore, costs are normally not awarded to or against an *amicus curiae* (a “friend of the court”, which is a non-party who submits arguments to the court).<sup>25</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Innes CJ in *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488, as quoted in AC Cilliers, *Law of Costs* (3d ed) at 1-4.

<sup>20</sup> Young J in *Greenspan Bros (Pvt) Ltd v Commissioner of Taxes* 1960 (1) SA 454 (SR) at 462, as quoted in AC Cilliers, *Law of Costs* (3d ed) at 2-10.

<sup>21</sup> As noted above, Rule 1 of the Rules of the High Court, as amended by GN 81/1996, defines counsel as “a legal practitioner admitted, enrolled and entitled to practice as such in the court”. Rule 31, as amended by this same notice, refers to “counsel and client scale”. Section 12 of GN 81/1996 (GG 1293) states that the term “counsel” should be substituted for the terms “attorney” and “advocate” wherever they appear in the Rules of the High Court.

<sup>22</sup> Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 2009 at 971-972.

<sup>23</sup> See *id* at 961-ff. A recent example is the case of *Mobile Telecommunications Ltd v Namibia Communications Commission and Others* (A 26/2011) [2012] NAHC 94 (3 April 2012) (unreported), where the successful litigant was awarded only 75% of its costs because of its consistent failure to act in accordance with the Rules of Court. At paras 81-83.

<sup>24</sup> *Id* at 977-ff. For examples of costs *de bonis propriis* in Namibia, see *Booyesen v Kalokwe NO and Others* 1991 NR 95 (HC) (magistrate); *Aztec Granite (Pty) Ltd v Green and Others* 2006 (2) NR 399 (SC) (legal practitioner); *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 675 (HC) (legal practitioner); *Windhoek Truck and Bakkie CC v Greensquare Investments 106 CC* 2011 (1) NR 150 (HC) (legal practitioner).

<sup>25</sup> *Id* at 982.

## 1.1 Costs in the High Court<sup>26</sup>

**The High Court will be discussed first here, as the forum in which most constitutional cases would originate.**

**The High Court will normally award costs “as between party and party”.**<sup>27</sup> In practice, party and party costs will normally be substantially less than the actual costs of the litigation, meaning that even the successful party will be liable for paying a portion of the costs out of his or her own pocket.

**The Court has discretion to award “counsel and client costs” where there is misconduct or abuse of court process by one of the parties.**<sup>28</sup> The rules refer to some specific instances where this may be appropriate.<sup>29</sup>

**The Court may refuse to award costs which a litigant would otherwise have been entitled to, if the litigant prolongs the lawsuit unnecessarily or takes actions which unduly increase its expense.**<sup>30</sup>

**Also, costs are not usually awarded against a public official, except where that official has behaved in a manner that is in bad faith or grossly irregular.**<sup>31</sup> However, Namibia’s Supreme Court has stated that “it is not necessary to decide whether there exists in this jurisdiction a practice not to order costs against a public officer where his or her action or attitude, even if found to be mistaken, is *bona fide* and based on reasonable grounds”, observing that even in South African law where such a general rule does exist, the principle is “not an inflexible one” and “should not be elevated into a rigid rule of universal application which fetters judicial discretion”.<sup>32</sup>

**An official called the taxing master assesses the costs which an unsuccessful party must pay to the successful party,**<sup>33</sup> according to a schedule of costs attached to the Rules of the High Court which set forth an acceptable range of fees for particular legal services.<sup>34</sup> The taxing

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<sup>26</sup> The Rules of the High Court are contained in GN 59/1990 (GG 90), as amended by GN 187/1992 (GG 549), GN 148/1993 (GG 757), GN 81/1996 (GG 1293), GN 182/1996 (GG 1350), GN 221/1997 (GG 1727), GN 69/1998 (GG 1829), GN 141/2006 (GG 3690), GN 6/2008 (GG 3983), GN 293/2010 (GG 4614) and GN 57/2011 (GG 4709). References to “attorneys” and “advocates” in the rules must be read as “legal practitioners” by virtue of section 92(1) of the Legal Practitioners Act 15 of 1995. See *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC) and *Kaese v Schacht and another* [2009] NAHC 95.

<sup>27</sup> Rules 69(1)-(2); see also *Handl v Handl* 2008 (2) NR 489 (SC) at para 20 (“...the word costs, when used in a court order, does not give any difficulty of interpretation. It means party and party costs.”).

<sup>28</sup> For examples, see *Indigo Sky Gems (Pty) Ltd v Johnston* 1998 NR 152 (HC) and *Hessel-Enke v Sindlgruber and Others* [2012] NAHC 119 where the Court stated: “It is trite law that punitive costs would only be awarded in exceptional circumstances and where the conduct of a litigant warrants such an award as a mark of disapproval by a Court.”

<sup>29</sup> See for example, Rule 6(15), Rule 21(7) and Rule 32(10)(a). In *Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC), the High Court noted some of the relevant factors that might justify an award of attorney and client costs: “Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation shows total disregard for the opponent’s rights; that the opponent has been put to unnecessary trouble and expense by the initiation of an abortive application; that the application is foredoomed to failure since it is fatally defective or that the litigant’s conduct is objectionable, unreasonable, unjustifiable or oppressive.” At para 15, quoting *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T).

<sup>30</sup> See *Channel Life Namibia Limited v Finance in Education (Pty) Ltd* 2004 NR 125 (HC) at 132-133.

<sup>31</sup> An example of a case applying this principle is *Hoveka NO and Others v The Master and Another* 2006 (1) NR 147 (HC) at 155C.

<sup>32</sup> *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and others* 2011 (2) NR 469 (SC) at para 43.

<sup>33</sup> The party liable to pay the costs is entitled to notice of the taxation’s time and place and the right to be present, and the taxing master may not proceed with the taxation without being satisfied that the liable party has received such notice. Rule 70(4).

<sup>34</sup> Rule 70(1). See Sixth Schedule, GN 141/2006 (GG 3690). The taxing master may depart from the costs permitted under the schedule or tariff “where strict adherence to such provisions would be inequitable”. With respect to particular items, the rules expressly require the taxing master to consider “the time necessarily taken, the complexity of the matter, the nature of the subject matter in dispute, the amount in dispute and any other factors which he or she considers relevant”. Rule 70(5).

master is expected to assess costs with a view to providing the successful party with “a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence”. But costs due to over-caution, negligence, mistake, special fees to an advocate or special witness-related expenses will not be permitted.<sup>35</sup> “What is permissible is ... those costs which an honest, experienced and capable practitioner would consider reasonable in relation to the particular claim or defence, bearing in mind the requirements of efficient practice and the exigencies of litigation.”<sup>36</sup> A party who is dissatisfied with the taxing master’s decision to allow or disallow costs for a particular item can object and require the taxing master to state a case for the decision of a judge.<sup>37</sup>

**In the case of *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*, the Supreme Court expressed concern about the potential effects of harsh orders of costs on indigent litigants – particularly where a costs award is made at an interim stage of the proceedings and must be paid before the case moves forward.<sup>38</sup> However, the connection between costs awards and access to justice has otherwise been seldom raised or discussed in Namibia.**

**Security for costs must be provided in certain circumstances, which could also arguably deprive some persons of their right of access to the courts.** In general, security is seldom required from a resident of the country but may be required from a non-resident<sup>39</sup> – with the principle being “every citizen should have uninhibited access to the courts”.<sup>40</sup> However, security for costs may be required from residents who are insolvent, engaging in vexatious litigation, acting in a nominal capacity without any real interest in the outcome of the case, or acting as a front for someone else.<sup>41</sup> **Security for costs may be required in order to appeal a High Court decision in a civil case.** When leave to appeal is granted, “the court granting the leave may order the applicant to find security for the costs of the appeal in such an amount as the Registrar may determine, and may fix the time within which the security is to be found”.<sup>42</sup> Furthermore, the Rules of the High Court state that a party wishing to appeal in a civil case *shall* furnish security unless the respondent is prepared to waive the security.<sup>43</sup> The Government is exempt from this requirement.<sup>44</sup> The purpose of requiring security in respect of appeals is to protect the opposing party against being saddled with the costs of the appeal where the party mounting the appeal proves unable to pay if unsuccessful, and to discourage unnecessary litigation where prospects of success in the appeal are doubtful.<sup>45</sup> Other instances where security for costs can be demanded

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<sup>35</sup> Rule 70(3).

<sup>36</sup> *Pinkster Gemeente van Namibia (Previously South West Africa) v Navolgers van Christus Kerk SA* 2002 NR 14 (HC) at 16C, quoting *Van Rooyen v Commercial Union Assurance Co of SA Ltd* 1983 (2) SA 465 (O) at 468C-E.

<sup>37</sup> Rule 48.

<sup>38</sup> *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC). This case overturned a High Court ruling that indigent applicants must pay the costs of an unsuccessful urgent interdict before being allowed to proceed with the underlying case in the normal course, commenting that “Orders which stay proceedings until the costs of interlocutory or other proceedings between the same parties have been paid are particularly harsh on indigent litigants and, in reality, are likely to inhibit or terminate their ability to obtain redress of their grievances in a court of law.” At para 42.

<sup>39</sup> Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 2009 at 69, 392-ff.

<sup>40</sup> *Hepute and others v Minister of Mines and Energy and another* 2008 (2) NR 399 (SC) at para. 23 (citing *Vanda v Mbuqe and Mbuqe; Namoyi v Mbuqe* 1993 (4) SA 93 (TK) at 94F - 95B).

<sup>41</sup> Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 2009 at 403-405, 410-411; *Hepute and others v Minister of Mines and Energy and another* 2008 (2) NR 399 (SC) at para. 23. “...it is not fair to allow a plaintiff with no real interest in the litigation to drag another through litigation while being unable to meet an adverse costs order at the end of the day; and it is equally unfair to allow a party who has an interest in the litigation to use a poor man (who also has an interest) and in so doing hedge itself against an adverse costs order.” At para 24.

<sup>42</sup> High Court Act 16 of 1990, section 18(5)(b).

<sup>43</sup> Rule 49(13).

<sup>44</sup> Rule 49(14).

<sup>45</sup> *Telecom Namibia and another v Mwellie* 1996 NR 289 (HC).

are covered by the Rules of the High Court or by laws pertaining to specific types of cases.<sup>46</sup> There are also a few situations where security against potential liabilities (as opposed to security against costs) must be provided in terms of the Rules of the High Court.<sup>47</sup> A person who is receiving legal aid will not be compelled to provide security for costs, unless the Court directs otherwise.<sup>48</sup> A person proceeding *in forma pauperis* is also exempt from the requirement of lodging costs for an appeal of a High Court judgment to the Supreme Court.<sup>49</sup>

**The Constitutionality of requiring security for costs has been considered on several occasions.** The High Court rule regarding security for the costs of appeal on its face leaves no scope for the Court to exercise its discretion to dispense with this security or to vary the amount of security. The High Court has held that this approach is inconsistent with the constitutional right to a fair and public hearing by an independent, impartial and competent court under Article 12(1)(a), and that the rule must be amended to give the Court a discretion to exempt an appellant from providing security for costs wholly or in part.<sup>50</sup> The Court quoted with approval the following principle from a similar South African case:

There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand to in effect bar access to a Court of appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution. The conflicting rights of the litigants can, in my view, be adequately safe-guarded were the Court to be vested with the power to determine, in the exercise of its discretion, whether a particular appellant should be compelled to put up security and in what amount.<sup>51</sup>

In a subsequent case, the High Court stated:

When security for costs is sought against an applicant who alleges the infraction of his/her constitutional rights, consideration of the nature and extent of the alleged violation is an important consideration in exercising the discretion one way or the other. In our new

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<sup>46</sup> See Rule 31(2)(b). Some examples of security requirements in other laws include the following:

- Section 11 of the Companies Act 28 of 2004 authorises the Court to require security for proceedings initiated by companies, where they may be unable to pay the other party's costs if they are unsuccessful. See *Cellphone Warehouse (Pty) Ltd v Mobile Telecommunications Ltd* 2002 NR 318 (HC) (which arose under the Companies Act 61 of 1973).
- Section 110(3) of the Electoral Act 24 of 1992 requires that an application to court in respect of an election must be accompanied by "security for the payment of all costs, charges and expenses that may become payable by the applicant" in an amount determined by the Registrar. See *DTA of Namibia and another v SWAPO Party of Namibia and others* 2005 NR 1 (HC).

<sup>47</sup> See Rules 8(9)-(10), 32(3) and (5) and 49(13)-(14). See also *Northbank Diamonds Ltd v FTK Holland BV and Others* 2002 NR 284 (SC) and *Hepute and others v Minister of Mines and Energy and another* 2008 (2) NR 399 (SC). In the *Hepute* case, the Supreme Court upheld the High Court's ruling that the impecunious plaintiffs must provide security because they were persons of straw and fronts for another party – even though the case potentially involved an infringement of their constitutional rights. The underlying application concerned the validity of an exclusive prospecting licence granted in respect of land where the applicants were employed. The applicants in the primary case were low-income earning employees with few possessions. They admitted that they were impecunious and would be unable to meet a costs order if the respondents were successful in the main application. The Supreme Court concluded that the applicants were "persons of straw" who were acting as a front for another party. Although it was not disputed that the applicants had a real interest in the matter, their employers had previously brought and lost an application seeking substantially the same relief, resulting in costs of some N\$1.5 million, and were funding the current proceeding. This approach would have essentially enabled the employers to have a second chance at succeeding in their case whilst insulating them from potential liability for costs.

<sup>48</sup> Rule 47(7).

<sup>49</sup> Rules of the Supreme Court, Rule 4(8).

<sup>50</sup> *Low v Chairperson of the District Labour Court, Windhoek and others* 2001 NR 197 (HC).

<sup>51</sup> At 201D-E, quoting *Shepherd v O'Niell and others* 2000 (2) SA 1066 (N) at 1073C-E. An element of discretion was introduced by amendments to Rule 8(2) of the Supreme Court Rules which allow "the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant's notice of appeal, or such longer period as that court on good cause shown may allow" to release the appellant wholly or in part from the obligation to provide security. See Government Notice 119 of 2003, Government Gazette 2994.

constitutional dispensation with a justiciable Bill of Rights, it is untenable to suggest that the constitutional rights enjoyed by a litigant and which, through litigation, he or she wishes to vindicate cannot be of any consequence in the exercise of the court's discretion whether or not to order security... It however needs to be said that the seriousness of the infraction of the constitutional rights is but one (not the only consideration) that goes into the weighing scale.<sup>52</sup>

**Also relevant to the issue of access to justice is the fact that a person may apply to the Registrar to proceed *in forma pauperis* (as a pauper, which is a person without any financial resources).**<sup>53</sup> If the person appears not to have N\$1000 and will not be able to earn it within a reasonable time, the Registrar must refer him to a legal practitioner and inform the Law Society of Namibia accordingly.<sup>54</sup> The legal practitioner must inquire into the person's means and the merits of the case. If the legal practitioner is satisfied that it is appropriate to take the case *in forma pauperis*, he or she shall request the Law Society to nominate a legal practitioner to take the case for free.<sup>55</sup> A counsel representing a client proceeding *in forma pauperis* must provide legal services for free, and is not permitted to withdraw, settle, or compromise the proceedings or discontinue legal services without the permission of the judge.<sup>56</sup> In such a case, the Registrar will serve process and accept documents without fee.<sup>57</sup> The opponent of a person proceeding *in forma pauperis* may apply to the Court for an order dismissing the claim or defence, or an order preventing the person in question from proceeding *in forma pauperis*.<sup>58</sup> If costs are awarded against the opponent of a litigant *in forma pauperis*, the legal practitioner representing that litigant 'may include in his or her bill of costs such fees and disbursements to which he or she would ordinarily have been entitled'.<sup>59</sup>

## 1.2 Costs in the Supreme Court<sup>60</sup>

**Like the High Court, the Supreme Court generally awards costs on a 'party and party' basis.**<sup>61</sup> An annexure to the Rules of the Supreme Court sets forth a scale of fees for the purpose of awards of costs. As in the High Court, a taxing master assesses any costs incurred by the winning party to determine the value of costs which must be paid by the losing party.<sup>62</sup> These assessments of costs are subject to Supreme Court review.<sup>63</sup>

**Like the High Court Rules, the Supreme Court Rules require security for the costs of an appeal in various circumstances.** When the Supreme Court grants leave to appeal (where a petition for such leave has been made to the Chief Justice), it may order the appellant to provide

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<sup>52</sup> *Hepute and others v Minister of Mines and Energy and another* 2008 (2) NR 399 (SC) at para 32.

<sup>53</sup> Rule 41(1)(a). The person seeking to act *in forma pauperis* must lodge with the Registrar (a) an affidavit stating his financial position and stating that he does not have N\$ 1000 (excepting the value of household goods, clothes and tools of trade) and will not be able to earn it within a reasonable time; (b) a statement from counsel that he or she is satisfied that the person in question cannot pay fees and that his or her legal services are being provided for free; and (c) "a certificate of *probabilis causa* [a plausible basis for the legal action] by the said advocate". Rule 41(2).

<sup>54</sup> Rule 41(1)(a), (2)(a).

<sup>55</sup> Rule 41(1)(b). If the attorney or advocate becomes unable to continue to prosecute the case, the Registrar or Law Society may, on request, nominate another practitioner to act instead. Rule 41(1)(c).

<sup>56</sup> Rule 41(5).

<sup>57</sup> Rule 41(2).

<sup>58</sup> Rule 41(6).

<sup>59</sup> Rule 41(7).

<sup>60</sup> Rules of the Supreme Court of Namibia are contained in GN 56/1990 (GG 86). GN 119/2003 (GG 2994) amends Rule 8.

<sup>61</sup> Fees for only one legal practitioner will be permitted, unless the Court has authorised additional for additional legal practitioners. Rule 11(4). In practice, many cases include an order for costs of one instructing counsel and one instructed counsel.

<sup>62</sup> Rule 13(1).

<sup>63</sup> Rule 13.

security for the costs of the appeal as determined by the Registrar.<sup>64</sup> Furthermore, if the execution of a judgment is suspended pending appeal, the appellant is required to “enter into good and sufficient security for the respondent’s costs of appeal”, unless the respondent waives the right to security or the court appealed from releases the appellant wholly or partially from the obligation to provide security.<sup>65</sup> As in the High Court, the Government is exempt from providing security<sup>66</sup> and parties receiving legal aid or acting *in forma pauperis* are not required to provide security for costs.<sup>67</sup>

### 1.3 Costs in the Magistrate’s Court<sup>68</sup>

**In general, the Magistrates Court Act 32 of 1944 gives a magistrate discretion to award costs that he or she deems just, including ‘counsel and client’ costs where this is appropriate.**<sup>69</sup> The court may award higher costs than those prescribed by the tariffs if the case involved difficult questions of fact or law, multiple claims, or a claim or defence which was vexatious or frivolous.<sup>70</sup> The court has similar discretion in respect of costs in a number of specific circumstances covered by the rules and the Act.<sup>71</sup>

**On the other hand, the rules address costs awards in many specific situations, regulating how and when the court may award costs if the parties fail to pursue the case by defaulting, abandoning claims or settling.**<sup>72</sup> Similarly, a few rules specifically address costs relating to the use of particular kinds of evidence.<sup>73</sup>

**A successful party will not necessarily be awarded all of the costs ordinarily provided on a ‘party and party’ basis.** If the court concludes that a party wasted time on unnecessary or irrelevant matters, or prolonged the proceedings unnecessarily, it may limit the costs awarded to those which would have applied if the party had followed a more efficient course of action.<sup>74</sup>

**A table attached to the rules lays out the scale of fees permitted to legal practitioners as between ‘party and party’.**<sup>75</sup> Taxation of costs is done by the clerk of the court.<sup>76</sup> A taxation of costs is subject to review by a magistrate, and the magistrate’s decision is in turn reviewable by a judge of the court of appeal.<sup>77</sup>

As in the other Namibian courts, costs recovered on a ‘party and party’ basis are unlikely to compensate a litigant for the actual costs of the litigation. In contrast, when a party in a civil case

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<sup>64</sup> Rule 3(6).

<sup>65</sup> Rule 8(2)-(3). The application of these rules is discussed in *Ondjava Construction CC and others V HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC).

<sup>66</sup> Rule 8(5).

<sup>67</sup> Rules 8(6) and 4(8).

<sup>68</sup> The Rules of Court are contained in RSA GN R.1108 of 21 June 1968, which has been much amended.

<sup>69</sup> Magistrates’ Court Act 32 of 1944, section 48(d), which permits the magistrate’s courts to award trial costs “(including costs as between attorney and client) as may be just”; in light of section 92 of the Legal Practitioners Act 15 of 1995, this would be construed as referring to any legal practitioner.

<sup>70</sup> Rule 33(8).

<sup>71</sup> See Rules (1)(a) and (6), 18(11), 27(6), 31(3), 33(2), 55A(5), 56(9), 60(3), (5) and (6). See also Magistrates Court Act 32 of 1944, section 65A(1), 65K(1)-(3) and 74, read with 74F(3)-(4).

<sup>72</sup> See Rules 12(1)(a), (c) and (d), 13(3), 27(1), (3), (4) and (5), 32(1) and (2).

<sup>73</sup> See Rule 24(10)(d), 24(8)(c), 15(1) and (3) and 30(11)-(12).

<sup>74</sup> Rule 33(10) and (12).

<sup>75</sup> Rule 33(5)(a). See also Magistrates Court Act 32 of 1944, section 80(1).

<sup>76</sup> Rule 33(16)-(22).

