IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

DATE: 7 November 2025

SIGNATURE:

Case No. A55/2025

In the matter between:

DE BOD, FRED CHRISTIAN STEVEN **APPELLANT**

And

THE ROAD ACCIDENT FUND **RESPONDENT**

Coram: Mngqibisa-Thusi, Nyathi *et* Millar JJ

Heard on: 9 October 2025

Delivered: 7 November 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 7 November 2025.

Summary: Contingency Fees Act 66 of 1997 — s 2(1)(b) and (2) — contingency fees agreements must comply with Act — not permissible for a legal practitioner to recover more than 25% of the capital amount towards fees.

'success fee' —does not attract Value Added Tax (VAT) in the same way as 'normal fees' — the Act was not enacted to provide legal practitioners with an alternative preferential method of determining their fees over and above normal fees.

'normal fees' as defined in the Act remain the standard by which the reasonableness of the fees of a legal practitioner is determined — surcharge which is added to normal fees to make up the success fee bears no relation to value of services rendered but is a function of risk.

ORDER

It is Ordered:

[1] The appeal is dismissed.

[2] There is no order for costs.

JUDGMENT

MILLAR J (Mngqibisa-Thusi et Nyathi JJ concurring)

[1] This is an appeal against a judgment and order granted on 30 September 2024 in terms of which the contingency fee agreement entered into between the plaintiff and his attorney was declared to be invalid for want of compliance with the Contingency Fees Act[1] (the Act).

[2] The crisp issue for determination in this appeal is whether, properly construed, the agreement in question falls foul of the Act or not.

[3] Contingency fees agreements between legal practitioners and their clients are prohibited by the common law and may only be entered into lawfully within the parameters of the Act. Even though the Act is written in clear language and ought to be readily understandable to legal practitioners, who are prepared to accept instructions from their clients on this basis, there persists some confusion regarding what is permitted and what is not permitted in terms of the Act.

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[1] 66 0f 1997. The relevant section of the Act is section 2 which provides:

*"2 **Contingency fees agreements***

(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."

[4] Before turning to the contingency fees agreement in issue in this appeal, an overview of how our Courts have interpreted the Act and a setting out of the present legal position is useful.

[5] In *Price Waterhouse Coopers Inc. and Others v National Potato Co-operative Ltd*[2] the scope of the Act was described as follows:

> *"[41] The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a 'no win, no fees' agreement (S2(1)(a) and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner on more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)). The Act has detailed requirements for the agreement (s 3), the procedure to be followed when the matter is settled (s 4), and gives the client a right of review (s 5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s 6) and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that Contingency Fees be carefully controlled. The Act was enacted to legitimise Contingency Fee Agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any Contingency Fee Agreement between such parties which is not covered by the Act is therefore illegal. What is of significance, however, is that by permitting 'no win, no fees' agreements the Legislature has made speculative litigation possible. And by permitting increased fee*

[2] 2004 (6) SA 66 (SCA) at para [41].

agreements the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action."

[6] In *De la Guerre v Ronald Bobroff & Partners*[3], the full court held that:

> *"the Contingency Fees Act is exhaustive on its stated object, and any contingency fee agreement not in compliance with it is invalid."*

[7] In *Thulo v Road Accident Fund*,[4] which was approved by the full court in *De La Guerre*, the court explained how the Act was to be interpreted. In this regard it was held that:

> *"[51] The true function of a proviso is to qualify the principal matter to which it stands as a proviso – as to which see, for example, Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 79F-J and the cases there cited. In other words, a proviso taketh away but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double – 100% more than – the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.* [My underlining].
>
> *[52] As this principle of interpretation is not always applied there is a danger of misinterpretation of this section by legal practitioners. Incorrectly interpreted it can be used to argue that the client has to pay (i) double the normal fee or (ii) 25% of the total amount awarded in a claim sounding in money, whichever is the higher. That is completely wrong. The practitioner's fee is limited, on a proper reading of the section, to (i) 25%*

3 2013 JDR 0213 (GNP) at para 14.2, Approved and applied in *Ronald Bobroff & Partners v De La Guerre* 2014 (3) SA 134 (CC).

4 2011 (5) SA 446 (GSJ) at paras [51]-[53]. This was cited with approval in *Mathimba* (below n 7) at para [104].

of the amount awarded in the judgment, or (ii) double the normal fee of the practitioner, whichever is the lower. If double the normal fee results in the client having to pay a fee higher than 25% of that which was awarded to the client in a money judgment (costs aside) the legislature has put a ceiling on such fee and said, in effect, 25% of the money amount awarded is the maximum fee that can be raised. Where, however, double the normal fee does not exceed 25% of the money amount awarded then double the normal fee is the maximum fee that can be raised."

[8] In *Masango v Road Accident Fund*,[5] it was held that:

> *"[12] The attorney (legal practitioner) is authorised in terms of s 2(1)(b) read with s 2(2) of the CFA, as an incentive, to charge a success fee which is higher than his or her normal fee, subject to the two caps. The normal fees of the attorney are taken as a base and the attorney is authorised to increase the normal or base fee by up to 100%. The attorney may thus increase the normal fee by say 10%, 20%, 30%, 40; 45% etc, but the percentage increase may not exceed 100%. This is the first cap on success fees. What is important is that there is a base (the normal fee) from which a percentage increase is permissible. This is the ordinary and only basis on which the practitioner may increase fees. The legal practitioner first determines his normal fee, which he would have been entitled to charge without a contingency fees agreement, and then increases it in terms of the contingency fees agreement. The success fee is a fee which has been increased from the normal fee. It is thus necessary that we understand the meaning of these 'fees', 'normal fees', and then 'success fees', as contemplated in the section".*

And

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[5] 2016 (6) SA 508 (GJ) at para [12] and [16]. 'Normal fees' are defined in the Act as 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.*"

> *"[16] 'Normal fees' of an attorney for litigious work are fees for charges that would ordinarily be allowed on taxation."*

[9] In *Mkuyana v Road Accident Fund*[6] in considering unregulated contingency fees stated that:

> *"[16] Unregulated, contingency fee agreements have the potential for earnings by legal practitioners which are excessive and disproportionate to the labour and risk invested. This will negatively impact on public confidence in the legal system. The legislature was clearly conscious of the risk of exploitation when it legitimised contingency fee agreements. What the Act therefore sets out to do is to carefully regulate the extent to which a legal practitioner may agreement with his client for the payment of an increased fee."*

[10] In *Mathimba and Others v Nonxuba and Others,*[7] the full court held:

> *"[106] For those reasons we have concluded that the proper approach to sub-section (2) is that it refers to and qualifies a higher fee where the contingency fee agreement is one under which the legal practitioner charges fees higher than normal fees. It imposes limitations on the whole of such an agreement. In other words sub-section (2) refers to the whole of the fees chargeable under an agreement not simply to the difference of normal fees and higher fees".*

[11] What is readily apparent from the authorities quoted above, is that the Act permits two types of contingency fee agreements –

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6 2020 (6) SA 405 (ECG) at para [16].
7 2019 (1) SA 550 (ECG) at para [106].

[11.1] The first is an ordinary 'no win, no fee agreement' where the legal practitioner, subject to a successful outcome, will charge his client his ordinary fees. These are referred to in the Act as 'normal fees' and are subject to taxation, should the practitioner's client require it. This is an agreement in terms of s 2 (1)(a) of the Act.

[11.2] The second is also a 'no win, no fee agreement' but in this instance, besides the entitlement to the 'normal fee' on a successful outcome, the legal practitioner is able to negotiate, based on his assessment of the risk, a 'surcharge' or 'success fee' of