<sup>77</sup> Magistrates Court Act 32 of 1944, section 81.



is awarded counsel and client costs, this can cover all the costs and charges for services reasonably performed by the legal practitioner.<sup>78</sup>

**Defendants may require certain categories of plaintiffs to provide security for the costs of the lawsuit.** These categories include any plaintiff who is not resident in Namibia, an unrehabilitated insolvent, a company, or someone with no real interest in the outcome of the case.<sup>79</sup> There are a few instances where security for other expenses must be provided.<sup>80</sup>

**Security is also required for civil appeals from the decision of a Magistrate's Court.** The appellant must provide security of N\$5000 for the respondent's cost of appeal. Security is not required, however, from the state or from a person receiving state-funded legal aid.<sup>81</sup>

**The rules expressly permit a party to sue or defend as a *pro Deo* litigant.** Someone who is applying to do this can arrange to get assistance from the clerk of the court to make the application. If the court is satisfied that the applicant seems to have a legitimate case but lacks the means to pay costs and court fees, it may order that the court processes shall be free of charge (except for the disbursements of the court messenger) and that a legal practitioner will be appointed to act on the applicant's behalf for free, or that the clerk must write out the documents necessary to comply with the rules.<sup>82</sup> If the court awards costs to a successful *pro Deo* litigant, this *pro Deo* litigant will be entitled to recover his or her legal practitioner's fees, court fees, and messenger's charges – but if the *pro Deo* litigant fails, he or she will not be obligated to pay the fees of the legal practitioner appointed to act on his behalf.<sup>83</sup> The rules state expressly that a *pro Deo* litigant is not exempt from liability for adverse costs<sup>84</sup> – although it is not clear how this could work in practice since a *pro Deo* litigant will by definition be unable to pay.

## 1.4 Costs in the Labour Court<sup>85</sup>

**Unlike the general rule in the High Court and Supreme Court, the general rule in the Labour Court is that each party shall bear its own costs.** Specifically, the Labour Court may not order a party to pay costs “unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings”.<sup>86</sup>

Similarly, when the Labour Commissioner acts as arbitrator he or she may make an order for costs only if the party or the party's representative “acted in a frivolous or vexatious manner ... by proceeding with or defending the dispute” or “during the proceedings.”<sup>87</sup>

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<sup>78</sup> Magistrates Court Act 32 of 1944, section 80(2); in light of section 92 of the Legal Practitioners Act 15 of 1995, this is to be construed as referring to any legal practitioner.

<sup>79</sup> Rule 62(1).

<sup>80</sup> For example, a party who applies for the trial to “take place with assessors” must deposit a set amount with the court for each assessor requested; unless the court orders otherwise, the fees and expenses of the assessor will be costs in the cause. Rule 59(6). See also Rule 48(7)(a)(ii) and (d).

<sup>81</sup> Rule 51(4). Similarly, under section 50(1) of the Magistrates Court Act 32 of 1944, where a defendant exercises the right available in certain cases to remove the proceedings to the High Court, the court may require that defendant to provide security.

<sup>82</sup> Rule 53(4).

<sup>83</sup> Rule 53(5)-(6).

<sup>84</sup> Rule 53.

<sup>85</sup> The Labour Court is governed by the Labour Act 11 of 2007. Labour Court Rules are contained in GN 279/2008 (GG 4175), as amended by GN 92/2011 (GG 4743).

<sup>86</sup> Labour Act 11 of 2007, section 118. See *Commercial Investment Corporation (Pty) Ltd v Namibian Food and Allied Workers Union and Others* 2007 (2) NR 467 (HC), which concerns a similar provision in the Labour Act 6 of 1992.

<sup>87</sup> *Id.*, section 86(15)-(16). If the arbitrator decides to make such an order, “the order of costs should set forth the amount of costs awarded”. Rule 37(1). If the Minister has not prescribed tariffs related to arbitration proceedings, then the arbitrator must

The theory behind the approach to costs in labour matters appears to be an effort to ensure that workers are not disadvantaged in litigating against employers, who are normally in a more advantageous financial position.

## 1.5 Small claims court proposal

**In 1997, the Law Reform and Development Commission issued a *Report on Small Claims Courts* proposing the establishment of an informal, non-adversarial court system in which individuals could litigate specified categories of disputes involving relatively small sums. The draft bill appended to the Law Reform and Development Commission report proposed separate rules for costs in such cases, suggesting that the only costs a small claims court would have the power to award would be court fees and expenses related to the issue of summons. Legal practitioners would not be allowed to appear before a small claims court, so there would be no need to reimburse the winning party for any counsel fees. The limited costs rules also reflect the inquisitorial nature of the proceedings, which should relieve litigants of costly investigations.<sup>88</sup>**

## 1.6 *Pro bono* legal assistance

The 1996 case of *Hameva and Another v Minister of Home Affairs, Namibia* examined the issue of costs in cases where clients are represented by the Legal Assistance Centre. The Deed of Trust of the Legal Assistance Centre at that stage stated that one of its purposes was to provide legal assistance in the public interest “and without charge to persons requiring such assistance”. The Supreme Court held that this would preclude the Legal Assistance Centre from entering into an agreement with a client to recoup disbursements, meaning that there could be no award of costs covering such disbursements.<sup>89</sup> More generally, the Court noted that because ‘party and party’ costs are in the nature of an indemnity, they cannot normally be awarded in respect of costs which the litigant would not actually have been liable to pay in the absence of an award of costs.<sup>90</sup>

The issue was raised again in the 2005 case of *Uirab v Minister of Basic Education*, without being definitively resolved:<sup>91</sup>

As to cost[s] I was requested to order the first and second defendants to pay the costs of the plaintiff, including, but not limited to, disbursements incurred by briefing counsel.<sup>[92]</sup> The Magistrate’s Court Rules allow for such an order and I can see no reason why a superior court cannot make a similar order. I say this particularly because [counsel for the first defendant] indicated during argument that the second defendant will not pay counsel’s costs in the absence of a ruling made by the Registrar to that effect. He indicated that the argument will be (ie before the Registrar) that counsel’s costs are not the costs of the plaintiff but are costs incurred by the Legal Assistance Centre. This case lasted for a number of days and in all probabilities counsel – disbursements will exceed the monetary award. By virtue of the

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award costs based on Schedule A of the Magistrates’ Court tariff, unless the party receiving costs was not represented by a legal practitioner. Rule 37(2)-(3). In the latter case, an annexure to the Labour Act Rules lays out the recoverable costs. Rule 37(3).

<sup>88</sup> Law Reform and Development Commission, *Report on Small Claims Courts* (LRDC 6), 1997.

<sup>89</sup> *Hameva and Another v Minister of Home Affairs, Namibia* 1996 NR 380 (SC).

<sup>90</sup> Id. The Supreme Court cited the similar outcome in the English case of *Gundry v Sainsbury* [1910] 1 KB 645 (CA), where there was an agreement between the plaintiff and his solicitor that the plaintiff would not be liable to pay the solicitor, which precluded the award of any costs to the unsuccessful opposing party in respect of the solicitor.

<sup>91</sup> *Uirab v Minister of Basic Education* Case No I 1257/2005 (High Court).

<sup>92</sup> Note that it was subsequently established that the costs of instructing counsel may no longer be treated as disbursements. See footnote 12 of this paper.

Supreme Court's decision in *Hameva and Another v Minister of Home Affairs, Namibia 1996 NR 380 (SC)*, an order of cost would include counsel's disbursements in the normal circumstances, but not where the client does not incur any expenses in relation to counsel's fees. This issue was raised by [counsel for the first defendant] during argument for the first time. He stated that the plaintiff is funded by the Legal Assistance Centre, and that the fees paid to counsel are not the plaintiff's disbursement. If this was raised in the pleadings, the plaintiff could have dealt with the issue during evidence by presenting the document... which [the plaintiff] had to sign when the Legal Assistance Centre was appointed, as having the effect that any disbursements, if not taxed, should be repaid to the Legal Assistance Centre from any award made to the plaintiff. The approach of the second defendant, not to raise this issue pertinently on the pleading but, to keep quiet and then ask the Registrar to determined legal issues, smacks, with respect, of opportunism. I will not allow it...<sup>93</sup>

The Court therefore ordered the unsuccessful defendants to pay the plaintiff's costs on a party and party scale, and directed that "such costs shall specifically include disbursements made in respect of counsel's fees".<sup>94</sup> However, since the counter-arguments were improperly raised and not considered by the Court, this ruling does not resolve the question of the impact of the *Hameva* ruling. (The defendants raised the issue on appeal, but the appeal was for other reasons never finalised.<sup>95</sup>)

The Legal Assistance Centre subsequently amended its Deed of Trust to address this issue, adding a proviso that despite the commitment to provide legal assistance "without charge", it is "authorised to recover costs in the form of disbursements and, insofar as it may be authorised thereto by the Law Society, to recover full legal costs, and further that the Centre may require prospective litigants to undertake to pay the actual disbursements paid by the Centre in relation to any litigation".<sup>96</sup>

It has been suggested that the provisions of the Legal Practitioners Act 15 of 1995 regarding the exemption of non-profit law centres from holding fidelity fund certificates (see box below) might pose a barrier to reimbursements for disbursements. However, the relevant provisions would seem to forbid lawyers without fidelity fund certificates only from holding money *from a client* in respect of disbursements to another person (by virtue of the prohibition on holding moneys for or on account of another person), and not from receiving reimbursement form an opposing party for the account of the law centre.

**Legal Practitioners Act 15 of 1995**  
[emphasis added]

**1. Definitions**

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"law centre" means –

- (a) a centre for clinical legal education in the Faculty of Law at the University of Namibia;  
or
- (b) a centre controlled by a non-profit making organisation which provides legal services without charge;

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<sup>93</sup> Case is unpaginated; quotation appears in the paragraph immediately preceding the Court's order.

<sup>94</sup> At point 4 of Court's order.

<sup>95</sup> Records of Legal Assistance Centre.

<sup>96</sup> Deed of Trust, Legal Assistance Trust, dated 20 June 2012 at para 2.1.

## **67. Exemption of certain legal practitioners from requirement to hold a fidelity fund certificate**

(1) A legal practitioner who is in the full-time employment of the State or of a law centre or who is not practising on his or her own account or in partnership or who is exempted under subsection (2) shall, subject to subsection (3), not be required to obtain and hold a fidelity fund certificate.

(2) Upon application made to it by a legal practitioner practising or intending to practise as a legal practitioner for his or her own account or in partnership, the Council may exempt such practitioner from holding a fidelity fund certificate if-

(a) in the case of a legal practitioner practising or intending to practise on his or her own account, such legal practitioner furnishes the Council with a written declaration stating that he or she will not in the conduct of his or her practice accept or receive or hold moneys for or on account of another person; or

(b) in the case of a legal practitioner practising or intending to practise in partnership, such legal practitioner furnishes the Council with a written declaration signed by every person who is or will be a member of such partnership stating that neither such partnership nor any member thereof will in the conduct of the practice of the partnership **accept or receive or hold moneys for or on account of another person.**

(3) Any legal practitioner who has been exempted under subsection (2) from holding a fidelity fund certificate and who in the conduct of his or her practice **accepts or receives or holds any money for or on account of another person, without first obtaining a fidelity fund certificate in accordance with the provisions of section 68 shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising** and shall be guilty of an offence and liable on conviction to a fine not exceeding N\$200 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

(4) An exemption contemplated in subsection (2) may be granted by the Council to a legal practitioner subject to such conditions as the Council may determine, including a condition requiring the legal practitioner to furnish the Council with a guarantee of fidelity in favour of the fund, in a form and by a person approved by the Council, guaranteeing the fidelity of such legal practitioner to an amount determined by the Council.

## **1.7 Exceptions in respect of constitutional issues**

**Namibian courts occasionally exercise their discretion to depart from the general rule that costs follow the event, in order to encourage applicants to use the courts to exercise their constitutional rights.**

For example, in *Tlhoru v Minister of Home Affairs*,<sup>97</sup> an applicant challenged the constitutionality of the statutory requirement that someone seeking Namibian citizenship by naturalisation must renounce all other citizenships. Although the Supreme Court eventually upheld the legislation in question, it did not award costs to the government, stating that “[t]he issues raised in the application were constitutional and complex in nature and of public importance. To her credit, respondent’s counsel did not move an order of costs in the event of the application being unsuccessful. It is an attitude which this court has commended on several occasions.”<sup>98</sup>

The Supreme Court similarly declined to require a losing applicant to pay the government’s costs in *Minister of Home Affairs v Majiedt and Others*,<sup>99</sup> which involved a constitutional challenge to the special statute of limitations on civil suits in respect of police action. The Supreme Court

<sup>97</sup> *Tlhoru v Minister of Home Affairs* 2008 (1) NR 97 (HC).

<sup>98</sup> *Id* at para 55.

<sup>99</sup> *Minister of Home Affairs v Majiedt and others* 2007 (2) NR 475 (SC).

upheld the statutory provision in question, but declined to award costs to the government. The Court reasoned as follows:

Notwithstanding the result of this appeal, it is not the intention of this court to send wrong signals to the citizenry that they are inhibited from exercising their right of access to the courts of law, and in particular going to courts of law to challenge the constitutionality of legislation they perceive as impinging on good governance. This is especially so when they intend to institute action which, like the present one, is not vexatious nor an abuse of the process of courts. This consideration justifies a departure from the usual rule of practice that a loser must bear the costs of the winning party.<sup>100</sup>

These outcomes are laudable, but insufficient to encourage access to justice because the litigants did not know *in advance* of the litigation that they would be exempted from the usual costs award. This means that a person seeking to litigate a constitutional issue must do so under the risk of paying the opponent's costs.

## 2. Problems with Namibia's current costs system

**Namibia's cost system stymies access to justice for two forms of valid litigation: public interest actions and actions brought on behalf of individual clients of modest means.** Although neutral on their face, the costs rules favour wealthy parties seeking relief in private matters.<sup>101</sup>

**First, a "loser pays" cost system discourages low-income and even middle-income applicants from filing meritorious cases: legal practitioners are expensive, and much of the population will simply not be able to fund litigation.**<sup>102</sup> Even if the applicant is likely to win the case and thus be reimbursed for some costs on a 'party and party' basis, the low- or middle-income applicant is unlikely to be able to afford to pay the remainder of the costs. For many low- and middle-income plaintiffs, it will simply not be financially possible to seek justice through the court system.

A system that discourages or prevents low- and middle-income plaintiffs from having access to the courts is problematic. Access to justice is a human right guaranteed by both the Constitution of Namibia and international covenants to which Namibia is a party.<sup>103</sup> **Effectively blocking a substantial portion of the population from accessing the courts violates their human rights.**

**Failing to provide effective access to justice mechanisms encourages people either to ignore injuries inflicted by others or engage in extra-legal forms of self-help.**<sup>104</sup> For instance, an individual who claims that a purchaser of the person's motor vehicle has failed to finalise payment may go to the purchaser's house and try to take the motor vehicle back by force, potentially provoking a violent confrontation. Ineffective access further teaches people that they cannot trust, use or rely on the justice system. As a result, they may be less likely to report crimes when they are victims or witnesses, or be less willing to participate in other court cases

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<sup>100</sup> Id at para 53.

<sup>101</sup> See Shami Chakrabarti, Julia Stephens & Caoilfhionn Gallagher, "Whose cost the public interest?" 2003 *Public Law* 697 (2003) (hereinafter "**Chakrabarti et al**") at 698 ("the courts' tendency to award costs against the unsuccessful party undoubtedly serves as a formidable barrier to litigants bringing an action which is in the wider public interest").

<sup>102</sup> See Chris Tollefson, "Costs and the Public Interest Litigant," 19 *Canadian Journal of Administrative Law & Practice* 39 (2006) (hereinafter "**Tollefson 2006**") at 49-50.

<sup>103</sup> See Legal Assistance Centre, "Access to Justice as a Human Right", Access to Justice Series, Paper No 1, 2012.

<sup>104</sup> Chris Tollefson, "Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation," 51 *University of New Brunswick Law Journal* 175 (2002) (hereinafter "**Tollefson 2002**") at 190.

and investigations. Even more troublingly, the system allows some citizens – wealthy ones – to use the courts to resolve disputes while effectively denying that same access to other citizens. The court rules should not function to prevent or deter lower income plaintiffs “from seeking to vindicate their rights against a more powerful adversary”.<sup>105</sup>

**Namibia’s legal aid system is intended to ameliorate this problem, but the availability of legal aid for civil matters is limited, and the relatively low means threshold will exclude some potential litigants who will not be able to finance their own litigation.**<sup>106</sup>

**The costs regime and the sheer expense of bringing a legal action work together to block public interest cases which by definition have potentially far-reaching outcomes.**<sup>107</sup> Most public interest actions will be undertaken by non-profit, charitable or non-governmental organisations on behalf of plaintiffs who cannot otherwise afford legal representation. Unfortunately, “the expense of litigation is such that few charitable organisations can afford to undertake the full financial burden of litigation (and even those who could would rather avoid it)”.<sup>108</sup> A system that holds a losing applicant liable for the defendant’s costs will exacerbate this barrier to justice: any public interest organisation will be forced to calculate whether vindicating a right or challenging an unconstitutional law merits the financial risk to the organisation. Being required to provide security for the defendant’s costs will further compound these problems and discourage valuable litigation.<sup>109</sup>

**Moreover, the “loser pays” system will over-deter public interest litigants because the risk calculus on which the “loser pays” system is based does not properly apply to public interest litigation.** A “loser pays” system discourages applicants from bringing cases they know are marginal or spurious by holding the losing party responsible for the winning party’s legal costs. Thus any party wishing to file a case must engage in a risk calculus: is the financial award the party hopes to gain worth the cost of litigation and the risk of paying the defendant’s costs? This risk calculus is difficult to make in the public interest context. An applicant making a novel claim, such as a constitutional challenge to a recently-enacted statute or a claim that the Constitution obligates the government to undertake certain obligations with respect to a minority group, is ill-positioned to predict in advance if the court is likely to accept the argument or cause of action as valid. So when engaged in the risk calculus, an applicant raising a novel point of law will be likely to place extra weight on the risk of losing and being forced to pay the defendant’s costs. Because public interest litigation by its very definition raises previously undecided points of law, it suffers particularly in a “loser pays” regime.

Furthermore, the system assumes that an individual litigating with a view to his or her private economic interest will litigate claims only if this makes economic sense.<sup>110</sup> At a certain point, the

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<sup>105</sup> Chris Tollefson, “When the ‘Public Interest’ Loses: The Liability of Public Interest Litigants for Adverse Cost Awards,” 29 *University of British Columbia Law Review* 303 (1995) (hereinafter “**Tollefson 1995**”) at 312.

<sup>106</sup> The income cut-off is currently N\$1100/month for a person with 4 dependants, according to the Legal Aid Regulations, although people with a higher income can still apply as the Director has discretion to grant legal aid over this threshold after considering the type of case.

<sup>107</sup> Public interest actions refer to actions that involve “a real ... human rights complaint” and “a real ... challenge to legislation, policy or practice of wide or potentially wide application or consequence, or exciting wide controversy.” Chakrabarti et al at 712.

<sup>108</sup> Adrian Zuckerman, “Protective Costs Orders: A Growing Costs-Litigation Industry,” 28 *Civil Justice Quarterly* 161 (2009) at 163.

<sup>109</sup> Laura Friedlander, “Costs and the Public Interest Litigant,” 40 *McGill Law Journal* 55 (1995) (hereinafter “**Friedlander**”) at 61-64; David Gourlay, *Case Comment – Access or Excess: Interim Costs in Okanagan*, 63 *University of Toronto Faculty of Law Review* 111 (2005) (hereinafter “**Gourlay**”) at 113.

<sup>110</sup> Friedlander at 60, quoting R Anand & I Scott, “Financing Public Participation in Environmental Decision Making,” 60 *Canadian Bar Review* 81 (1982) at 98; see Gourlay at 112-13: “The determination of whether to bring a law suit “must account for, *inter alia*, the probability of success, the potential financial return, if any, and the applicable cost-transfer rules”.

risks of losing and paying the defendant's costs combined with the costs of litigation will outweigh the financial benefit a litigant hopes to achieve by bringing or defending a lawsuit. But for public interest litigants, the purpose of litigation is often to challenge unconstitutional legislation or to obtain an interdict blocking an invalid practice, rather than to seek financial gain.<sup>111</sup> Consequently, the chance of a potential financial loss through having to pay a defendant's costs will almost always be greater than the chance of a potential financial gain. The opportunity for financial gain will not sufficiently spur litigation to challenge unconstitutional practices, and thus public interest litigation will be over-deterred.

**The risk calculus also assumes that the potential benefits of litigation as well as the costs will accrue to the party bringing the litigation.** In private litigation, this assumption usually holds true: A party who sues to enforce a contract, for example, seeks the financial benefits of that contract. If the party wins the case, he or she alone will reap the financial rewards. In contrast, public interest cases “by definition have a beneficial component extending beyond the parties at bar”,<sup>112</sup> because they seek to benefit a large, diffuse population. Consider, for instance, a case challenging a school policy about pregnant learners on the grounds that it discriminates on the basis of sex. If the applicant wins, the victory would benefit all pregnant learners and possibly even all teenage girls currently enrolled in state schools. Yet, if she loses, she alone will be responsible for her own costs and the costs of the defendant. Thus, even if “the social benefit of an action might outweigh the litigation costs and risks, the potential private benefit resulting to any individual plaintiff may be insufficient to justify the action”.<sup>113</sup> For any single plaintiff, bringing a public interest action challenging unconstitutional practices may simply not be worth the risk.

**Costs rules that block public interest litigants' access to the courts also prevent them from vindicating important substantive rights and holding the government accountable.**<sup>114</sup> In foreign jurisdictions, public interest litigation has proven crucial to advancing substantive rights such as rights to food and housing. Public interest litigation has also been utilised to end racial segregation in schools, eliminate sexual discrimination and protect the environment.

**Even when public interest plaintiffs lose, society often benefits from the litigation. Public interest litigation can raise awareness about injustices and provide rallying points that lead to reforms.** For example, an American scholar has convincingly argued that the violent resistance to the United States Supreme Court decision ordering the end of racial segregation in public schools led to broader legislative reforms that made it illegal to discriminate on the basis of sex and race in the workplace and in education, and dismantled a system in which Southern states used proxies for race to prevent the vast majority of their African-American citizens from voting.<sup>115</sup> **Furthermore, the public benefits from clarification of novel issues.**<sup>116</sup> And, since public interest litigation often involves sensitive and controversial issues such as sex and race discrimination or environmental concerns, it can be particularly important to promote resolution through the courts rather than through divisive or confrontational extralegal – or illegal – methods.<sup>117</sup>

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<sup>111</sup> Friedlander at 60, quoting LM Fox, “Costs in Public Interest Litigation” 10 *Advocates Quarterly* 385 (1989).

<sup>112</sup> Gourlay at 113.

<sup>113</sup> *Ibid.*

<sup>114</sup> Tollefson 2006 at 50.

<sup>115</sup> See Michael J Klarman, “How *Brown* Changed Race Relations: The Backlash Thesis,” 81 *Journal of American History* 81 (1994).

<sup>116</sup> Tollefson 2002 at 190.

<sup>117</sup> *Ibid.* A Canadian court has noted: “Disputes involving environmental issues, such as this one, are all too liable to provoke confrontations outside the law. In my opinion, it would not be conducive to the proper and legal resolution of this case which is one of significant public interest, to penalize the petitioners who have acted responsibly by attempting to resolve the issues according to the law, through awarding costs against them.” *Sierra Club of Western Canada v BC (AG)* 83 DLR (4<sup>th</sup>) 708 (1990) at 716.

### 3. Comparative examples: Fee-shifting and protective costs orders in public interest litigation

Despite sharing Namibia's general rule that costs follow the event, courts in foreign jurisdiction have created exceptions to this rule in order to encourage public interest litigation. **In all four jurisdictions discussed below, a litigant who brings a claim of public importance and fails may be relieved of the normal obligation to pay the costs of the winning party.**

Furthermore, **courts in the United Kingdom and Canada will sometimes issue orders protecting the litigant from costs before the litigation even begins, thereby permitting a party to proceed without fear of having to pay the opposing party's costs.** This second type of order significantly lowers the barrier to entry for parties seeking to litigate issues of public concern.

More broadly, **relieving public interest litigants from the burden of costs awards recognises that elaboration on matters of public law, and particularly on constitutional issues, benefits all of society and that it is unfair to require a single litigant to bear the costs alone.**

#### 3.1 Canada

Canada's general approach to costs is similar to that applied in Namibia.<sup>118</sup> However, **Canadian courts have recognised that “where a suit entails a public benefit of some kind, it may be appropriate to relieve an unsuccessful litigant of its usual obligation to pay the other side's costs”.**<sup>119</sup> They have exercised this discretion in cases raising issues that are “novel”, “of importance to the public”<sup>120</sup> or “expressly pursued as a test case”.<sup>121</sup>

In *Allman v Northwest Territories*,<sup>122</sup> for example, a plaintiff unsuccessfully challenged a statute determining voter eligibility for a particular election in light of the newly-enacted Canadian Charter of Rights and Freedoms. The Court declined to award costs to the winning party on the ground that the “issues were entirely novel and of possibly far-reaching public importance”, and therefore “clearly deserved to be submitted for judicial consideration”.<sup>123</sup> The Court stated, “at this stage in the life of the Charter, given its wide impact on all facets of our legislation, it is at least incumbent upon the court to consider whether, in all the relevant circumstances, costs should follow the event”.<sup>124</sup> The Court concluded that “a citizen acting in the general interest and not merely on his own behalf should not have to bear the burden of costs where he has reasonably and in good faith brought before the courts a question as to the validity of legislation which is the subject of public controversy”.<sup>125</sup>

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<sup>118</sup> The losing party generally pays the winning party's costs, unless there is a compelling reason for some other approach. Garry D Watson, “Class Actions: The Canadian Experience,” 11 *Duke Journal of Comparative & International Law* 269 (2001) at 274. However, the losing party normally pays only party and party costs only (ie partial indemnity) rather than attorney and client costs (which provide near total indemnity). Friedlander at 58. Courts have a general discretion to make appropriate costs awards. See, for example, Ontario's *Courts of Justice Act* RSO 1990, c C43 [CJA], section 131(1) (“the court may determine by whom and to what extent the costs shall be paid”) and British Columbia Rules of the Court Rule 57(9) (“costs of ... a proceeding shall follow the event unless the court otherwise orders”).

<sup>119</sup> Tollefson 1995 at 312.

<sup>120</sup> Friedlander at 67. This article describes the refusal to award costs in cases of importance to the public as the “general position” and cites a long string of examples. See also Tollefson 1995 at 312.

<sup>121</sup> Tollefson 1995 at 312.

<sup>122</sup> *Allman v Northwest Territories* [1983] NWTR 231.

<sup>123</sup> Id at 232.

<sup>124</sup> Id at 234.

<sup>125</sup> Id at 234. The costs order was overturned on appeal. See *Allman v Northwest Territories* [1984] NWTR 65, 50 AR 161 (CA).



**Occasionally, courts have even awarded fees to unsuccessful public interest plaintiffs because it was a matter of public interest to clarify the relevant constitutional issues.**<sup>126</sup> For example, in *Singh v Canada (AG)*,<sup>127</sup> the applicants challenged the constitutionality of provisions of the Canada Evidence Act that permitted the government not to disclose evidence in certain circumstances. Although the Court dismissed the plaintiffs' claim, it awarded them costs from the government because "the testing of the constitutional principles involved in this matter is clearly in the public interest, since they are at the heart of our constitutional democracy". The Ontario Court of Appeal<sup>128</sup> and the Supreme Court of Canada<sup>129</sup> have followed suit in cases against provincial and federal government.

**In 2001, the Supreme Court of Canada recognised a third option to relieve public interest plaintiffs of their cost burdens: ordering the *advance funding* of the public interest plaintiff's full litigation costs.** In the seminal case of *British Columbia (Ministry of Forests) v Okanagan Indian*,<sup>130</sup> the Court identified criteria to determine if a public interest case is "special enough" such that "the unusual measure of ordering costs would be appropriate":

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.<sup>131</sup>

Even if a claim meets these conditions, the ultimate determination to grant an interim costs order remains at the discretion of the Court. The Court further noted that interim costs "must not impose an unfair burden" on defendants, and voiced particular concern regarding "the position of private litigants". Notably, however, the judgment did not limit interim costs orders to cases in which the government is the defendant.

**Yet the Supreme Court has since curtailed an expansive reading of *Okanagan*.** In *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue)*,<sup>132</sup> the appellant sought advance funding of its appeal of a customs determination that books that the appellant was attempting to import were obscene, challenging this decision as being contrary to the Charter. The Court first asserted that "public interest advance costs orders are to remain special and, as a result, exceptional". It also disclaimed access to justice as the "paramount consideration" in the decision to award advance costs, and clarified the criteria articulated in *Okanagan*: "First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large". Further, the applicant "must prove that the interests of justice would not be served if a lack of resources made it necessary to abort the litigation". To meet this requirement, "the applicant must explore all other possible funding options" and demonstrate that it has tried and failed to obtain private funding "through fundraising campaigns, loan applications, contingency fee agreements and any other available options". If the applicant is not impecunious, he must be

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<sup>126</sup> Tollefson 2002 at 188.

<sup>127</sup> *Singh v Canada (AG)* [1999] 4 FC 583.

<sup>128</sup> See, eg, *Horsefield v Ontario (Registrar of Motor Vehicles)* (1999) 44 OR (3d) 73 (CA); *B(R) v Children's Aid Society of Metropolitan Toronto* 10 OR (3d) 321 (1992).

<sup>129</sup> See, eg, *Schacter v Canada*, [1992] 2 SCR 679; *Blencoe v BC (Human Rights Commission)* [2000] 2 SCR 307.

<sup>130</sup> *British Columbia (Ministry of Forests) v Okanagan Indian* [2003] SCR 371.

<sup>131</sup> *Id* at para 40.

<sup>132</sup> *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue)* [2007] 1 SCR 38.

prepared to contribute financially to the litigation. Moreover, the application for advance costs will fail if the parties could settle the issue or if “the public interest could be satisfied, without an advance costs award”.<sup>133</sup> Finally, if the Court grants an advance costs award, it must impose or approve a “definite structure” for the litigation. Applying these criteria, the Court denied the advance costs award.

## 3.2 United Kingdom

**Like the Canadian courts, courts in the United Kingdom have absolved losing public interest litigants of costs.** For example, in *R v Secretary of State for the Environment, Transport and Regions Ex p. Challenger*,<sup>134</sup> the Court exercised its discretion not to order the plaintiffs to pay the government’s costs, after the plaintiffs unsuccessfully sought judicial review of a government decision to hold a public inquiry on railway development without supplying them with legal aid to assist them in presenting their case. The Court reasoned that, although the plaintiffs lost, they had presented a case that was not only genuine, but also involved “points which are potentially of some importance”. In particular, the Court noted that they were “applicants of limited resources”, and that their impecunious situation served as an element of their substantive case, concluding that “it would not be just or reasonable to order them to pay the respondents’ costs” – but noting that this decision should not be understood as a general endorsement of such non-payment of costs.

**In addition, in the United Kingdom a public interest litigant can seek protection from costs awards at the start of litigation. A “protective cost order” is “an order ... that the costs payable by a party (generally, but not invariably, a claimant) will be capped in the event that they are unsuccessful in litigation”.**<sup>135</sup> The High Court first articulated the principles determining the availability of protective cost orders in the public interest context in the *Child Poverty Action Group* case.<sup>136</sup> This case defined a “public law challenge” as a case that “raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case”. It articulated the following criteria to determine when a protective costs order should be used to cap costs in advance:

- the court must be satisfied that the issues raised are “truly ones of general public importance”, and have “a sufficient appreciation of the merits of the claim” to conclude that it is in the public interest to make the order.
- the court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue, with it being “more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing”.<sup>137</sup>

The High Court cautioned, however, that “the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances”. It cited two reasons for exercising caution: first, it will often not become clear whether an issue is of sufficient public importance to justify such an order before the substance of the case is heard, and second, it will rarely be possible to make a sufficient assessment of the merits of the claim at the interlocutory stage without allowing interlocutory proceedings to

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<sup>133</sup> Id at para 42.

<sup>134</sup> *R v Secretary of State for the Environment, Transport and Regions Ex p. Challenger* [2001] Env.L.R. 209.

<sup>135</sup> Aileen McColgan, “Limiting the costs of litigation – protective costs orders in the Court of Appeal,” 28 *Civil Justice Quarterly* 169 (2009) at 169.

<sup>136</sup> *R v Lord Chancellor Ex p. Child Poverty Action Group and R v DPP Ex p. Bull (for and on behalf of Amnesty International UK)* [1999] 1 WLR 347.

<sup>137</sup> Id at para 44.

become “dress rehearsals of the substantive applications”. (The Court refused to make a protective costs order in the *Child Poverty Action Group* case because it was not able to conclude on the material before it that the case raised matters of great public importance.)

In the wake of this leading case, courts issued several protective costs orders to enable public interest matters to be adjudicated.<sup>138</sup>

**The Court of Appeal clarified and rearticulated the standards for issuing a protective cost order (“PCO”) in the *Corner House* case.<sup>139</sup> The Court expressed concern that the guidelines articulated in the *Child Poverty Action Group* case were cumbersome to apply and had not significantly encouraged access to justice in public interest cases.<sup>140</sup> It substituted the following guidelines:**

- (1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
  - (i) the issues raised are of general public importance;
  - (ii) the public interest requires that those issues should be resolved;
  - (iii) the applicant has no private interest in the outcome of the case;
  - (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and
  - (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
- (2) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.
- (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.<sup>141</sup>

The Court of Appeal also noted that PCOs can take several different forms:

- i) A case where the claimant’s lawyers were acting *pro bono*, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome;
- ii) A case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping their maximum liability for costs if they lost;
- iii) A case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost;
- iv) The present case where the claimants are bringing the proceedings with the benefit of a conditional fee agreement, which is otherwise identical to (iii).<sup>142</sup>

Protective cost orders can be justified because the very act of bringing the issues to the court’s attention can itself serve the public interest. Note that the Court of Appeal removed the requirement from *Child Poverty Action Group* case that the Court have “sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order”.<sup>143</sup> Instead, the Court now need only be satisfied that the issues are of general public importance and that it is in the public interest that they be resolved. However, the revised test restricts public

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<sup>138</sup> See [2005] 1 WLR 2600 at para 52.

<sup>139</sup> *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

<sup>140</sup> *Id* at para 70.

<sup>141</sup> *Id* at para 74.

<sup>142</sup> *Id* at para 75, bracketed information omitted.

<sup>143</sup> [1999] 1 WLR 347 at 358 C-E.

interest cases to those in which the applicant has “no private interest in the outcome of the case”. Scholars have noted that this effectively prevents any PCOs in cases brought under the Human Rights Act, which grants causes of action only to those whose rights have been violated.<sup>144</sup>

**At the same time as revising the guidelines for protective cost orders, the Court of Appeal instituted a “financial disincentive for those who believe they can apply for a PCO as a matter of course”, to prevent abuse of the mechanism.**<sup>145</sup> If the applicant seeks a PCO and fails, it will be liable for the costs incurred by the defendant in opposing the PCO application – although the Court suggested that only very modest costs should be awarded in such instances. Nevertheless, a public interest litigant seeking a PCO faces significant financial risk just by filing the application.<sup>146</sup> Although the desire for a safeguard is understandable, the potential costs seem to make a PCO virtually impossible for most public interest litigants to attain in practice.<sup>147</sup>

**The English courts have also eliminated the principle initially articulated in *Child Poverty Action Group* that PCOs should be issued only in exceptional cases.** In 2008, the *Report of the Working Group on Access to Environmental Justice* expressly questioned this exceptionality test on the ground that it was “being applied so as to set too high a threshold”, which would guarantee that PCOs “made no significant contribution to remedying the access to justice deficit it was intended to deal with”.<sup>148</sup> In the *Wiltshire Primary Care Trust* case,<sup>149</sup> the Court of Appeal quoted this report in concluding that exceptionality was not an additional criteria to the basic principles set in the *Corner House* case. It further clarified that the requirement of “general” public importance did not mean that the issue “must be of interest to all the public nationally” but is rather “a question of degree”. In the *Buglife* case, the Court of Appeal confirmed that “there is no principle of exceptionality which imposes additional criteria to those set out in *Corner House*”.<sup>150</sup>

**The UK government is in the process of institutionalising the concept of protective costs in respect of personal injury claims, by introducing a regime of “qualified one way costs shifting (QOCS)”,** through amendments to the Civil Procedure Rules under discussion in 2012. The objective would be to ensure that “claimants conducting their case properly will not have to pay towards defendants’ costs if the claim fails”. The basic principles would be as follows:

- QOCS will apply to all claimants whatever their means.
- As a general rule, claimants who lose will not have to contribute to defendants’ costs.
- QOCS protection would be lost if –
  - the claim is found to be fraudulent on the balance of probabilities;
  - the claimant has failed to secure an award higher than a defendant’s offer to settle; or
  - the case has been struck from the roll because where the claim discloses no reasonable cause of action or is otherwise an abuse of the court’s process.
- QOCS protection would be allowed for all appeal proceedings, since the requirement of obtaining leave to appeal controls unmeritorious appeals.<sup>151</sup>

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<sup>144</sup> Richard Clayton, “Public Interest Litigation, Costs and the Role of Legal Aid,” 2006 *Public Law* 429 at 431.

<sup>145</sup> [2005] 1 WLR 2600 at para 78.

<sup>146</sup> According to two practitioners, the overall risk a potential public interest claimant faces may be in excess of £10,000. Richard Stein & Jamie Beagent, “*R (Corner House Research) v The Secretary of State for Trade and Industry*,” 17 *Journal of Environmental Law* 413 (2005) at 441.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Report of the Working Group on Access to Environmental Justice* (2008), appendix 3.

<sup>149</sup> *R (on the application of Compton) v Wiltshire Primary Care Trust (Compton)* [2008] EWCA Civ 749 at para 24.

<sup>150</sup> *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209 at paras 18-20.

<sup>151</sup> Ministerial statement on *Implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Civil Litigation Funding and Costs*, Ministry of Justice, 17 July 2012, accessed at [www.parliament.uk/documents/commons-vote-office/July\\_2012/17-07-12/18-Justice-LegalAidAct.pdf](http://www.parliament.uk/documents/commons-vote-office/July_2012/17-07-12/18-Justice-LegalAidAct.pdf).

The UK Law Society has pointed out that this limitation on costs shifting will not protect losing claimants against the costs of the defendant's disbursements.<sup>152</sup>

**The current law reform initiatives will also amend the Civil Procedure Rules to encourage early settlement**, in line with the following principles:

- An additional amount will be payable by a defendant who does not accept a claimant's offer to settle, if the court gives judgment for the claimant that is at least as advantageous as the claimant's proposal for settlement.
- This additional amount will be calculated as 10% of damages where damages are in issue, and 10% of costs for non-damages claims. In mixed claims involving both damages and non-damages, the sanction will be calculated as 10% of the damages element of the claim.
- This sanction will, however, be subject to a tapering system for claims over £500 000, so that the maximum sanction is likely to be £75 000.<sup>153</sup>

**The encouragement of early settlements is viewed as another mechanism which will help to reduce costs to litigants.**<sup>154</sup>

**Many litigants in the UK have either "before-the-event" or "after-the-event" insurance for lawsuits.** "Before-the-event" insurance provides general coverage for potential litigation costs, while "after-the-event" insurance is taken out after an event which could lead to litigation (such as an accident which has resulted in injuries) in order to indemnify the policyholder against the amount which might have to be paid for the opponent's costs, as well as the policyholder's own disbursements, if the lawsuit is lost. Actual payment of the insurance premiums can be deferred until after the outcome of the case; it is also possible to take out loans to cover the costs of the premiums. A policyholder who is successful in the ensuing litigation could previously claim the "after-the-event" insurance premiums as part of his or her costs, but this has recently changed. An unsuccessful litigant must, of course, pay the deferred premium or repay the loan obtained for payment of the premium.<sup>155</sup>

### 3.3 Australia

**Since the early 1970s, Australian courts have "regularly declined to make cost orders against unsuccessful litigants in cases of public importance".**<sup>156</sup> **The Australian courts appear to have first articulated this practice as a rule in 1997 in *Oshlack v Richmond River Council*.**<sup>157</sup> In this case, the High Court affirmed a decision to decline to award costs against a losing plaintiff who had challenged the validity of a consent for the development of a subdivision of land. The Court identified cases vindicating the public interest as a category of litigation that warrants departure from the general rule of awarding costs to the successful party. The Court did not define "public

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<sup>152</sup> "Proposals for reform of civil litigation funding and costs in England and Wales: Implementation of Lord Justice Jackson's recommendations, Response by The Law Society", February 2011 at para 2.5, available at [www.lawsociety.org.uk/Representation/Policy-Discussion/Proposals-for-reform-of-civil-litigation-funding-and-costs-Law-Society-response/](http://www.lawsociety.org.uk/Representation/Policy-Discussion/Proposals-for-reform-of-civil-litigation-funding-and-costs-Law-Society-response/).

<sup>153</sup> Ibid.

<sup>154</sup> See "Proposals for reform of civil litigation funding and costs in England and Wales: Implementation of Lord Justice Jackson's recommendations, Response by The Law Society", February 2011 at para 1.7.

<sup>155</sup> See "Conditional fee agreements" at FindLaw UK, [www.findlaw.co.uk/law/dispute\\_resolution/litigation/costs\\_and\\_funding/500227.html](http://www.findlaw.co.uk/law/dispute_resolution/litigation/costs_and_funding/500227.html). Section 27 of the Access to Justice Act 1999 amended the Courts and Legal Services Act 1990 to allow recovery of success fees from the losing party, effective 1 April 2000. This has since been changed by section 44 of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amends Courts and Legal Services Act 1990 and will come into force for most types of claims on 1 April 2013. Section 46 of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 also amends the Courts and Legal Services Act 1990 to provide that after-the-event insurance premiums will not be recoverable as costs in most categories of cases.

<sup>156</sup> Chakrabarti et al at 707 cites numerous cases as examples of this rule.

<sup>157</sup> *Oshlack v Richmond River Council* [1998] HCA 11; (1997) 152 ALR 83.

interest litigation,” but considered that precedent from Australia and other jurisdictions demonstrated that courts have declined to award costs in cases where “a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain”. It cited the following as factors relevant to determining whether a case constitutes public interest litigation: whether public rights were at issue, the arguability of the case, whether a significant number of people share the concerns of the applicant, the seriousness and significance of the issues raised, and the appellant’s objectives in pursuing it. The Court dismissed concerns that permitting plaintiffs to bring test cases without cost would open the floodgates of excessive litigation and concluded based on experience that that the flood would actually constitute “little more than a modest flow”.<sup>158</sup>

### 3.4 South Africa

In South Africa, as in Namibia, two principles generally govern costs: the decision, “unless expressly otherwise enacted, is in the discretion of the presiding judicial officer”, and costs should generally be awarded in favour of the successful party.<sup>159</sup> In practice, however, South African courts decline to order unsuccessful public interest plaintiffs to pay the state’s costs when they raise “genuine constitutional questions”.<sup>160</sup>

**In the 2009 *Biowatch* case,<sup>161</sup> the Constitutional Court articulated and elucidated a two-prong test for determining cost awards in constitutional litigation: the court should consider (1) whether a costs order “would hinder or promote the advancement of constitutional justice”<sup>162</sup> and (2) whether the constitutional litigation was “frivolous or vexatious, or in any other way manifestly inappropriate”.<sup>163</sup>** In the underlying litigation, *Biowatch*, an environmental watchdog organisation, sought information from government bodies. The High Court found that the Registrar for Genetic Resources had “been in default of his responsibilities in a number of respects, and made several orders in *Biowatch*’s favour”. However, *Biowatch* had made “inept requests for information”. Therefore, the High Court did not award costs against the government. A multinational biotechnology company, *Monsanto*, had intervened. The High Court held that that *Biowatch*’s conduct had compelled *Monsanto* to intervene, particularly to prevent *Biowatch* from gaining access to confidential information supplied by *Monsanto* to the Registrar. It therefore ordered *Biowatch* to pay *Monsanto*’s costs, even though *Biowatch* had been largely successful in its claim.<sup>164</sup> After the Transvaal Provincial Division (Full Court) upheld the costs order,<sup>165</sup> the Constitutional Court granted leave to appeal.<sup>166</sup>

The Constitutional Court, although noting that judicial discretion should remain flexible, concluded that it was “both possible and desirable” to develop “some general points of departure with regard to costs in constitutional litigation”, especially in respect of cases involving the right to information and environmental justice. First, the Court concluded that **the enquiry should**

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<sup>158</sup> Id at para 121, quoting *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 at 245 (and upholding that lower court decision).

<sup>159</sup> See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC) at para 3.

<sup>160</sup> *Chakrabarti et al* at 708.

<sup>161</sup> *Trustees, Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC) at para 6.

<sup>162</sup> Id at para 6.

<sup>163</sup> Id at para 24.

<sup>164</sup> *Trustees, Biowatch Trust v Registrar: Genetic Resources and others* 2005 (4) SA 111 (T).

<sup>165</sup> *Trustees, Biowatch Trust v Registrar: Genetic Resources and others*, Case number A831/2005, North Gauteng High Court, Pretoria, 6 November 2007 (unreported).

<sup>166</sup> *Biowatch* applied for leave to appeal directly to the Constitutional Court from the Full Court judgment, but the Constitutional Court held it was inappropriate to bypass the Supreme Court of Appeal. The SCA, however, refused the application, without providing reasons. 2009 (6) SA 232 (CC) at para 4.

**begin with the nature of the issues, rather than the status of the parties as public interest organisations;** “what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it”.<sup>167</sup>

Second, the Court concluded that, as a general rule, **an unsuccessful litigant in constitutional litigation should not be ordered to pay costs in favour of the state**, for three reasons: (1) **to diminish the “chilling effect”** that adverse costs orders would have on parties seeking to assert constitutional rights; (2) because, regardless of the outcome, **constitutional litigation affects and clarifies the rights of persons in similar situations to the litigants and so is for the good of the public;** and (3) because **each constitutional case “enriches the general body of constitutional jurisprudence** and adds texture to what it means to be living in a constitutional democracy”.<sup>168</sup>

Third, **the state should not be able to recover costs from a losing public interest litigant because the state “bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution”.** Yet the rule is not without limits. To benefit from the rule, the issues in the litigation must be “genuine and substantive, and truly raise constitutional considerations relevant to the adjudication”. If an application is “frivolous or vexatious, or in any other way manifestly inappropriate”, the applicant will not be protected against an adverse costs award.<sup>169</sup>

Applying these principles to the case at hand, the Constitutional Court overturned the cost award in favour of Monsanto and awarded costs against the state in respect of the lower court litigation. It considered that Biowatch achieved “substantial success” in its litigation against the state, receiving a “favourable response” from the court in eight of the eleven categories of information it sought. Any “ineptitude” in Biowatch’s framing of requests for information “fell far short of the kind of misconduct that would have justified the Court in refusing” to award costs to a substantially successful litigant in a constitutional case. Furthermore, the application was neither frivolous nor vexatious, but raised compelling constitutional issues. Finally, as the High Court had found, Biowatch had effectively been compelled to go to court by “the persistent failure of the governmental authorities to provide legitimately-sought information”.<sup>170</sup>

The Court then addressed the costs award in favour of Monsanto, ruling that the High Court had failed to consider appropriately that the litigation raised constitutional issues, that the state’s conduct had provoked the litigation, or that Biowatch had been substantially successful. The Constitutional Court therefore overturned the costs order in favour of Monsanto.<sup>171</sup>

The Constitutional Court elaborated in a subsequent case how this approach to costs can be beneficial:

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<sup>167</sup> Id at para 20.

<sup>168</sup> Id at paras 21-23.

<sup>169</sup> Id at paras 23-25.

<sup>170</sup> Id at paras 43-47.

<sup>171</sup> Id at paras 53-58. For some examples of Constitutional Court cases applying and refining the *Biowatch* approach, see *Wiese v Government Employees Pension Fund and others* [2012] ZACC 5; *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC); *Moutse Demarcation Forum and others v President of the Republic of South Africa and others* 2011 (11) BCLR 1158 (CC); *Falk and Another v National Director of Public Prosecutions* 2012 (1) SACR 265 (CC); *Camps Bay Ratepayers and Residents Association and another v Harrison and another* 2011 (4) SA 42 (CC); *De Lacy and another v South African Post Office* 2011 (9) BCLR 905 (CC); *Governing Body of the Juma Masjid Primary School and others v Essay NO and others* 2011 (8) BCLR 761 (CC); 2011 (12) BCLR 1225 (CC); *Nokotyana and others v Ekurhuleni Metropolitan Municipality and others* 2010 (4) BCLR 312 (CC); *Bothma v Els and others* 2010 (2) SA 622 (CC); *Koyabe and others v Minister for Home Affairs and others* 2010 (4) SA 327 (CC); *Women’s Legal Trust v President of the Republic of South Africa and others* 2009 (6) SA 94 (CC).

It is true that litigation of this sort is expensive and requires great expertise. South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to costs in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order. The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued.<sup>172</sup>

**Constitutional issues are most likely to arise in cases addressing the regulatory role of the state, where the litigation is between the state and a private party but has a “radiating impact on other private parties”.**<sup>173</sup> However, the same approach to costs orders has been taken with respect to constitutional cases arising between private parties. For example, in *Barkhuizen v Napier*,<sup>174</sup> the Constitutional Court declined to order costs against a driver involved in litigation against his insurance company:

This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances justice and fairness require that the applicant should not be burdened with an order of costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and the Courts below.<sup>175</sup>

**There are also several recent South African cases where courts have awarded costs in instances where the successful litigant was being represented *pro bono*.** For example, costs were awarded in such circumstances in *Naude v Bioscience Brands Ltd*, with the Labour Court citing “considerations of law and fairness” and an analogy to the High Court rule allowing costs to be awarded in respect of litigants *in forma pauperis*.<sup>176</sup>

The Labour Court considered the issue at greater length in *Zeman v Quickelberge and another*:<sup>177</sup>

In litigation the *pro bono* client is at a disadvantage. As between attorney and client, the attorney for the *pro bono* litigant can only claim such expenses from the client as are actually incurred by the attorney. It has been argued that since his client has incurred no fees, the attorney acting *pro bono* can claim no fees, only disbursements, from the losing party. The problem with this view is that it enables the opposing party to litigate with impunity, discourages settlement, and militates against public interest. In addition it is unfair. Nothing constrains the opposing party from obtaining a cost order against a *pro bono* client. The argument that because the *pro bono* litigant has incurred no costs and does therefore not need to be indemnified for his costs, is ... ill-founded.<sup>178</sup>

The Court cited the High Court rule on cost in respect litigants *in forma pauperis* and the Magistrate’s Court Rules on *pro Deo* litigants (both with analogies in Namibia<sup>179</sup>), the provisions of South Africa’s Legal Aid Act 22 of 1969 which entitle the Legal Aid Board to recover costs

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<sup>172</sup> *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) at para 165 (footnote omitted).

<sup>173</sup> *Trustees, Biowatch Trust v Registrar, Genetic Resources & Others* 2009 (6) SA 232 (CC) at para 28.

<sup>174</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>175</sup> Id at 90.

<sup>176</sup> *Naude v Bioscience Brands Ltd* [2010] ZALC 42 at para 89. Namibia has a similar rule on litigants *in forma pauperis*. See High Court Rules, Rule 41(7).

<sup>177</sup> *Zeman v Quickelberge and another* [2010] ZALC 122.

<sup>178</sup> Id at para 74-77.

<sup>179</sup> See High Court Rules, Rule 41(7) and Magistrates’ Courts Rules, Rule 53(5)-(6).



(similar to those in Namibia's Legal Aid Act 29 of 1990<sup>180</sup>) and the provisions in South Africa's Attorneys Act 53 of 1979 (as amended in 2000) stating that a litigant represented free of charge by a law clinic may obtain an order for costs as if those costs had actually been incurred. The Court also cited a provision in the Legal Services Bill under discussion in South Africa which would implement a similar rule for costs for *pro bono* work, as well as comparative case law from the United States.

In answer to concerns that allowing costs on such circumstances might in effect constitute unregulated contingency fees, the Court made the following comments:

Legal costs are usually recovered from the losing party on a scale as between party and party, and it is common knowledge that the prescribed tariff of fees is well below what attorneys actually charge their (paying) clients. Attorneys are unlikely to take on *pro bono* cases in the hope of winning costs on a scale as between party-and-party. In any event, even if this happened, the purpose of *pro bono* assistance will still be served in that an indigent client will have been afforded access to justice. The point of *pro bono* service is to provide access to justice to those who cannot afford it otherwise, not to focus on whether the legal representative of the *pro bono* client profits or not. It is this misplaced focus that has bedevilled the issue of whether a *pro bono* litigant can recover costs. In my view, access to justice to indigent clients should be encouraged ... Should a successful *pro bono* litigant be awarded costs, the unsuccessful party is no worse off than would otherwise be the case. The obverse is also true: A *pro bono* litigant still runs the risk of an adverse costs order against him or her. The knowledge that a losing party ... would never run the risk of an adverse costs order, would have a chilling effect on the willingness of legal practitioners to provide their services *pro bono*.<sup>181</sup>

The question was also considered extensively in *Thusi v Minister of Home Affairs and Others*.<sup>182</sup> Here, as in *Zeman*, the Court noted existing exceptions to the general rule that costs can be awarded only to indemnify expenses actually incurred, and concluded that these exceptions indicate that "in the area of assisting the indigent to obtain access to justice there is no public policy reason precluding the attorney from recovering costs on an order in favour of the client".<sup>183</sup> In South Africa, this principle is further supported by the statute authorising contingency fees (discussed below) and judicial interpretations of the Constitutional right of access to justice. The Court asserted that there was no decisive authority either for or against awarding costs in favour of a client who was represented *pro bono*, citing the following justifications for allowing such costs:

Litigants bringing similar proceedings who have the means to pay their legal representatives are entitled to obtain orders for costs and to tax them against the Department. Such litigants could agree with their attorney that the latter would wait for the outcome of the case before rendering a bill. Essentially that is what the applicants seek. To deny them the benefit of an exception to the general principle would deny justice to some who are amongst the poorest in our society and least able, as I said at the outset, to deal with an inefficient and heartless bureaucracy. It would place them at a disadvantage in relation to people of means. It would also provide those who are at fault with a fortuitous benefit because of the willingness of the attorneys to undertake these cases at their own risk.<sup>184</sup>

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<sup>180</sup> Section 17 of Namibia's Legal Aid Act states: "(1) Where a court awards costs to a legally aided person in any proceedings, such costs shall be the costs which would have been payable if the services performed under legal aid had been performed by a practitioner on the instruction of a client without benefit of legal aid, and such costs shall be taxed accordingly." and "(2) Notwithstanding that costs referred to in subsection (1) have been awarded to the legally aided person, such costs shall be payable to the Director."

<sup>181</sup> [2010] ZALC 122 at paras 101-103.

<sup>182</sup> *Thusi v Minister of Home Affairs and Others* 2011 (2) SA 561 (KZP).

<sup>183</sup> 2011 (2) SA 561 (KZP) at para 108.

<sup>184</sup> *Id* at para 109.

The Court therefore concluded that a judicial exception was warranted, and held that “an order for costs may be granted in favour of a successful applicant (1) where the litigant is indigent and is seeking to enforce constitutional rights against an organ of state; and (2) the legal representative acts on their behalf for no fee and accepts liability for all disbursements; and (3) the litigant agrees that the legal representative will be entitled to the benefit of any costs order made by the court or tribunal in his or her favour”.<sup>185</sup>

Another justification was put forward in the 2012 case of *Section 27 and Others v Minister of Education and Another*, where the North Gauteng High Court awarded costs in respect of *pro bono* legal representation, remarking that –

the relationship between the attorney and client with regard to the issue of *pro bono* costs, is not an issue that involves the respondents, and I cannot imagine that the respondents can seek to obtain benefit from that. In any event in this regard, one must take cognisance of the fact that the role of civil society organisations in this regard, is important in facilitating access to courts in order to vindicate Constitutional rights, and to the extent that they are successful, there is no reason why they should not be entitled to costs, even if they act on a *pro bono* basis having regard to the issues of sustainability and financial integrity that such organisations face on a continued basis.<sup>186</sup>

## 4. Recommendations on costs

**Namibian courts should promulgate rules stating that public interest plaintiffs will not be required to pay defendants’ costs when certain criteria are met.** Such plaintiffs are already exempted from costs orders on an *ad hoc* basis, but this approach is inadequate. First, the decision not to award costs to a winning defendant in important constitutional cases occurs only *after* litigation has ended – meaning that a public interest plaintiff must risk liability for the defendants’ costs and can only hope that he or she will not be held responsible for them at the end of the day. Second, the exceptions occur only infrequently, and sporadic protection is insufficient to prevent the fear of liability for costs from inhibiting public interest litigation. Namibian courts should provide more certainty by enacting a court rule that expressly empowers courts to decline to award costs to defendants in unsuccessful public interest cases, with criteria to guide the court’s discretion. Although this rule would still be applied on a case-by-case basis, articulation as a rule would help to create a uniform and predictable practice.

**The envisaged rule should define “public interest cases” as those that involve a dispute about a novel issue of public importance.** The rule should require the issue to be novel because one of the justifications for encouraging public interest litigation is that the public benefits from courts’ explication of the law, even when the plaintiff loses. The issue raised must also be of public importance, so that the public good is served by the litigation regardless of the outcome. These cases will consist primarily of challenges “to legislation, policy or practice of wide or potentially wide application or consequence, or exciting wide controversy”.<sup>187</sup>

**The rule should distinguish, however, between the merits of the claim as ultimately adjudicated and the merits of bringing the claim in the first place.**<sup>188</sup> A claim may ultimately

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<sup>185</sup> Id at para 111.

<sup>186</sup> *Section 27 and Others v Minister of Education and Another* [2012] ZAGPPHC 114 at para 42. See also *Rogers v Hendricks* [2007] 2 All SA 386 (C), where the Western Cape High Court held that costs could be awarded in respect of a contingency fee agreement which was not compliant with all of the technical requirements in the Act, after the legal practitioner had initially acted *pro bono*.

<sup>187</sup> Chakrabarti et al at 712.

<sup>188</sup> Ibid.

lose, but bringing the case may still be of benefit to the public because it clarifies a controversial point of law. Indeed, if the rule restricted cases of public importance to cases in which the plaintiff won, the entire purpose of the rule would be rendered moot. The courts should protect plaintiffs against fees in cases involving constitutional issues because it is of national benefit to clarify the meaning and reach of the Constitution. That a case is expressly pursued as impact litigation and that the attorneys in the case are acting *pro bono* should both be factors in favour of an order that the plaintiff not be held liable for the defendant's costs if the case is lost.

**The proposed rule should *not* require that the plaintiff lack any personal stake in the outcome of the litigation.** Such a requirement would conflict with current standing rules that require that an applicant have a "direct and substantial" interest in the litigation, and would mean that no one could take advantage of the rule. The rule should also follow the example set by Canada and decline to base the rule's applicability on the identity of the plaintiff, because a private party can bring cases of widespread social importance. Newspapers, for example, may be the best litigants to bring cases involving rights of free expression.

**Courts should continue to have discretion to award costs against plaintiffs ostensibly bringing actions in the public interest which are, in fact, frivolous or vexatious.** In cases such as these, courts should be able to award costs on a party and party or a counsel and client basis.

**Furthermore, public interest plaintiffs should not be protected from costs if they fail to win more than the defendants have offered in settlement.** Under current magistrate court rules, a defendant may make a settlement offer by paying the offered amount into the court. If the plaintiff fails to win more than the offered amount, the court may order the plaintiff to pay the defendant's costs after the settlement offer.<sup>189</sup> Similarly, in the High Court, failure to accept an offer of settlement can be taken into account in awarding costs,<sup>190</sup> and judicial discretion is usually exercised in the circumstances described to order the defendant to pay the plaintiff's costs up to the date of the offer of settlement while the plaintiff pays the defendant's costs thereafter.<sup>191</sup> A rule protecting public interest plaintiffs from costs awards should not affect these rules.

**A court should be able to make an order protecting a plaintiff from costs at any time during litigation, but the rule should indicate a strong preference for protective costs orders made before trial.** If such costs orders are issued only at the end of litigation, public interest plaintiffs might be discouraged by the uncertainty from bringing the action at all. By permitting the equivalent of British protective costs orders issued at the beginning of litigation, the courts can insulate plaintiffs from the risk of costs awards from the beginning of the litigation. In the case of an order before litigation, the court may also consider whether "the defendant's superiority in terms of its financial capacity to bear the costs of the litigation creates an inequality of arms".<sup>192</sup>

**New court rules to this effect could encourage useful public interest litigation, without seriously undermining the general rules regarding costs which are currently operative.**

**As an additional issue, the law should also be clarified to allow costs awards in favour of litigants who are represented *pro bono*.** The proposed provision on this topic in the South African Legal Services Bill 2012 could be considered as a model (see box).

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<sup>189</sup> Magistrates Court Rules, Rule 18(2)(a) and (6).

<sup>190</sup> High Court Rules, Rule 34(11)-(12).

<sup>191</sup> See *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 16-17.

<sup>192</sup> Chakrabarti et al at 713.

**excerpt from  
South African Legal Services Bill 2012**

**Recovery of costs by attorneys rendering free legal services**

**92.** (1) Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other person by an attorney, and costs become payable to that litigant or other person in terms of a judgment of the court or a settlement, or otherwise, that litigant or other person must be deemed to have ceded his or her rights to the costs to that attorney or practice.

(2) (a) A litigant or person referred to in subsection (1) or the attorney concerned may, at any time before payment of the costs referred to in subsection (1), give notice in writing to –

- (i) the person liable for those costs; and
- (ii) the registrar or clerk of the court concerned,

that the legal services are being or have been rendered for free by that attorney or practice.

(b) Where notice has been given as provided for in paragraph (a), the attorney concerned may proceed in his or her own name, or the name of his or her practice, to have those costs taxed, where appropriate, and to recover them, without being formally substituted for the litigant or person referred to in subsection (1).

(3) The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the litigant or person to whom the legal services were rendered by the attorney actually incurred the costs of obtaining the services of the attorney acting on his or her behalf in the proceedings or dispute concerned.

# PART B:

## CONTINGENCY FEES

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Another possible strategy that could increase access to justice is some form of conditional or contingency fees. **In either a conditional or contingency fee system, a party is not responsible for any legal fees if his action is not successful.** Under a **conditional fee system**, the legal practitioner's payment in the event of success is based on normal hourly rates, sometimes topped up with an extra percentage. Under a **contingency fee system**, the payment is based on the size of the damage award, usually calculated as a fixed percentage of the sum recovered. In both systems, it is possible for the payment to be adjusted based on the stage reached in the proceedings, so that cases which settle early are compensated at a lower rate. Contingency fee percentages can also be set up to vary depending on the magnitude of the award.

### 1. Current position in Namibia

**A conditional contingency fee agreement (also known as a “no win, no fee” agreement) provides that the client will pay counsel on an agreed basis if the case is successful. Such agreements are not currently permitted in Namibia, although there are some anecdotal reports that they are being utilised in practice nonetheless.**

**Legal practitioners in Namibia are expressly forbidden by Rules of the Law Society of Namibia from entering into ‘contingency fee’ agreements.** Rule 21(2)(n) provides that a member of the Law Society will be considered not to comply with the required professional standards if he or she agrees to charge, or charges, a contingency fee. The rule defines a contingency fee as a fee that is charged only if the matter is “partially or entirely successful or otherwise based on the outcome of the matter”.<sup>193</sup>

**There is Roman-Dutch authority prohibiting agreements whereby a lawyer agrees with a client to take a share in a lawsuit,<sup>194</sup> and such agreements arguably offend common law rules against maintenance and champerty.** The South African Law Reform Commission has defined “maintenance” as “the act of assisting the plaintiff in any legal proceedings in which the person giving the assistance has no valuable interest, or in which he acts from an improper motive”. Champerty consists of “an agreement that if the proceedings in which the maintenance occurs succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainer”.<sup>195</sup> As the Supreme Court of Appeal observed in a recent South African case, “English common law condemned champerty out of a concern for the integrity of the judicial system; the fear that champertous agreements may give rise to abuses such as the inflation of

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<sup>193</sup> Rules of the Law Society of Namibia are set forth in General Notice 340/2002 (GG 2848). General Notice 251/2004 (GG 3313) amends Rule 24. General Notice 385/2007 (GG 3948) amends Rules 1, 6, 9, 13, 19, 20, 21, 22 and 24 and inserts Rule 20A. General Notice 308/2008 (GG 4120) amends Rule 21.

<sup>194</sup> This has been canvassed in an opinion for the Law Society of Namibia by Mr M Paleker, Senior Lecturer, Department of Private Law, University of Cape Town, South Africa, Attorney of the High Court of South Africa, dated 20 June 2006. Voet 2.14.18, Grotius 3.1.41 and Van der Leeuwen 5.4.2 are amongst the sources he cites. Some case law has suggested that the Roman-Dutch prohibition was not absolute. See, for example, *Hollard v Zietsman* (1885) NLR 93 and *Goodgold Jewellery (Pty) Ltd v Brevadau CC* 1992 (4) SA 474 (W) at 479G-H – but Mr Paleker suggests that this is the result of the influence of English law on the courts in question and not a clear statement of Roman-Dutch law.

<sup>195</sup> South African Law Commission, *Project 93: Speculative and Contingency Fees, Report* (1996) at 1.14.

damages; the suppressing of evidence and the suborning of witnesses”.<sup>196</sup> However, the Court also remarked in the same case that “[t]he law of maintenance and champerty developed out of a need to protect the system of civil justice; and as the civil justice system has developed its own inner strength the need for the rules for maintenance and champerty has diminished – if not entirely disappeared”.<sup>197</sup>

**In 1996, the South African Law Reform Commission concluded that while cases interpreting the common law do not hold that contingency fee agreements are necessarily unlawful, such agreements are of doubtful validity:**

From the case law and common law authorities consulted it can reasonably be inferred that agreements containing contingency fee arrangements are at least of doubtful validity. If such agreements are not bona fide entered into, are against public policy, are champertous, amount to trafficking or speculation in litigation or the sale and purchase of the subject-matter of a lawsuit, or are entered into after confidences between lawyer and client have been exchanged, they are illegal. Naturally the circumstances under which each such agreement was entered into have to be evaluated... to determine its legality.<sup>198</sup>

**Pre-Independence precedent in Namibia has found that contingency fee arrangements are not enforceable.** In the “South West African” case of *Gramowsky v Steyn*, the Court commented that “a contract by which an attorney agrees to accept from this client, in lieu of fees, a commission on any amount that may be recovered as a result of an action which is being instituted, is a contract which a court of law should not enforce”.<sup>199</sup> The Court in this case held that such a contract was *contra bonos mores* (against public morality). This was confirmed in the subsequent “South West African” case of *Law Society of SWA v Steyn*.<sup>200</sup>

Since independence, a member of the Law Society of Namibia has been fined in a disciplinary proceeding for charging a client a contingency fee; this was noted without comment by the Court in an application to strike the attorney from the roll as a sanction for another charge.<sup>201</sup>

**However, the common law position has not been challenged in light of Namibia’s Constitution.** A 2004 South African case, *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd*,<sup>202</sup> gives an overview of the South African common law and concludes, in light of the Constitutional values which have altered understandings of public policy, that agreements which might once have been considered champertous are not automatically contrary to public policy or void. The agreement in question was not a contingency fee concluded with a lawyer, but a similar arrangement with a non-lawyer whereby funding for litigation was essentially exchanged for a share in any future damages award.

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<sup>196</sup> *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) at para 30.

<sup>197</sup> Id at para 32. More specifically, the Court noted: “The judiciary is independent. Its independence is guaranteed by the Constitution. The civil justice system is regulated by the state and has the necessary mechanisms to withstand the abuses perceived to flow from champertous agreements. There are trained and disciplined legal professionals who are subject to strong ethical codes. And there are pre-trial procedures such as discovery to ensure that evidence is not fabricated or suppressed. There is also the trial itself where the veracity of the evidence can be properly tested. There is also the cost of losing. This is a great disincentive to the dishonest litigant.” At para 39.

<sup>198</sup> South African Law Commission, *Project 93: Speculative and Contingency Fees, Report*, 1996 at 1.19.

<sup>199</sup> *Gramowsky v Steyn* 1922 SWA 48 at 52.

<sup>200</sup> *Law Society of SWA v Steyn* 1923 SWA 46. These cases were cited in the Paleker opinion.

<sup>201</sup> *Disciplinary Committee for Legal Practitioners v Murorua and Another* [2012] NAHC 161. The legal practitioner in question disputed that he had been rightly convicted of any of the three offences considered at the disciplinary hearing. The application was brought in terms of section 35(9) of the Legal Practitioners Act 15 of 1995, which requires an application to the Court for an order to strike a legal practitioner’s name from the roll or to suspend him or her from practice; therefore the focus of the case was another charge which had attracted this sanction. At paras 1, 21.

<sup>202</sup> *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA).

This case first surveyed the South African common law, arriving at a somewhat more liberal interpretation of it than the South African Law Reform Commission.<sup>203</sup>

[26] A number of cases decided in South Africa in the last years of the 19<sup>th</sup> and the early part of the 20<sup>th</sup> Century show that the courts took an uncompromising view of agreements which I shall call champertous (ie any agreement whereby an outsider provided finance to enable a party to litigate in return for a share of the proceeds of the action if that party was successful or any agreement whereby a party was said to ‘traffic’, gamble or speculate in litigation), and refused to entertain litigation following on such agreements or to enforce them.<sup>204</sup>

[27] However, it is clear that the courts acknowledged one exception. It was accepted that if any one, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void.<sup>205</sup> In a number of these early cases the courts adopted and applied statements pertaining to maintenance and champerty made by the Privy Council in *Ram Coomar Coondoo and another v Chunder Canto Mookerjee* 1886 2 AC 186 at 210. The Privy Council said that –

‘a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner’.

However, it 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’.<sup>206</sup>

This was early recognition that in a case where an injustice would be done if a litigant was not given financial assistance to conduct his case a champertous arrangement would not be contrary to public policy.

[28] Although the number of reported cases concerned with champertous agreements diminished, courts have still adhered to the view that generally they are unlawful and that litigation pursuant to such agreements should not be entertained.<sup>207</sup>

[29] The reasons for champertous agreements being considered to be contrary to public policy have not, so far, been reconsidered or tested by the courts in the light of changed circumstances and, in particular, in the light of the Constitution.

The Court cited the Constitutional right of access to justice,<sup>208</sup> which is similar to that contained in the Namibian Constitution,<sup>209</sup> as well as the right to freedom of contract which lies at the

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<sup>203</sup> Id at paras 26-29, with the Court’s bracketed citations shown here as footnotes (and case citations shown in full).

<sup>204</sup> Citing *Green v De Villiers, Dr Leyds, NO, and The Rand Exploring Syndicate* [1895] 2 OR 289 at 293-294; *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* [1894] 2 OR 336 at 339-341; *Schweizer’s Claimholders’ Rights Syndicate, Limited v The Rand Exploring Syndicate, Limited* [1896] 2 OR 140 at 144-5; *CVJJ Platteau v SP Grobler* [1897] 4 OR 389 at 394-396; *Campbell v Welverdiend Diamonds, Ltd* 1930 TPD 287 at 292-4.

<sup>205</sup> Per Kotze CJ in *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* [1894] 2 OR 336 at 340; *Schweizer’s Claimholders’ Rights Syndicate Limited v The Rand Exploring Syndicate, Limited* [1896] 2 OR 140 at 144; *Patz v Salzburg* 1907 TS 526 at 527.

<sup>206</sup> See *Platteau v Grobler* [1897] 4 OR 389 at 394-395; *Thomas Hugo and Fred J Möller NO v The Transvaal Loan, Finance and Mortgage Company* 1894] 2 OR 336 at 340; *Schweizer’s Claimholders’ Rights Syndicate, Limited v The Rand Exploring Syndicate Limited* [1896] 2 OR 140 at 144-5; *Patz v Salzburg* 1907 TS 526 at 527-528; *Campbell v Welverdiend Diamonds, Ltd* 1930 TPD 287 at 290-1.

<sup>207</sup> See eg *Lekeur v Santam Insurance Co Ltd* 1969 (3) SA 1 (C); *Goodgold Jewellery (Pty) Ltd v Brevadau CC* 1992 (4) SA 474 (W).

intersection of the Constitutional values of dignity, equality and freedom.<sup>210</sup> The case came to three conclusions:

- (1) an agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not contrary to public policy or void;
- (2) the illegality of such an agreement or an attorney's contingency fee agreement would not be a defence in the action;
- (3) litigation pursuant to such an agreement may constitute an abuse of the process which in appropriate circumstances a court may prevent notwithstanding a litigant's right of access to the courts enshrined in s 34 of the Constitution.<sup>211</sup>

However, this case dealt with an agreement involving a non-lawyer; as will be discussed in detail below, South African courts and law societies continue to disagree on whether it is permissible for a *legal practitioner* to make a contingency fee agreement under common law, outside the framework of the South African Contingency Fees Act.

**One can speculate that a Namibian case which drew on constitutional values might come to a conclusion permitting contingency fees concluded in good faith with legal practitioners. However, short of such a ruling it appears that enabling legislation would be necessary to make it possible for legal practitioners to enter into contingency fee agreements. This would be good policy in any event, as it would allow for the establishment of a protective framework for any new measures which are introduced.**

## 2. Comparative examples

### 2.1 United States

**Contingency fees were first used in the United States, against the backdrop that parties in the United States usually bear their own costs; costs do not normally follow the event.** Thus a party who brings a case under a contingency fee agreement and wins cannot count on the unsuccessful party bearing the costs of litigation – making the possibility of funding litigation from an as-yet-unobtained award particularly useful. At the same time, a party who brings a case under a contingency agreement and loses does not have to pay for the successful party's costs – so a losing US party who has entered into a contingency fee agreement will be responsible only for court costs. In Namibia, in contrast, the losing party would normally still be liable for the opposing party's costs on a party and party basis. In the US, contingency fees are the primary funding mechanism for personal injury and tort (delict) cases.<sup>212</sup>

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<sup>208</sup> Constitution of the Republic of South Africa, section 34: "*Access to courts.* Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

<sup>209</sup> 2004 (6) SA 66 (SCA) at para 44, quoting Cameron JA in *Brisley v Drotosky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) at para 94: "[T]he constitutional values of dignity, equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ... contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."

<sup>210</sup> Namibian Constitution, Article 12(1)(a): In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ..."

<sup>211</sup> Id at para 52.

<sup>212</sup> See Law Reform Commission of Hong Kong, *Report: Conditional Fees* (2007) at 2.4, available at [www.hkreform.gov.hk/en/publications/rconditional.htm](http://www.hkreform.gov.hk/en/publications/rconditional.htm).



## 2.2 United Kingdom

In the United Kingdom, costs usually follow the event, although courts retain broad discretion regarding the payment of court costs.<sup>213</sup> It is permissible for legal practitioners and their clients to enter into a conditional fee agreement, which is defined as an agreement in which an attorney is not paid unless the client succeeds.<sup>214</sup> If the client does succeed, then the attorney is paid his or her rate as normally calculated. The agreement may also entitle the attorney to an “uplift” or “success fee”, usually calculated as a percentage of the normal fee or costs.<sup>215</sup> Thus, if the uplift is 50%, then the attorney will be paid 150% of the normal hourly fee if he or she wins the case. An order from the Lord Chancellor has capped the size of the uplift at 100%.<sup>216</sup> Thus, a conditional fee agreement may provide that winning solicitors may collect double their normal fee. (A conditional fee agreement that does not provide an uplift or success fee is often referred to a speculative fee agreement. Speculative fee agreements have been characterised as “quick and easy alternatives” to conditional fee agreements in cases with “very strong prospects of success”.<sup>217</sup>) Conditional fee agreements are not allowed in family proceedings or criminal cases.<sup>218</sup> UK Civil Procedure Rules have set fixed success fees for some categories of cases, in line with the insurance principle of “the many paying for the few”.<sup>219</sup>

“After-the-event” insurance (discussed in Part A, section 3.2 above) covers any “success fee” which has been included in the successful opponent’s conditional fee agreement. As noted above, until recently, the successful litigant could also recover the insurance premiums from the losing party.<sup>220</sup>

The combination of conditional fee agreements and “after-the-event” insurance has essentially replaced publicly-funded legal aid for personal injury claims in the UK. However, the law is currently being reformed so that success fees and after-the-event insurance premiums will in future no longer be recoverable from the losing side in most types of lawsuits.<sup>221</sup> The Law Society has gone on record opposing this law reform on the grounds that a person has been wronged by another’s negligence or breach of duty should be entitled to adequate compensation for the harm that they have suffered, and that this compensation “should not be diminished by the costs of pursuing it”; if success fees and insurance premiums are no longer recoverable,

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<sup>213</sup> Chakrabarti et al at 699.

<sup>214</sup> Courts and Legal Services Act 1990, section 58(2)(a). These types of agreements were first introduced in 1995, primarily for personal injury cases, and extended to all types of cases other than family or criminal matters in 1998. See Law Society submission in “Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence”, House of Commons, Constitutional Affairs Committee, 2006 at Ev67.

<sup>215</sup> Access to Justice Act of 1999 (as amended), section 27 (amending Courts and Legal Services Act 1990, section 58); see also Winand Emons, “Playing It Safe with Low Conditional Fees versus Being Insured by High Contingent Fees” (2004) at 3.

<sup>216</sup> Conditional Fee Agreements Order 2000, regulation 4. Despite this legislative permission, in *Callery v Gray* [2001] EWCA Civ 1117, the Court of Appeal set a maximum 20% uplift in road accident cases. In personal injury cases, the practice is to cap the uplift of the solicitor at 25% and the uplift of the barrister at 10%. See Peter Kunzlik, “Conditional Fees: The Ethical and Organisational Impact on the bar,” 62 *The Modern Law Review* 850 (1999) at 859.

<sup>217</sup> Richard Moorhead, “Conditional Fee Arrangement, Legal Aid, and Access to Justice”, 33 *University of British Columbia Law Review* 471 (1999-2000) at 476.

<sup>218</sup> Courts and Legal Services Act 1990, section 58-58A.

<sup>219</sup> “Proposals for reform of civil litigation funding and costs in England and Wales: Implementation of Lord Justice Jackson’s recommendations, Response by The Law Society”, February 2011 at para 2.5, available at [www.lawsociety.org.uk/Representation/Policy-Discussion/Proposals-for-reform-of-civil-litigation-funding-and-costs-Law-Society-response/](http://www.lawsociety.org.uk/Representation/Policy-Discussion/Proposals-for-reform-of-civil-litigation-funding-and-costs-Law-Society-response/).

<sup>220</sup> Section 27 of the Access to Justice Act 1999 amended the Courts and Legal Services Act 1990 to allow recovery of success fees from the losing party, effective 1 April 2000. This has since been changed.

<sup>221</sup> This change will be effected by Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and associated orders and regulations and changes to the Civil Procedure Rules, effective 1 April 2013, subject to a delayed implementation for mesothelioma and insolvency claims. UK Ministry of Justice, “Civil Justice Reforms”, 12 October 2012, available at [www.justice.gov.uk/downloads/publications/policy/moj/civil-justice-reforms-full-package.pdf](http://www.justice.gov.uk/downloads/publications/policy/moj/civil-justice-reforms-full-package.pdf).

successful plaintiffs will have to pay these costs out of their damages awards, which offends against the principle of full compensation for the injury suffered. The Law Society has also expressed concern that the result of this change will be that “many claimants will not pursue what would otherwise be entirely legitimate claims to recover for loss or injury”.<sup>222</sup>

The law reforms currently underway in the UK will cap success fees in personal injury cases at 25% of the damages award (excluding damages for future care and loss). Lawyers will in future also be expected to provide clearer explanations of how the success fee will be calculated, including a breakdown between the success fees of solicitor (attorney) and barrister (advocate), in the interests of transparency.<sup>223</sup>

### UK GUIDELINES ON FEE ARRANGEMENTS WITH CLIENTS

The UK Solicitors’ Regulation Authority Handbook contains a set of guidelines which are indicators of principled behaviour by lawyers. These include the following guidelines pertaining to fee arrangements with clients:

- discussing whether the potential outcomes of the *client’s* matter are likely to justify the expense or risk involved, including any risk of having to pay someone else’s legal fees;
- clearly explaining your fees and if and when they are likely to change;
- warning about any other payments for which the *client* may be responsible;
- discussing how the *client* will pay, including whether public funding may be available, whether the *client* has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;
- where you are acting for a *client* under a fee arrangement governed by statute, such as a conditional fee agreement, giving the *client* all relevant information relating to that arrangement;
- where you are acting for a publicly funded *client*, explaining how their publicly funded status affects the costs;
- providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the *client*;
- where you receive a *financial benefit* as a result of acting for a *client*, either:
  - (a) paying it to the *client*;
  - (b) offsetting it against your fees; or
  - (c) keeping it only where you can justify keeping it, you have told the *client* the amount of the benefit (or an approximation if you do not know the exact amount) and the *client* has agreed that you can keep it;
- ensuring that *disbursements* included in your bill reflect the actual amount spent or to be spent on behalf of the *client*.<sup>224</sup>

**The United Kingdom also permits collective conditional fee agreements (CCFAs) designed specifically for mass providers and purchasers of legal services, such as trade unions, insurers or commercial organisations.**<sup>225</sup> CCFAs allow fees to be payable on a common basis for the classes of proceedings covered.<sup>226</sup> By allowing organisations to enter into agreements for

<sup>222</sup> “Proposals for reform of civil litigation funding and costs in England and Wales: Implementation of Lord Justice Jackson’s recommendations, Response by The Law Society”, February 2011 at paras 1-7, 1.8, 2.2.

<sup>223</sup> UK Ministry of Justice, “Civil Justice Reforms”, 12 October 2012.

<sup>224</sup> *Solicitors’ Regulation Authority Handbook* (version 5, 2012), SRA Code of Conduct 2011, Chapter 1: Client Care.

<sup>225</sup> Gary Slapper & David Kelly, *The English Legal System: 2009-2010* at 584.

<sup>226</sup> John O’Hare & Kevin Browne, *Civil Litigation* § 2.020.

the funding of cases by all of its members, the CCFA reduces the cost of individual litigation.<sup>227</sup> CCFA's are governed by the same rules that apply to all other conditional fee agreements.<sup>228</sup>

**There have been conflicting assessments of the impact of conditional fee agreements in the UK.** At the time they were introduced, the government articulated their intent as follows:

No-win no-fee conditional agreements will result in better access to justice. Access will be given to the many people who fall between those who are very rich or those who are so poor that they qualify for legal aid. In future, the question of whether one gets one's case to court will no longer depend on whether one can afford it, but on whether one's case is a strong one.<sup>229</sup>

The Law Society asserted that this approach to fees made legal redress possible for persons who could not qualify for legal aid, but could not otherwise afford litigation.<sup>230</sup>

In 2004, a group called Citizens Advice cited these amongst the problems encountered with such fees:

- Consumers were often induced into signing conditional fee agreements inappropriately.
- Consumers were being subjected to “high-pressure sales tactics by unqualified intermediaries introducing them to a legal process”, with inappropriate marketing techniques such as approaching accident victims in hospital.
- Unrecoverable loan-financed insurance premiums were “eroding the value of claimants’ compensation”, with some successful litigants finding that they owed more money than the compensation won, thus turning the claims process into “a zero-sum game”.
- Conditional fee agreements had led to “cherry-picking of high value cases with high chances of success”, with lawyers being conversely reluctant “to take on good small claims which may nevertheless be of enormous financial and personal significance to the client, thus denying access to justice”.<sup>231</sup>

Although statistical evidence indicates that the introduction of conditional fee agreements did *not* led to a substantial increase in litigation in the UK, a government investigation found that such agreements (amongst other factors) have created a popular perception that compensation is easy to obtain, leading in turn to more frivolous claims and an excessively risk-adverse climate, termed a “compensation culture”.<sup>232</sup>

The UK has also recently introduced contingency fees, which are referred to in the UK as “**damages-based agreements**”. These were previously limited to employment matters, but will in future (when the relevant amendments to the Court and Legal Services Act come into force in 2013) be allowed in any dispute resolution proceedings, even those which do not take place in courts. The approach will allow costs recovery by the winning party on the conventional basis, with any costs recovered from the losing party being offset against the contingency fee owed to

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<sup>227</sup> Gary Slapper & David Kelly, *The English Legal System: 2009-2010* at 584; John O’Hare & Kevin Browne, *Civil Litigation* 25.

<sup>228</sup> The Law Society, Practical Advice Service, *Payment by Results* (2010) at 17. The authority for CCFA's comes from section 58 of the Courts and Legal Services Act 1990, as amended by section 27 of the Access to Justice Act 1999.

<sup>229</sup> UK Minister of Justice Geoff Hoon, as quoted in Finlo Rohrer, “How did no-win no-fee change things?” *BBC News Magazine*, 7 May 2008, accessed at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/7387796.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7387796.stm).

<sup>230</sup> “Compensation Culture: Third Report of Session 2005–06, Volume I”, House of Commons, Constitutional Affairs Committee, 2006 at para 7.

<sup>231</sup> Id at para 13, citing a Citizens Advice report, “No win, No fee, No chance” (2004).

<sup>232</sup> Id at paras 8-17, 111-112; see also Finlo Rohrer, “How did no-win no-fee change things?” *BBC News Magazine*, 7 May 2008.

the legal practitioner by the successful claimant. Like conditional fee agreements, they will not be permitted in family or criminal matters.<sup>233</sup>

The latest Damage-Based Agreement Regulations (still in draft form as of 2012) propose that these fees be capped at 25% of the sum recovered by the client in respect of personal injury claims and 35% in employment matters.<sup>234</sup> The draft regulations include a range of procedural protections for the client, such as requiring that damages-based agreements must specify the circumstances in which the fee will be payable and explain the justification for the level of payment being agreed upon.<sup>235</sup> The client must be informed in writing of whether other methods of financing the proceedings might be available.<sup>236</sup> There are also procedural protections designed to protect lawyers. For example, if a damages-based agreement is terminated, the lawyer is allowed to charge the client for the fees and expenses of the work done to date, but no more. The client is also prohibited from terminating a damages-based agreement after liability has been admitted, after a settlement has been reached or within seven days before the start of the hearing.<sup>237</sup>

## 2.3 South Africa

**In South Africa, the South African Law Commission investigated the issue of speculative and contingency fees in 1996, describing such arrangements as “the poor man’s key to the courthouse”.<sup>238</sup> It recommended that contingency fee agreements should be legalised in South Africa, but cautioned that because such arrangements could easily be abused, strict guidelines would be necessary to prevent exploitation. The result of these recommendations was the Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999). This law takes an approach similar to that applied to conditional fees agreements in the UK.**

A legal practitioner may enter into a “contingency fee agreement” in any case with reasonable prospects of success, with the exception of criminal or family law matters.<sup>239</sup> However, the Act caps the success fee both as a percentage of the award to the client *and* as a percentage of the normal fee: the success fee may be no more than double the normal fee, and may constitute no more than 25% of the total award to the client, excluding costs.<sup>240</sup> Several court cases have clarified that these two limitations must be read together, and must be applied so that the maximum fee is whichever of these two calculations is the lower.<sup>241</sup> Courts have disagreed on whether taxed

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<sup>233</sup> Courts and Legal Services Act 1990, section 58AA, as amended by section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective 1 April 2013; Civil Justice Council, “Report of the Working Party on Damages Based Agreements (Contingency Fees)”, 25 July 2012, available at [www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Pre-action%20protocols/contingency-fees-working-party-report1.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Pre-action%20protocols/contingency-fees-working-party-report1.pdf); UK Ministry of Justice, “Civil Justice Reforms”, 12 October 2012.

<sup>234</sup> Damages-Based Agreements Regulations 2012 (draft), regulations 8-9, available at [www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Pre-action%20protocols/annex-6d-damages-based-agreement1.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Pre-action%20protocols/annex-6d-damages-based-agreement1.pdf). Some of the provisions in the draft accessed refer specifically to certain types of proceedings, but the Report of the Working Party on Damages Based Agreements (Contingency Fees) has recommended that there should be a single set of regulations for all cases where the funding mechanism is a damages-based agreement, whatever the nature of the claim. Civil Justice Council, “Report of the Working Party on Damages Based Agreements (Contingency Fees)”, 25 July 2012 at para 4

<sup>235</sup> Damages-Based Agreements Regulations 2012 (draft), regulation 3.

<sup>236</sup> Id, regulation 4(2) and 5(2).

<sup>237</sup> Id, regulation 10.

<sup>238</sup> South African Law Commission, *Project 93: Speculative and Contingency Fees, Report* (1996) at para 3.2.

<sup>239</sup> Contingency Fees Act 66 of 1997, section 2(1).

<sup>240</sup> Id, section 2(2).

<sup>241</sup> *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA); *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ). See also *Mnisi v Road Accident Fund* [2010] ZAGPPHC 38.

costs paid by the unsuccessful party must be counted towards the maximum percentages set by the statute.<sup>242</sup> It is also unclear if the caps set by the Act include disbursements.<sup>243</sup>

The Act includes detailed requirements concerning the contents of the agreement, and gives clients a 14-day period in which they may withdraw from the agreement – leaving them liable for payment of fees for any “necessary or essential” work done to advance their interests during this period.<sup>244</sup> With a view to preventing any conflicts of interest, the Act also provides that where a contingency fee agreement exists, offers of settlement can be accepted only if affidavits are filed with the court by both attorney and client, and that the settlements must be made into orders of court.<sup>245</sup> The Act also gives clients a right to have the agreement, or the fees charged in terms of it, reviewed by the appropriate professional body.<sup>246</sup> The professional controlling bodies are empowered to make rules to give effect to the Act, and the Minister of Justice may make regulations relating to its implementing and monitoring.<sup>247</sup> The clear intention is that contingency fees be carefully controlled.<sup>248</sup>

**However, after the Act came into force, there was still a question as to whether agreements outside the parameters of the Act would be valid in terms of the common law.** In the 2004 case of *Price Waterhouse Coopers Inc and Others v National Potato Cooperative Ltd*,<sup>249</sup> the Supreme Court of Appeal found that an agreement between a claimant and a non-lawyer which traded finance for the litigation for a share of the reward was not contrary to public policy. This case also stated that the Contingency Fees Act 66 of 1997 “legitimises contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the Common Law”, concluding that any contingency fee agreement between such parties outside the Act’s framework would be illegal.<sup>250</sup> Some practitioners considered this statement to be *obiter dictum* and argued that “Common Law Contingency Fee Agreements” outside the statutory framework were valid. This inspired several provincial law societies to issue guidelines stating that “success fee” agreements which were not concluded within the Act’s parameters would be unlawful,<sup>251</sup> whilst several others have reportedly have taken the position that their members *may* conclude agreements outside the statutory framework if they do not violate ethical prohibitions on overreaching or overcharging.<sup>252</sup> This issue was addressed in *Thulo v The Road*

<sup>242</sup> *Mofokeng v Road Accident Fund, Makhuele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* [2012] ZAGPJHC 150 at paras 49-50, in contrast to *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ) at paras 52-53. These two cases put forward differing interpretations of section 2(2) of the Contingency Fees Act. 66 of 1997.

<sup>243</sup> See affidavit of the South African Association of Personal Injury Lawyers (Saapil) at [www.saapil.co.za/files/20120612104836438.pdf](http://www.saapil.co.za/files/20120612104836438.pdf). See *RMA van der Merwe v Marlette Geldenhuys*, case no 36216/06 (WLD).

<sup>244</sup> Contingency Fees Act 66 of 1997 section 4. The provisions on client withdrawal are contained in section 4(3)(h).

<sup>245</sup> *Id.*, sections 3-4. See *Mofokeng v Road Accident Fund, Makhuele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* [2012] ZAGPJHC 150 at para 53-54: “there cannot be an out-of-court settlement in a pending litigation where one of the parties is a party to a contingency fees agreement in respect of the proceedings before court. The purpose [of the requirement that the settlement be made an order of court] must be to ensure that the supervisory or monitoring process of the court is present whenever matters litigated under the Contingency Act are settled or finalised.” This case elaborates on the Court’s monitoring role in respect of settlements in contingency fee cases, at para 55-ff, which it summarises as a practice directive, at para 63-ff. See also Kim Hawkey, “Clarity on contingency fees agreements,” *De Rebus* 41, 48-49, October 2012.

<sup>246</sup> Contingency Fees Act 66 of 1997, section 5.

<sup>247</sup> *Id.*, sections 6-7.

<sup>248</sup> A thorough summary of the Act and its background is contained in *Mofokeng v Road Accident Fund, Makhuele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* [2012] ZAGPJHC 150.

<sup>249</sup> *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA).

<sup>250</sup> *Id.* at para 41.

<sup>251</sup> Lize-Marie Wiedeman, “The Myth of The Common Law Contingency Fee”, Lindsay Keller Attorneys, undated (referring to the Kwazulu-Natal and Cape Law Societies), accessed at [www.coldpressmedia.co.za/bee/2012/september/articles/lindsay\\_keller.html](http://www.coldpressmedia.co.za/bee/2012/september/articles/lindsay_keller.html).

<sup>252</sup> See founding papers of South African Association of Personal Injury Lawyers (Saapil), which is in the process of requesting a declaratory judgement on this issue from a Full Bench of the High Court of Pretoria, at [www.saapil.co.za/files/20120612104836438.pdf](http://www.saapil.co.za/files/20120612104836438.pdf).

*Accident Fund*, where the South Gauteng High Court held that “there is no such thing as a Common Law Contingency Fee”,<sup>253</sup> and that “the Contingency Fees Act is the only means whereby a contingency fee can be charged by a legal practitioner in South Africa”.<sup>254</sup> More recently, the South Gauteng High Court, in the *Mofokeng* case, surveyed the statute’s function in detail and reiterated that contingency fee agreements concluded outside the Act are illegal and unenforceable.<sup>255</sup> However, in *Thusi v Minister of Home Affairs and Others*, the Kwa-Zulu-Natal High Court suggested that the Act could be understood to allow for a speculative fee arrangement which was not subject to all the requirements in the Act, and that fee arrangements outside the statutory framework were permissible at common law.<sup>256</sup>

At the time of publication (November 2012), the South African Association of Personal Injury Lawyers (Saapil) was in the process of requesting a declaratory judgement from a Full Bench of the High Court of Pretoria on whether the Act exhaustively regulates the power of legal practitioners to conclude fee agreements with their clients. Saapil notes that the Act does not expressly prohibit the conclusion of contingency fee agreements outside its parameters and asserts that the Act does not affect agreements made outside the statutory framework.<sup>257</sup> At the same time, Saapil is being sued for damages by several clients who allege that the contingency fee agreements they entered into unlawfully exceed the caps set by the statute – with one client alleging that more than R1 million of her R2.8 million pay-out from the Road Accident Fund went to legal costs.<sup>258</sup>

In the 2001 case of *Mnweba v Maharaj*, the High Court held that the fact that a fee agreement had been validly concluded between a lawyer and a client is not an absolute defence to a claim that the fee contemplated is so unreasonable as to be contrary to public policy; the Court concluded that it is not bound by fee agreements between attorneys and their clients.<sup>259</sup>

The 2012 case of *Dumse v Mpambaniso* addressed another potential avenue of abuse. Here, a lawyer had concluded an agreement with a client which resulted in the lawyer claiming some 84% of the amount received by the client in compensation for having a leg amputated after a motor vehicle accident. The agreement was not technically a contingency fee agreement, since it was not made conditional on the case’s success – but the Court found that the lawyer must have been aware that his client would not be able to afford the fees contemplated in the agreement, and there was thus no realistic way to recover the fees unless the claim was successful. The Court concluded that “the impugned fee agreement was deliberately designed to take it outside the purview of the Act” so that the lawyer could “charge fees in excess of those prescribed by the Act”.<sup>260</sup> The Court set aside the fee agreement on the grounds that the fees demanded were “grossly exorbitant, unconscionable and against public policy”.<sup>261</sup>

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<sup>253</sup> *Thulo v The Road Accident Fund* 2011(5) SA 446 (GSJ) at para 50.

<sup>254</sup> *Id* at para 59.

<sup>255</sup> *Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* [2012] ZAGPJHC 150 at para 41.

<sup>256</sup> *Thusi v Minister of Home Affairs and Others* 2011 (2) SA 561 (KZP) (Wallis J). The law firm in this case agreed with their clients that they would not be liable for any fees if unsuccessful, and if successful only for such fees as were recovered from the unsuccessful parties. The Court noted that the issue of whether or not such an agreement fell within the Act depended on whether s 2(1)(a) and (b) of the Act must be read conjunctively, but did not decide this question because the applicants did not assert that their agreement fell within the Act. At para 103, note 81. The Court also referred to the relevant statement in *Price Waterhouse Coopers Inc and Others v National Potato Cooperative Ltd* as *dictum* and noted that the fee arrangement in the case before it was “not one that would be prohibited by the common law”. At para 110.

<sup>257</sup> See founding papers at [www.saapil.co.za/files/20120612104836438.pdf](http://www.saapil.co.za/files/20120612104836438.pdf).

<sup>258</sup> Prega Govender, “Lawyer fights fees cap in high court”, *Sunday Times*, 11 Nov 2012.

<sup>259</sup> *Mnweba v Maharaj* [2001] 1 All SA 265 (C) at paras 48-51.

<sup>260</sup> *Dumse v Mpambaniso* [2012] ZAECGHC 47 at para 44.

<sup>261</sup> *Id* at para 48.

South Africa seems to have followed the path of the UK, with one recent case noting that “it is common knowledge that contingency fees agreements are entered into in almost all claims against the Road Accident Fund and other personal injury claims”.<sup>262</sup> Contingency fee cases have also been concentrated in social security claims and claims against the Ministry of Home Affairs regarding the failure to issue identity documents.<sup>263</sup> Judge Malcolm Wallis has described this as “‘a cottage industry’ of litigation, where an under-performing government department responsible for service delivery is identified and then subjected to a stream of litigation conducted on a speculative basis in the belief that costs orders will be made against the department concerned”.<sup>264</sup> Medical professionals have expressed concern that the introduction of contingency fees into South Africa has contributed to a mushrooming of medical malpractice claims, as well as increasing the size of settlements in these cases.<sup>265</sup> South African Health Minister Aaron Motsoaledi has reportedly commissioned a study to investigate reasons for the spike in medical malpractice litigation, set to report by the end of 2012.<sup>266</sup>

In one recent case, *Minister of Home Affairs v Maboho and Others*, the Supreme Court of Appeal discussed the problems which can arise which cases of a particular type are taken on in bulk, often on a contingency fee basis, from a profit motive on the part of a legal firm:

The law reports are replete with reported cases (and one shudders to think how many unreported cases there have been) that show that there are very many persons who are entitled to social grants and identity documents who have not been provided with them due to laziness, lack of capacity or gross ineptitude in the government departments concerned. This has evoked a strong response from the courts...

The difficulty facing the courts is compounded by the desire of some attorneys not so much to assist members of the public to obtain their due, but to exploit the situation for personal gain. There can of course be no objection to attorneys assisting clients to assert their rights by litigation. That is a primary function of the attorneys’ profession; and if some firms of attorneys are prepared to act *pro bono* or on a contingency basis, they are performing a public service. Nor can there be an objection if a standard format or precedent is used to bring an application on behalf of a number of clients — provided that the standard format is tailored to fit the circumstances of each particular applicant. Where the abuse comes in is where this is not done and the client (who more often than not is illiterate) deposes to allegations that are not relevant to his or her case or, worse, that are not true. This problem can be dealt with by the courts directly by scrutinizing each application... a court should of course be careful not to visit the sins of the attorney on the client — particularly where... the applicants are ‘drawn from the very poorest within our society’ and ‘have the least chance of vindicating their rights through the legal process’.

Large scale litigation in similar matters by a particular attorney can of course be the product of touting, and can also lead to bills of costs in standard form being submitted for taxation where the amounts claimed do not accurately reflect the amount of work done by the attorney. In addition, taxation at the normal tariff applicable for individual applications may not be appropriate where an attorney has produced a ‘job lot’. The problem is exacerbated by

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<sup>262</sup> *Mofokeng v Road Accident Fund, Makhuvale v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* [2012] ZAGPJHC 150 at para 2, point 8.

<sup>263</sup> *Ndlovu v Minister of Home Affairs and Another* 2011 (2) SA 621 (KZD) at para 3; *Thusi v Minister of Home Affairs and Others* 2011 (2) SA 561 (KZP) at paras 1-3.

<sup>264</sup> Judge Malcolm Wallis, “Some thoughts on the commercial side of practice”, 25 (1) *Advocate* 33 (April 2012), available at [www.sabar.co.za/law-journals/2012/april/2012-april-vol025-no1-pp33-36-and-52.pdf](http://www.sabar.co.za/law-journals/2012/april/2012-april-vol025-no1-pp33-36-and-52.pdf).

<sup>265</sup> Clive Sperry, “Review of 2011”, 15 (4) *South African Journal of Radiology* (2011). According to one online newsletter: “Health minister Dr Aaron Motsoaledi has launched an all-out attack on the high cost of medical litigation in the country, accusing lawyers of ‘unmercifully’ targeting doctors to make up for the income they lost when legislation stopped them from further exploiting the Road Accident Fund.” “Motsoaledi Wages War against Lawyers”, *Medical Chronicle*, 10 October 2011, [www.medicalchronicle.co.za/motsoaledi-wages-war-against-lawyers/](http://www.medicalchronicle.co.za/motsoaledi-wages-war-against-lawyers/).

<sup>266</sup> Prega Govender, “Lawyers scare off doctors”, *The Sunday Times*, 3 June 2012.

the fact that taxations are frequently unopposed and vast amounts of taxpayers' money are wasted. Those abuses can, and one hopes they will be, addressed first by the law societies and, ultimately, by the courts.<sup>267</sup>

**As of November 2012, Saapil was in the process of bringing a constitutional challenge to the fee cap in the Contingency Fees Act, should it be ruled by a Full Bench of the High Court that it is impermissible for legal practitioners and their clients to conclude a fee agreement outside the Act's framework.** The application cites the rights to human dignity, privacy and a fair public hearing, amongst others. Saapli alleges that it is an unjustifiable interference with the freedom of contract, and unconstitutional discrimination, to single out legal practitioners for particularly restrictive treatment. More specifically, the applicants argue that the caps are set too low, depriving litigants of access to justice and legal practitioner of legitimate custom, that the caps are too inflexible to cater for cases of widely varying degrees of risk, that the capping of fees at a percentage of monetary claims curtails the range of legal services on offer to clients with relatively small claims, that the caps serve no purpose if the fees are objectively fair and that the procedural requirements relating to settlements impermissibly disadvantage both legal practitioner and client.<sup>268</sup>

**The use of contingency fees in South Africa must be viewed in the context of other current developments. A Legal Services Bill, published in 2012 and still being hotly debated at the time of writing, would radically alter the structure and governance of the legal profession.** One of its goals would be to “ensure that legal services are affordable and within the reach of the citizenry”.<sup>269</sup> It would, amongst other things, prohibit legal practitioners from charging fees higher than those determined under the Act, and set community service requirements for candidate and registered legal practitioners which could include the provision of *pro bono* legal services to the public. The Bill would also establish a Legal Services Ombud to “protect and promote the public interest in relation to the rendering of legal services”.<sup>270</sup> One discussion of the proposed bill noted amongst its motivations the fact that the rules currently governing contingency fee agreements provide insufficient protection for litigants.<sup>271</sup>

**excerpts from  
South African Legal Services Bill 2012**

- 29.** (1) The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include –
- (a) community service as a component of practical vocational training by candidate legal practitioners; or
  - (b) a minimum period of recurring community service by legal practitioners upon which continued registration as a legal practitioner is dependent.
- (2) For the purposes of this section, “community service” includes service involving –
- (a) the delivery of free legal services to the public in terms of an agreement between the candidate legal practitioner or the legal practitioner with a community based organisation, trade union or non-governmental organisation;

<sup>267</sup> *Minister of Home Affairs v Maboho and Others* [2012] ZASCA 42 at paras 6-8 (footnotes and case citations omitted).

<sup>268</sup> See founding papers at [www.saapil.co.za/files/20120612104836438.pdf](http://www.saapil.co.za/files/20120612104836438.pdf).

<sup>269</sup> Legal Services Practice Bill, B20-2012, Preamble.

<sup>270</sup> Id, sections 29, 35, 46 and 49. According to the General Bar Council, legal practitioners are already obliged to provide 20 hours of *pro bono* service annually. *Legalbrief Today*, 28 May 2012, quoting Bar Council Chairperson Gerrit Pretorius.

<sup>271</sup> Minutes of meeting of Parliamentary Committee on Justice and Constitutional Development, 6 June 2012 (published by Parliamentary Monitoring Group), comment by Adv Skosana.



- (b) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation approved by the Council;
- (c) service as a judicial officer, including as a commissioner in the small claims court;
- (d) service to the State, approved by the Minister after consultation with the Council;
- (e) service on regulatory structures established or recognised in terms of this Act;
- (f) any other service as may be determined by the Council in the rules; or
- (g) any other service which the candidate legal practitioner or the legal practitioner may want to perform with the approval of the Minister.

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**35.** A legal practitioner, juristic entity or Legal Aid South Africa may only charge fees in respect of legal services as –

- (a) are in accordance with the fee structure determined in terms of this Act, taking into account –
  - (i) the importance, significance, complexity and expertise of the legal services required;
  - (ii) the volume of work required and time spent in respect of services rendered; and
  - (iii) the financial implications of the matter at hand; or
- (b) may be determined in law.

## 2.4 Australia

**No Australian state or territory permits the use of fee agreements that fix the legal practitioner’s payment as a percentage of the court’s award to the client.<sup>272</sup> However, conditional fee agreements are generally permitted.**

For example, the Legal Profession Act 2004 of New South Wales defines a “conditional costs agreement” as an agreement which provides “that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate”.<sup>273</sup> The agreement must be in writing, in “clear plain language”; set forth the circumstances that will constitute a “successful outcome”; contain a statement that the client has been informed of his or her right to seek independent legal advice before entering into the agreement; and contain a “cooling-off period” of at least five business days, during which time the client may terminate the agreement – with the exception that the latter two requirements do not apply to a conditional costs agreement with “a sophisticated client”.<sup>274</sup> Conditional costs agreements are not allowed in criminal cases or family matters.<sup>275</sup>

A conditional costs agreement may provide for an “uplift fee”, with the exception of cases involving successful claims for damages.<sup>276</sup> The theory behind this exception is that since the

<sup>272</sup> The Law Reform Commission of Hong Kong, *Report: Conditional Fees* (2007) at 5.15, available at [www.hkreform.gov.hk/en/publications/rconditional.htm](http://www.hkreform.gov.hk/en/publications/rconditional.htm); Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system 2000* at para 5.21. In a 2002 case, a legal practitioner had entered into what was effectively a contingency agreement under which he would receive 10% of any award under 10 million dollars and 5% of any award over 10 million dollars. The Court held the agreement was unenforceable. *Smits v Roach* 42 ACSR 148 (2002).

<sup>273</sup> Legal Profession Act 2004, section 323(1).

<sup>274</sup> Id, section 323(3) and (4B).

<sup>275</sup> Id, section 323(2).

<sup>276</sup> Id, section 324(1)

law requires legal practitioners to certify that any claims for damages have reasonable prospects of success, they are not justified to charge their clients an extra 25% for the inherent 'risk'.<sup>277</sup>

The agreement must separately identify the basis for calculating the "uplift fee", which may not exceed 25% of the legal costs in a litigious matter, with "legal costs" referring to amounts that a client is charged by a law practice for legal services, including disbursements but excluding interest.<sup>278</sup> The agreement must contain an estimate of the uplift fee or at least "a range of estimates of the uplift fee", and "an explanation of the major variables that will affect the calculation of the uplift fee".<sup>279</sup>

In contrast to conditional fees, contingency fees are prohibited – by a provision forbidding a costs agreement where any part of the amount payable is calculated by reference to the value of the subject matter in a transaction or proceeding.<sup>280</sup>

A law firm which enters into a prohibited fee arrangement was, in the initial law, penalised by being forbidden to collect any fees at all,<sup>281</sup> but this harsh rule was mitigated by a 2006 amendment which allowed a law firm which had made a prohibited agreement regarding an uplift fee to collect the basic fee but without the uplift premium.<sup>282</sup>

Other Australian states have similar conditional costs systems – which is not surprising, given that most of the state legislation is based on a Model Bill which prohibits contingency fees, but permits conditional costs agreements providing for uplift fees of up to 25% of fees for litigious matters. However, as of 2010, various Australian states still differed significantly in the size of the cap on the uplift fee. Victoria and New South Wales capped the success fee at 25% and Queensland at 50%,<sup>283</sup> whilst South Australia permitted a 100% uplift.<sup>284</sup> In further contrast, Tasmania forbade barristers from entering conditional costs agreements that provide for uplifts.<sup>285</sup>

The Council of Australian Governments is in the process of nationalising regulation of the legal profession in Australia, including costs regulations. The proposals for the National Rules are similar to the current regime in New South Wales, allowing conditional fees with uplifts in some circumstances but forbidding contingency fees. It has also been proposed that the rules should address tactics used to circumvent the restrictions on contingency fees:

Litigation-funders often provide funding on the basis that the costs recoverable from the litigant will be determined as a proportion of any award of damages. In several jurisdictions practitioners are prohibited from entering into contingency agreements in claims for damages. Generally, practitioners should not be able to avoid these prohibitions by taking a financial interest in a litigation-funder or by their associate or relative taking an interest. Accordingly, the Taskforce notes that legal practitioners could be prohibited from establishing corporate

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<sup>277</sup> Hon Henry Tsang Legal Profession Amendment Bill, Second Reading Speech, Hansard, Legislative Council, 23 May 2006, accessed at [www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LC20060523050](http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LC20060523050). Australia's 2006 Model Bill on the Legal Profession proposed somewhat more straightforwardly that a conditional costs agreement may not provide for an uplift fee "unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely". Standing Committee of Attorneys-General, Model laws project – Legal profession, August 2006, section 3.4.26.

<sup>278</sup> Hon Henry Tsang Legal Profession Amendment Bill, Second Reading Speech, Hansard, Legislative Council, 23 May 2006; see Legal Profession Act 2004, sections 345, 347, 348.

<sup>279</sup> Legal Profession Act 2004, section 324.

<sup>280</sup> Id, section 325.

<sup>281</sup> Id, section 327. See *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd & Anor (No 4)* [2011] NSWSC 720 (28 June 2011).

<sup>282</sup> Legal Profession Amendment Act 2006 (No.30); Hon. Henry Tsang Legal Profession Amendment Bill, Second Reading Speech, Hansard, Legislative Council, 23 May 2006.

<sup>283</sup> Barristers Rules, Rule102A(d).

<sup>284</sup> Profession Conduct Rules, Rule 8.10.

<sup>285</sup> Rules of Practice 1994 (Tas), Rule 92(1).

vehicles to provide litigation funding or entering into agreements with litigation funding vehicles owned by an associate of their law practice or a relative. The Taskforce would be interested in the views of the Consultative Group and stakeholders on this matter.<sup>286</sup>

## 2.5 Other jurisdictions

A survey of several other jurisdictions which use conditional fees or contingency fees found similar systems as in the UK and South Africa for the most part. Some potentially interesting and useful points gleaned from these other jurisdictions are listed here:

- In Manitoba (Canada), the Law Society of Manitoba warns attorneys that once a contingency agreement is signed, a lawyer cannot withdraw representation unless the contract expressly permits him to do so.<sup>287</sup> Interestingly, the statute on contingency fees here does not cap the percentage an attorney may charge under a contingency fee contract, nor limit what kinds of cases may employ contingency fee contracts; however, the client may apply to the court for a declaration that the contract “is not fair and reasonable to the client”.<sup>288</sup>
- Ireland has permitted the use of speculative fee arrangements for approximately thirty years. Although success fees are permitted, they are apparently seldom used.<sup>289</sup> Ireland does not permit contingency fee agreements where the legal practitioner’s fee is calculated in relation to the award to the client.<sup>290</sup>
- India does not permit fee agreements making the legal practitioner’s payment contingent on the outcome of the case.<sup>291</sup> As early as 1907, an Indian court held that an attorney who entered into such an agreement committed professional misconduct and was liable to disciplinary action.<sup>292</sup> Both the Bar Council<sup>293</sup> and the Supreme Court<sup>294</sup> have upheld suspensions imposed on attorneys because they entered into such no-win, no-fee agreements. Nevertheless, lawyers sometimes enter into informal, verbal agreements concerning contingency fees and will try to claim their fee from the amount recovered, particularly if the client is too poor to proceed otherwise.<sup>295</sup> In recent times, the use of contingency fees has emerged in motor vehicle accident cases and has become an accepted norm despite its illegality. It has been noted that this approach ensures that lawyers have no interest in unnecessarily prolonging court cases.<sup>296</sup>

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<sup>286</sup> Coalition of Australian Governments, “National Legal Profession Reform: Discussion Paper: Legal Costs”, 4 November 2009 at 11.

<sup>287</sup> See [www.legalfinancejournal.com/contingency-fees-in-canada/](http://www.legalfinancejournal.com/contingency-fees-in-canada/).

<sup>288</sup> Legal Profession Act, CCSM c. L107.

<sup>289</sup> Law Reform Commission of Hong Kong, *Report: Conditional Fees* (2007) at 5.44, available at [www.hkreform.gov.hk/en/publications/rconditional.htm](http://www.hkreform.gov.hk/en/publications/rconditional.htm).

<sup>290</sup> *Id* at 5.45.

<sup>291</sup> Bar Council of India Rules, Chapter II, Section II (Rules Governing Advocates), Part IV, Rule 20

<sup>292</sup> *Ganga Ram v. Devi Das* 61 PR (1907).

<sup>293</sup> See, eg, *Rajendra Pai v Alex Fernandes and Ors.* D.C. Appeal no. 11/2000; *HG Kulkani v BB Subedar* DC Appeal no. 40/1996.

<sup>294</sup> See, eg, *In re ‘G,’ a senior advocate of the Supreme Court of India* 1954 SC 557.

<sup>295</sup> “The Indian Legal Profession”, Harvard Law School Program on the Legal Profession, 2011.

<sup>296</sup> A Singh and NA Zahid, *Strengthening Governance Through Access To Justice*, New Delhi: PHI Learning Pvt Ltd, 2009 at 41.

### 3. Concerns about conditional and contingency fee agreements

If Namibia seriously considers instituting contingency or conditional fees, it must contemplate the potential consequences for both clients and counsel. First, although “no-win, no-fee agreements” have the potential to make attorneys available to some people who could not otherwise afford them, the access to justice benefits would likely be minimal, particularly in public interest cases. Second, a contingency or conditional fee system will not necessarily either increase or decrease overall litigation costs, although it will shift costs in some cases from client to counsel. Third, and perhaps most importantly, contingency and conditional fee agreements generate significant ethical concerns Namibia will need to address if it wishes to institute either system. These concerns are elaborated below.

#### 3.1 Access to justice

**Contingency and conditional fee systems can make legal practitioners – and thus the courts – more accessible to some people who could otherwise not afford them.**<sup>297</sup> Such fee agreements reduce the financial risk of litigation to plaintiffs, who will not have to pay their own legal practitioner’s fees if they lose. Instead, this risk and some associated costs are effectively shifted to the legal practitioner, who can in turn spread that risk across many cases. Furthermore, litigants does not need to fund the litigation up front, since they will only have to pay if the outcome is positive, which will normally (in the case of a plaintiff suing for damages) be only after receipt of the award.

**The contingency fee system also changes the risk calculus. It encourages lawyers to take on riskier cases if the potential award is sufficiently large, by linking the fee to the size of the award.** From an access to justice perspective, altering these incentives has both benefits and drawbacks.

It may be good policy to encourage relatively risky public interest cases which might otherwise never be litigated. Also, in cases where a plaintiff sues for damages and the potential financial award is sufficiently large, a plaintiff who could otherwise not afford a legal practitioner may be able to find representation.

**But the positive impact on public interest litigation may ultimately be marginal because the necessary financial incentives will rarely exist.** For example, an applicant who seeks to have a statute declared unconstitutional may not seek any monetary damages. Conditional or contingency fee agreements will not make such litigation more accessible, as few lawyers would enter into a fee agreement which will not provide a realistic possibility of payment of the full costs of the case in the event of success.

**Nor are such agreements likely to be very useful in public interest cases that seek to break new legal ground. Conditional fee and contingency fees are unlikely to aid a litigant in obtaining representation if the case has less than a fifty percent chance of succeeding,<sup>298</sup> and**

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<sup>297</sup> James P George, “Access to Justice, Costs, and Legal Aid,” 54 *American Journal of Comparative Law* 293 (2006) at 311 (“The contingency fee makes litigation possible for people who could not otherwise afford it.”); Lord Chancellor’s Department, *Modernising Justice* (1999) at § 2.43 (“Where they are allowed, conditional fees have already greatly extended access to justice. With conditional fees, people take good cases, in the certain knowledge that [they] will not be left out of pocket if they lose.”).

<sup>298</sup> Testimony of Richard Langton, “Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence”, House of Commons, Constitutional Affairs Committee, 2006 at Ev10.

**litigation seeking to establish new rights or rules of law will often be particularly uncertain.** Moreover, a contingency fee system may bring the public interest plaintiff's interests into conflict with his legal practitioner's interests: the plaintiff may be willing to sacrifice a monetary award in order to achieve a change in a law or institutional policy, while the legal practitioner will logically want to maximise the monetary award to assure or increase his or her own fee. Conditional and contingency fees are therefore unlikely to help fund the most crucial and necessary litigation.

**Similarly, contingency fee arrangements will probably not help most vulnerable and low-income litigants access legal assistance.** In normal cases, legal practitioners will earn their hourly rate multiplied by the number of hours worked. Under a contingency fee arrangement, legal practitioners will earn a percentage of the award if they win and nothing if they lose. A legal practitioner is therefore unlikely to take a case if the expected payment under the contingency fee arrangement, adjusted for the likelihood that the case will succeed, is smaller than the normal hourly rate multiplied by the number of hours the legal practitioner expects to work on the case. In other words, **legal practitioners will not take on contingency cases if they could earn more money doing other work.** If legal practitioners do not have a full complement of other work, so that the contingency case adds to rather than replaces other work, they will have a greater incentive to take the case.

**The same drawback applies to conditional fee agreements.** Under these agreements, legal practitioners will earn their normal hourly rates plus an extra percentage of that rate if they win, and nothing if they lose. The payment does not depend on the size of the award to the client. If a client cannot afford to pay the legal practitioner at the normal hourly rate, however, the client will not be able to pay the legal practitioner unless the expected award is large enough to cover a portion of the legal practitioner's normal rate, plus the percentage uplift. In either case, even though the fees are not explicitly tied to the damages which may be awarded, the legal practitioner will not have a financial incentive to take the case unless the expected award is sufficiently large.

**Many Namibians in need of representation will not be involved in cases with potential awards large enough to motivate legal practitioners to represent them on a contingency or conditional fee basis.** For example, the question of who will inherit a family home in an informal settlement will likely be of immense importance to the individuals involved in the case, but the asset at stake is unlikely to be large enough to provide a legal practitioner with the necessary inducement to represent one of the parties.

**Moreover, conditional and contingency fee arrangements will not address a significant barrier keeping low-income litigants out of court: cost awards.** If a Namibian litigant loses, she must pay the costs of the winning litigant. Even if the potential award is large enough to motivate a *legal practitioner* to take the case, the *plaintiff* may not want to risk a potentially devastating costs award in the event that the case is unsuccessful.

**Furthermore, shifting the risks and costs of litigation to the legal practitioner may mean that parties engaged in less risky litigation or seeking other legal services may bear extra costs because the legal practitioner has taken on a different, high-risk case.** In other words, other clients may pay higher hourly rates in order to permit legal practitioners to take on the risks of engaging in litigation on a contingency basis. The South African Law Reform Commission, for example, noted that foreign commentators have argued that contingency and conditional agreements "may disadvantage others, who will unknowingly subsidise, through the payment of higher fees, lawyers' losses in other contingency actions".<sup>299</sup>

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<sup>299</sup> South African Law Commission, *Project 93: Speculative and Contingency Fees, Report* (1996) at 3.3.

**Encouraging riskier litigation is not always a uniform good: some litigation is a frivolous waste of resources that will simply clog the courts and waste both time and resources.** In the United States, scholars and even politicians have frequently voiced concerns that contingency fees generate frivolous litigation. The premise is that plaintiffs will bring frivolous cases because they do not need to pay their lawyers unless they win, and lawyers will accept these cases because they hope for a large pay-out at the end of litigation or a quick settlement.

**In practice, however, this concern is likely exaggerated.** First, it does not make economic sense for a lawyer to take on large numbers of frivolous cases. A lawyer practicing on a contingency or conditional basis must “evaluate potential cases in terms of the risks involved and the potential returns associated with those risks”.<sup>300</sup> It does not make sense for lawyers to invest time in too many high risk cases, because then they will not win often enough to make accepting these cases worthwhile.<sup>301</sup>

The empirical evidence available about contingency fees in the United States seems to support the conclusion that attorneys do not heedlessly accept cases in the hopes of generating quick pay-outs. For example, one study found that attorneys accepted approximately 34% of cases brought to them on average. Unsurprisingly, those attorneys who had the fewest client visits per week had a significantly larger acceptance rate – up to nearly 50%. But for practitioners contacted by clients twenty or more times per week, the acceptance rate was only 8%.<sup>302</sup>

In the United Kingdom, testimony presented before the House of Commons Constitutional Affairs Committee established that permitting conditional fee agreements had not caused an increase in claims; in fact, the total number of claims brought since conditional fee agreements were introduced had actually decreased slightly.<sup>303</sup> On the other hand, this statistic suggests that conditional fee agreements did not actually increase access to justice.

In South Africa, one judge critical of the contingency fee system has sounded a note of caution:

**...we should beware of following the example of those jurisdictions where contingency fees are the major source of revenue for plaintiffs’ lawyers. It is no coincidence that those are the most litigious societies on the planet.** And you must not believe the explanation that this affords access to justice for those who could not otherwise afford it. If it does, that is a mere by-product of what is described by lawyers in the corridors of the courts as “drumming up trade”. Once again **a well-meaning endeavour to assist those who cannot afford legal services provides a perverse incentive for lawyers to profit.** This takes a variety of forms. It occurred in our own local courts in relation to cases on behalf of persons claiming social security grants. There was a natural sympathy for the applicants that disguised what was really happening, which was that governmental inefficiency was exploited to provide a not inconsiderable source of revenue to the legal practitioner riding the bandwagon. Let me mention briefly what happened when the court put an end to this by introducing a practice directive governing such cases. A year later I was asked to reconsider that practice directive but the evidence led before me showed unequivocally that people having grievances about social security grants were having their problems resolved quicker by following the directive than they had by pursuing legal proceedings. And of course the taxpayer was being saved vast sums in legal fees.

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<sup>300</sup> Herbert M Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Washington University Law Quarterly* 739 (2002) (hereinafter “Kritzer”) at 755.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Id.* at 755-56.

<sup>303</sup> Testimony of Lord Phillips of Worth Matravers, “Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence”, House of Commons, Constitutional Affairs Committee, 2006 at Ev2.

This is an inevitable consequence of a system of contingency fees. Lawyers will seek out potentially vulnerable targets and then find litigants to pursue them. The litigants hope to benefit from an award and the lawyer hopes to take as much as possible by way of contingency fees ... . The pattern we have encountered here in regard to social security and home affairs cases is currently being repeated in the United Kingdom in cases involving claims against housing authorities where the claims are modest but the lawyers' fees are much greater. We need to cry out that there is a vast difference between providing access to justice and the enrichment of lawyers. Whilst I am not in principle opposed to some system of contingency fees it requires safeguards to prevent its exploitation by those who see in it an opportunity to enrich themselves by gaming the system.<sup>304</sup>

One cautious route would be to set up a system which allows *conditional fees*, but not *contingency fees*. In both cases, the attorney earns nothing if the case is not successful. A conditional fee arrangement, however, de-links the size of the legal fee from the size of the award to the client. A legal practitioner acting under a conditional fee system thus has no motivation to take on a case with a relatively low chance of success simply because the potential award might be very large.

### 3.2 Costs of litigation

**Allowing a conditional or contingency fee system will affect the size of legal practitioners' fees.** Under a conditional fee arrangement, the fees in a successful case will always be greater than the fees assessed at an hourly rate, since the conditional fee is generally, by definition, the normal hourly fee plus a percentage increment as a "success fee" or "uplift". On the other hand, if the case is unsuccessful the client pays nothing at all.

**Of particular concern under a conditional fee system is that legal fees can consume most of the award.**<sup>305</sup> Under a contingency fee system, a plaintiff is guaranteed to retain a fixed percentage of the award – almost always a majority. When operating under a conditional fee agreement, however, an attorney's uplift is assessed not in terms of the amount of the award, but as a percentage of what would have been the normal hourly fee. If the amount of damages is small enough, the uplift may eat up most of the damages. A Policy Studies Institute Research Report, for example, found that attorneys often fix the uplift too high in light of the ultimate payout.<sup>306</sup> Further, the purchaser of legal services may not know or understand this risk when they agree to a conditional fee.<sup>307</sup>

**One way to address these problems would be to cap the total fee as a percentage of the award, as in South Africa. The uplift would be negotiated between the legal practitioner and client as a percentage of the hourly rate, but the entire fee would be capped at a fixed percentage of the total award.**<sup>308</sup> This is for obvious reasons an approach which applies only in respect of claimants.

**Another potential solution would be to treat the uplift as costs that a winning party could recover from a losing party. However, this would create an unfair situation for a losing**

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<sup>304</sup> Wallis J in *Ndlovu v Minister of Home Affairs and Another* 2011 (2) SA 621 (KZD) at para 3 (emphasis added).

<sup>305</sup> Testimony of Lord Phillips of Worth Matravers, "Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence", House of Commons, Constitutional Affairs Committee, 2006 at Ev2.

<sup>306</sup> Geoffrey Woodruffe, "Loser Pays and Conditional Fees – An English Solution?" 37 *Washburn Law Journal* 345 (1997-1998) (hereinafter "**Woodruffe**") at 354-44.

<sup>307</sup> Testimony of Lord Phillips of Worth Matravers, "Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence", House of Commons, Constitutional Affairs Committee, 2006 at Ev2.

<sup>308</sup> Woodruffe at 354-44.

**party, who would be liable for an increased fee beyond the usual statutorily-regulated costs simply because the winner chose a particular funding scheme.** Further, it would prevent the market from effectively limiting the size of the success fee under the agreement: clients entering conditional fee agreements would have little incentive to bargain for lower uplifts because, even if they were successful in the matter, the other party would bear the amount of the uplift.<sup>309</sup>

In contrast, **no categorical relationship exists between a contingency fee system and the relative fee size. Contingency fee arrangements may raise the fees a client would pay in contrast to normal hourly fees in some cases, but lower them in others.** Whether the fee is higher or lower will depend on factors including the size of the award to the client, the percentage of the award paid to the legal practitioner and the number of hours worked on the case. In certain cases, contingency fees can actually save the client money. When an award turns out to be sufficiently small and the lawyer must put in a significant amount of work, a contingency agreement may mean that the client pays *less* than he would at the legal practitioner's normal hourly rate.<sup>310</sup>

**Both conditional and contingency fees can promote competition by providing different payment options for clients;** competition can drive down the price of services and, even if they do not, a wider variety of funding options gives clients more choices. In the United Kingdom, for example, a government report has expressly concluded that it is in the public's best interests to have a market for legal services which gives clients "the widest possible choice of cost effective services".<sup>311</sup> **Both types of fees also protect the client's interests by providing legal practitioners with particularly strong motives to win.**

**In England, the shift of legal representation out of government-funded legal aid to litigation financed by conditional fee agreements both increased the overall cost of litigation<sup>312</sup> and saved the government money.** As the government began to permit conditional fee agreements more broadly, it stopped granting legal aid in personal injury and road accident cases;<sup>313</sup> conditional fee agreements were the only funding arrangement available to people who wanted to bring personal injury cases and could not afford normal attorneys' fees. Thus the system reduced the cost to the government. **However, because conditional fee arrangements provided for uplifts which could be as high as 100% of the normal fee, the overall cost of litigation to society may have increased.** Also, as noted above, the introduction of such fee agreements may push legal fees upward for all paying clients as legal practitioners seek to cover the losses incurred where they were not able to collect fees because the case was unsuccessful.

**Unless Namibia stopped funding certain forms of litigation or cut the legal aid budget, a shift to conditional or contingency fees would not save the government money; it would still be a better deal for a client to get guaranteed free legal representation (which also provides protection against a costs award) than to risk paying a success fee or a percentage of any damages award.** However, the means test and the other criteria for legal aid would mean that the legal aid option would be unavailable to most litigants – so for some, conditional or contingency

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<sup>309</sup> Testimony of Lord Phillips of Worth Matravers, "Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence", House of Commons, Constitutional Affairs Committee, 2006 at Ev3.

<sup>310</sup> Kritzer at 354–55.

<sup>311</sup> Lord Chancellor's Department, *The Work and Organisation of the Legal Profession* (1989) at 1.

<sup>312</sup> See Testimony of District Judge Oldham, "Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence", House of Commons, Constitutional Affairs Committee, 2006 at Ev6; Testimony of Lord Phillips of Worth Matravers, id at Ev2.

<sup>313</sup> Access to Justice Act of 1999 (as amended); see Testimony of David Marshall, "Compensation Culture: Third Report of Session 2005–06, Volume II, Oral and written evidence", House of Commons, Constitutional Affairs Committee, 2006 at Ev10; Evidence Submitted by the Law Society, id at Ev67.



fees might be the only realistic avenue to litigation apart from participation in private insurance schemes which cover legal costs.

**Another consideration to keep in mind is that Namibia has a Motor Vehicle Accident Fund which deals with compensation for road accidents and a Social Security Commission which deals with compensation for work-related injury – both key subject areas for conditional and contingency fee arrangements in other jurisdictions.** If Namibia were considering the introduction of such fee arrangements, it would be advisable to first assess how such arrangements would be likely to affect the ways these categories of claims are currently managed.

### **3.3 Ethical concerns**

**Both conditional and contingency fee arrangements can generate potential conflicts of interest between lawyer and client.**

**Ethical concerns regarding “no-win, no-fee agreements” arise primarily because the legal practitioner gains a financial stake in the outcome of the case and that interest can conflict with client’s interest.** Under a contingency fee system, for example, lawyers might want to settle quickly for a lower amount than the client wishes in order to guarantee they are paid, or they might want to push to take a case to trial hoping for a large verdict when a client would prefer to settle.<sup>314</sup> In the case of conditional fees, lawyers might push settlements that are not in a clients’ best interest since they receive payment only if they win, but the size of the award has no effect on the size of the payment.<sup>315</sup>

**The conflict between lawyer and client will become particularly acute when the amount a legal practitioner reasonably expects to earn under a fee agreement is less than the amount he or she would have earned at the hourly rate for that case.** Under an hourly fee arrangement, a plaintiff will usually want to limit the time a lawyer works on a case in order to keep the fees down. If the hours are kept sufficiently low, a plaintiff may rationally choose to settle for a lower amount because his net gain will be greater than a higher amount achieved at greater cost in attorney’s fees.<sup>316</sup> When paying using a contingency fee, however, the client is indifferent to the number of hours worked, and only wants to maximise recovery. The lawyer, however, *does* care about the number of hours worked. When the amount of money the lawyer would earn under on an hourly basis exceeds the expected recovery, that lawyer starts to lose money the more he or she works. In this case, the lawyer will want to settle in order to maximise the fee in comparison to the hours worked, while the client may want to push forward with litigation to maximise the award.

**But forbidding contingency and conditional fee agreements will not eliminate potential conflicts between lawyers and clients; hourly fee arrangements can generate such conflicts as well.** When charging at an hourly rate, the lawyer may want to drive up the number of hours worked at the expense of the client. Furthermore, the lawyer has no financial incentive to win because he or she gets paid either way.<sup>317</sup> **Of course, ethical duty, reputation and professional organisations governing legal practitioners all work to restrain this type of exploitative behaviour.**

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<sup>314</sup> See Woodruffe at 352, citing Michael Napier & Fiona Bawden, *Conditional Fees: A Survival Guide* (1995) at 46.

<sup>315</sup> Peter Kunzlik, “Conditional Fees: The Ethical and Organisational Impact on the Bar,” *Modern Law Review*. 850 (1999) at 864.

<sup>316</sup> Kritzer at 773.

<sup>317</sup> In the long term, however, a legal practitioner who worked many hours but failed to win would likely find it difficult to locate and keep clients.

**Similar restraints may also work to check ethical problems in the contingency or conditional fee context.** An American legal scholar has argued that a lawyer's reputation and investment in that reputation act as an effective check on abuses of contingency fees. For example, satisfied clients who refer friends and family are often the primary source of clients. It hurts a lawyer in the long-term if a client realises that he could have recovered a greater award or received a larger settlement: the client will refuse to refer other potential clients to the lawyer and may even badmouth the lawyer and thus damage his or her reputation. "A lawyer who settles cases too cheaply may have trouble maintaining the reputation necessary to create a flow of potential clients that is in the lawyer's long-term interest."<sup>318</sup>

**Another potential ethical concern is that contingency and conditional fee arrangements may also encourage legal practitioners to violate ethical rules in order to "win at any cost."** Under both types of arrangements, the lawyer is paid only if the case is successful and so is likely to feel a greater urgency to win the case. This incentive may entice some lawyers to violate ethical rules in order to win. A lawyer may be more likely, for example, to withhold evidence during discovery, when his or her own finances are at stake.

A further charge levied against contingency and conditional fee agreements is that **some clients will not understand the nature of the fee system or the nature of the obligations to which they are committing themselves.** But the problem of confusion is not restricted to contingency or conditional fee agreements, but could apply to more traditional funding arrangements as well. **Other jurisdictions have dealt with this challenge by requiring lawyers to explain in writing the nature of the agreement and the extent of the client's liability. Some jurisdictions allow for judicial review of such contracts; if the judge concludes that the agreement is unfair or unreasonable, it can be voided, modified or cancelled.** These protections help protect the client against unfair or unreasonable obligations.

Before instituting a contingency or conditional fee system, Namibia must consider how to prevent and counteract the resulting ethical risks. In particular, it should consider if the potential benefits to legal practitioners or clients justify the possible ethical costs.

## 4. Recommendations

**We are not yet convinced that Namibia should adopt conditional or contingency fee agreements. Although their introduction would likely improve access to justice in a particular subset of cases, they would still leave the poorest, most vulnerable litigants without assistance and would not necessarily help public interest cases reach the courts. Furthermore, they would introduce problematic ethical concerns.**

If Namibia decides to introduce contingency or conditional fee agreements, however, we recommend the following regulations to address these ethical difficulties.

**If Namibia adopts any "no-win, no-fee" system, we recommend that this should be a system of conditional fees (the normal hourly fee plus an uplift) and not contingency fees (a percentage of the monetary award).** A conditional fee system will prevent the excessive fees that have sometimes been gained as contingency fees in the United States, by making the fee proportionate to the work actually performed. In particular, a conditional fee system will not lead

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<sup>318</sup> Kritzer at 775.

to “ambulance chasing” of the kind that occurred in India after an industrial accident exposed hundreds of thousands of people to toxic chemicals and killed thousands: attorneys descended on a poor, injured and vulnerable population, seeking to file suit in US courts in hopes of a large, easy pay-out with little work.<sup>319</sup> As a further protection, under this system clients will retain the right to have their costs taxed by the taxing master or the Law Society.

**We propose that the party entering into the agreement, as opposed to the losing party, should be liable for the uplift.** Although a system awarding the uplift as costs against the losing party would more effectively encourage access to justice for low- and middle-income parties by allowing them to retain any monetary award in full, such a system would be unfair to losing parties by making them responsible for additional costs due to their opponents’ choice of funding mechanism. In the United Kingdom, the losing party is responsible for the uplift, but in practice this amount is usually covered by insurance. If such insurance developed in Namibia, the position might be revised.

**The court rules should cap the uplift for plaintiffs in order to ensure the fee does not consume the entire award.** First, as in South Africa, there should be a cap on the uplift based on a percentage of the normal statutory fee. Second, as in South Africa, there should also be a cap in terms of the total percentage of the award to the plaintiff. Together, the caps will ensure the plaintiff receives the majority of the award.

**Namibia should also institute procedural protections to ensure that clients are not exploited by unscrupulous legal practitioners.** First, a conditional fee agreement must be in writing, in plain language that the average person can understand, and signed by both the lawyer and the client or their agents. The legal practitioner must inform the client both orally and in the written contract about the nature of the fee obligation – including information about responsibility for any uplift; the circumstances which will constitute success; the manner in which the uplift fee will be calculated; the maximum uplift for which the client may be held responsible; and the maximum percentage of the award that may be charged as an uplift. **In particular, the agreement must define partial success, if appropriate – such as winning on only one of several causes of action or winning only a portion of the award sought.** The agreement must provide for a fair method of calculating the size of the success fee in the case of partial success. Any agreement purporting to hold the client responsible for fees above and beyond the statutory caps should be void.

**A client should have a right to have the agreement reviewed by a judge at any time up to six months after the legal practitioner has been paid, with the judge having power to void, modify, or cancel any agreement found to be unfair or unreasonable, or any agreement concluded in a situation where it was not reasonable to believe that the client understood the agreement’s terms.** The usual tariff of hourly rates would apply where an agreement is voided or cancelled.

**A question to be further considered is whether a client litigating under a conditional fee agreement should be responsible for disbursements.** Holding a client responsible for disbursements will undermine the access-to-justice purpose of permitting such agreements, as having to pay court fees and other disbursements upfront might prevent the poorest would-be-

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<sup>319</sup> See Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, Toronto: University of Toronto Press, 1993 (reviewed at <http://198.170.85.29/Lessons-from-Bhopal.htm>). The confusion inspired the Indian government to pass the Bhopal Gas Leak Disaster (Processing Of Claims) Act, 1985 making itself the exclusive representative of the victims in legal proceedings for compensation inside or outside of India.

litigants from accessing the courts. Furthermore, requiring the client to pay disbursements could lead to misunderstandings or abuse. A client might enter a conditional fee agreement believing that he or she will pay “nothing” if the case is not successful, only to discover that he or she is liable for disbursements.

**As in other jurisdictions examined, contingency or conditional fee agreements should not be allowed in criminal and family law cases,** particularly cases involving child custody and access. In criminal cases, a contingency fee simply does not make sense: the client will always be the defendant (or a potential defendant), and in most criminal cases there will be no monetary award at issue, and thus no way to calculate a contingency fee or to fund the uplift on a conditional fee award. More importantly, defendants in criminal cases are entitled to legal representation under Article 12(1)(e) of the Constitution. Namibia should not permit funding arrangements that would make this right effectively contingent on a particular funding scheme. Allowing conditional or contingency fees in family law cases would prioritise monetary awards over peaceful resolutions of family conflict.<sup>320</sup> For example, a legal practitioner in a child custody case should be concerned with the best interests of the child and with winning custody for his client, rather than improving his client’s financial position. This conflict becomes particularly acute and dangerous when issues of abuse and safety are involved. Further, the “object of family law is to achieve a just and equitable distribution of family property and to provide for the welfare of children. Contingency fee arrangements that allow for an increased fee or uplift, it is said, have the effect of reducing the pool of assets available to the parties and any children.”<sup>321</sup>

**Conditional or contingency fees will not help a party who is required to provide security for the opposing party’s costs at the outset of litigation.** Presumably a legal practitioner and a client could form an agreement under which the legal practitioner agrees to provide security for costs if necessary –although it is unlikely that any legal practitioner would be willing to take on this risk.

**A further consideration is the interaction of contingency fees with the legal insurance such as that provided by Legal Shield.** Under a Legal Shield policy (as of mid-2011), the insured pays approximately N\$150 per month in exchange for legal cover of N\$150 000 per insured per matter.<sup>322</sup> The policy limits the legal practitioners who can be used to those on a panel selected by Legal Shield.<sup>323</sup> According to a Legal Shield employee, there would be no need for one of their clients to enter into contingency fee agreements since the client’s litigation costs would be covered by the insurance policy.<sup>324</sup> However, the Legal Shield policy excludes certain claims, including (amongst others) claims that arise in whole or in part from events outside Namibia, from political activities of the policy holder, from a business matter or from defamation “or any other type of injuria where the Insured is cited as a Defendant”.<sup>325</sup> Providing the additional option of conditional or contingency fees might help provide access to justice for individuals whose claims are excluded from coverage. Furthermore, since Legal Shield would pay the legal practitioner’s normal hourly fees, a client with insurance cover might elect to enter into a contingency or conditional fee arrangement that provides financial incentives for victory. Of

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<sup>320</sup> South African Law Commission, *Project 93: Speculative and Contingency Fees, Report* (1996) at 4.43.

<sup>321</sup> Id at 4.51.

<sup>322</sup> Interview with Legal Shield employee, 27 July 2011; [www.legalshield.na/index.php?option=com\\_content&view=article&id=57&Itemid=66](http://www.legalshield.na/index.php?option=com_content&view=article&id=57&Itemid=66)

<sup>323</sup> Interview with Legal Shield employee, 27 July 2011; Legal Shield Policy Contract, section 10(6), available at [www.legalshield.na/downloads/Legal\\_Shield\\_Contract.pdf](http://www.legalshield.na/downloads/Legal_Shield_Contract.pdf).

<sup>324</sup> Interview with Legal Shield employee, 27 July 2011.

<sup>325</sup> Legal Shield Policy Contract, section 6.

course, many people do not choose to purchase such insurance or cannot afford to do so, and conditional or contingency fees might help this segment of the public access legal representation.

**Payments into the Fidelity Fund would also be affected by the operation of a “no-win, no-fee agreement”.** Under the Legal Practitioners Act 15 of 1995, “Every legal practitioner who holds or receives moneys for or on behalf of any person shall open and keep a separate trust banking account at a banking institution in which he or she shall deposit all such moneys.”<sup>326</sup> If the money is not needed immediately, it may be invested in “a separate trust savings or other interest-bearing account.”<sup>327</sup> The legal practitioner must pay over interest from this account to the Fidelity Fund.<sup>328</sup> An attorney paid under a contingency or conditional fee arrangement would never hold any client funds in trust: the attorney would either be paid at the end of litigation after a successful or partially successful result, or would not be paid at all. Therefore the trust account would not earn interest to be paid over to the Fidelity Fund in respect of these cases.

**Any legislation permitting conditional or contingency fee agreement in Namibia would need to consider payments to advocates.** Because advocates’ exemption from holding fidelity fund certificates depends on their not receiving funds directly from clients, advocates would not be permitted to make contingency or conditional fee agreements with clients directly. However, if an attorney referring a case to an advocate has formed a contingency or conditional fee agreement with the client, the advocate would also presumably not be paid unless the action succeeded. This might discourage advocates from participating in cases where a conditional or contingency fee agreement is in place. Moreover, the advocate, attorney, and client would need to work out an agreement determining the conditions under which the advocate would be paid. If the advocate were paid out of the amount to be paid over to the attorney in the event of success, it would reduce the amount paid to the attorney; such payment agreements may discourage attorneys from referring cases to advocates, or from forming contingency or conditional agreements in the first place. In contrast, an agreement under which the client must pay the advocate on top of paying the attorney seems drastically unfair to the client who has entered into the agreement believing that his or her final liability for the case has been capped.

**A final consideration concerns the problem of long delays between the argument of a case and the delivery of the judgement,** which are problematic in Namibia at present.<sup>329</sup> Against this backdrop, a legal practitioner would be taking a great risk by making payment contingent on a successful outcome, as this could mean that payment might be received only years after the work was done. This would be likely to make Namibian lawyers reluctant to enter into such agreements even if they were allowed.

**Because of the many concerns cited in this section, we would recommend great caution in moving toward any form of conditional fee arrangements.**

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<sup>326</sup> Legal Practitioners Act 15 of 1995, section 26(1).

<sup>327</sup> Id, section 26(2).

<sup>328</sup> Id, section 26(4).

<sup>329</sup> See, for example, “Judicial misconduct”, *insight magazine*, June 2012.

# APPENDIX A

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## UNITED KINGDOM

### Courts and Legal Services Act 1990, sections 58-58B (showing 2012 amendments)

#### 58 Conditional fee agreements.

(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this section and section 58A –

- (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
- (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances; and
- (c) **references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase.**

(3) The following conditions are applicable to every conditional fee agreement –

- (a) it must be in writing;
- (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
- (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee –

- (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
- (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
- (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.

**(4A) The additional conditions are applicable to a conditional fee agreement which –**

- (a) provides for a success fee, and**
- (b) relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.**

**(4B) The additional conditions are that –**

- (a) the agreement must provide that the success fee is subject to a maximum limit,**
- (b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,**
- (c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and**
- (d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.**

(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.

#### 58A Conditional fee agreements: supplementary.

(1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are –

- (a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and
- (b) family proceedings.

(2) In subsection (1) “family proceedings” means proceedings under any one or more of the following –

- (a) the Matrimonial Causes Act 1973;
- (b) the Adoption Act 1976;
- (c) the Domestic Proceedings and Magistrates’ Courts Act 1978;
- (d) Part III of the Matrimonial and Family Proceedings Act 1984;
- (e) Parts I, II and IV of the Children Act 1989;

- (f) Part IV of the Family Law Act 1996; and
- (g) the inherent jurisdiction of the High Court in relation to children.
- (3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c) –
  - (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
  - (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).
- (4) In section 58 and this section (and in the definitions of “advocacy services” and “litigation services” as they apply for their purposes) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.
- (5) Before making an order under section 58(4), **(4A) or (4B)**, the Lord Chancellor shall consult –
  - (a) the designated judges;
  - (b) the General Council of the Bar;
  - (c) the Law Society; and
  - (d) such other bodies as he considers appropriate.
- ~~(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.~~
- (6) A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement.**
- (7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).

#### **58AA. Damages-based agreements relating to employment matters**

- (1) A damages-based agreement which ~~relates to an employment matter and~~ satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
- (2) But subject to subsection (9), a damages-based agreement which ~~relates to an employment matter and~~ does not satisfy those conditions is unenforceable.
- (3) For the purposes of this section –
  - (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that –
    - (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
    - (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;
  - ~~(b) a damages based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.~~
- (4) The agreement –
  - (a) must be in writing;
  - (aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;**
  - (b) **if regulations so provide**, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;
  - (c) must comply with such other requirements as to its terms and conditions as are prescribed; and
  - (d) must be made only after the person providing services under the agreement **has complied with such requirements (if any) as may be prescribed as to the provision of information.**
- (5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.
- (6) Before making regulations under subsection (4) the Lord Chancellor must consult –
  - (a) the designated judges,
  - (b) the General Council of the Bar,
  - (c) the Law Society, and
  - (d) such other bodies as the Lord Chancellor considers appropriate.
- (6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.**

- (7) In this section –
- “payment” includes a transfer of assets and any other transfer of money’s worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);
  - “claims management services” has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act).

**(7A) In this section (and in the definitions of “advocacy services” and “litigation services” as they apply for the purposes of this section) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.**

(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).

**(9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.**

**(10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal**

### **58B Litigation funding agreements [PROSPECTIVE]**

(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) For the purposes of this section a litigation funding agreement is an agreement under which –

- (a) a person (“the funder”) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (“the litigant”); and
- (b) the litigant agrees to pay a sum to the funder in specified circumstances.

(3) The following conditions are applicable to a litigation funding agreement –

- (a) the funder must be a person, or person of a description, prescribed by the Secretary of State;
- (b) the agreement must be in writing;
- (c) the agreement must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the Secretary of State;
- (d) the agreement must comply with such requirements (if any) as may be so prescribed;
- (e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder’s anticipated expenditure in funding the provision of the services; and
- (f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Secretary of State in relation to proceedings of the description to which the agreement relates.

(4) Regulations under subsection (3)(a) may require a person to be approved by the Secretary of State or by a prescribed person.

(5) The requirements which the Secretary of State may prescribe under subsection (3)(d) –

- (a) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made; and
- (b) may be different for different descriptions of litigation funding agreements.

(6) In this section (and in the definitions of “advocacy services” and “litigation services” as they apply for its purposes) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(7) Before making regulations under this section, the Secretary of State shall consult –

- (a) the designated judges;
- (b) the General Council of the Bar;
- (c) the Law Society; and
- (d) such other bodies as he considers appropriate.

(8) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.

(9) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.



# APPENDIX B

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## SOUTH AFRICA Contingency Fees Act 66 of 1997

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

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

### Definitions

1. In this Act, unless the context otherwise indicates –
  - (i) “contingency fees agreement” means any agreement referred to in section 2(1);
  - (ii) “day” means a court day;
  - (iii) “legal practitioner” means an attorney or an advocate;
  - (iv) “normal fees”, in relation to work performed by a legal practitioner in connection with proceedings, means the reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney and own client basis, in the absence of a contingency fees agreement;
  - (v) “proceedings” means any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity, and includes any professional services rendered by the legal practitioner concerned and any arbitration proceedings, but excludes any criminal proceedings or any proceedings in respect of any family law matter;
  - (vi) “professional controlling body” –
    - (a) in respect of an attorney, means any body established by or under any law for the purposes of exercising control over the carrying on of the business of the attorneys’ profession, and of which such an attorney is a member; and
    - (b) in respect of an advocate, means any body which is determined by the Minister of Justice by notice in the *Gazette* for the purposes of this Act, and of which such an advocate is a member.

### Contingency fees agreements

2. (1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed –
  - (a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;
  - (b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.
- (2) Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the ‘success fee’), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

### Form and content of contingency fees agreement

3. (1) (a) A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the *Gazette*, after consultation with the advocates’ and attorneys’ professions.
- (b) The Minister of Justice shall cause a copy of the form referred to in paragraph (a) to be tabled in Parliament, before such form is put into operation.

(2) A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement.

(3) A contingency fees agreement shall state –

- (a) the proceedings to which the agreement relates;
- (b) that, before the agreement was entered into, the client –
  - (i) was advised of any other ways of financing the litigation and of their respective implications;
  - (ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;
  - (iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and
  - (iv) understood the meaning and purport of the agreement;
- (c) what will be regarded by the parties to the agreement as constituting success or partial success;
- (d) the circumstances in which the legal practitioner's fees and disbursements relating to the matter are payable;
- (e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
- (f) either the amounts payable or the method to be used in calculating the amounts payable;
- (g) the manner in which disbursements made or incurred by the legal practitioner on behalf of the client shall be dealt with;
- (h) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and
- (i) the manner in which any amendment or other agreements ancillary to that contingency fees agreement will be dealt with.

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

#### **Settlement**

**4.** (1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating –

- (a) the full terms of the settlement;
- (b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;
- (c) an estimate of the chances of success or failure at trial;
- (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
- (e) the reasons why the settlement is recommended;
- (f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and
- (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

(2) The affidavit referred to in subsection (1) must be accompanied by an affidavit by the client, stating –

- (a) that he or she was notified in writing of the terms of the settlement;
- (b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and
- (c) his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.

#### **Client may claim review of agreement or fees**

**5.** (1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the *Gazette* for the purposes of this section.

(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust.

**Rules**

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

**Regulations**

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

**Short title and commencement**

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

# APPENDIX C

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## PROPOSED DRAFT HIGH COURT RULES ON COSTS FOR NAMIBIA

### Protective cost orders in public interest cases

(1) The court may make a protective cost order at any stage of the proceedings, on such conditions as it thinks fit, on application by a party and after giving the opposing party or parties an opportunity to be heard, provided that the court is satisfied that –

- (i) the issues raised in the case are of general public importance;
- (ii) the public interest requires that those issues should be resolved; and
- (iii) having regard to the financial resources of the applicant or applicants and the respondent or respondents, and to the amount of costs that are likely to be involved, it is fair and just to make the order.

(2) A protective cost order may –

- (i) prescribe in advance that there will be no order as to costs in the substantive proceedings whatever the outcome of the case, with the result that all parties bear their own costs;
- (ii) prescribe in advance that there be no adverse costs order against the party requesting the protective cost order in the event that this party is unsuccessful in the substantive proceedings;
- (iii) cap the maximum liability for costs against the party requesting the protective cost order in the event that this party is unsuccessful in the substantive proceedings.

(3) If a plaintiff covered by a protective costs order refuses an offer of settlement and fails in the event to be awarded more than the offered amount or remedy, the protective cost order shall apply only with respect to the proceedings up to the date of the offer of settlement.

(4) The court may make any award regarding costs that it deems fit in respect of an application for a protective cost order under this rule.

### Recovery of costs by legal practitioners rendering free legal services

(1) If legal services are rendered without charge by a legal practitioner to a party to any proceedings in the court, and costs become payable to that party in terms of a judgment of the court or a settlement or otherwise, that party will be deemed to have ceded his or her rights to the costs to that legal practitioner or to his or her practice and the legal practitioner concerned may proceed in his or her own name, or the name of his or her practice, to have those costs taxed, where appropriate, and to recover them, without being formally substituted for the party in question.

(2) The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the party to whom the legal services were rendered by the legal practitioner actually incurred the costs of obtaining the services of the legal practitioner acting on his or her behalf in the proceedings concerned.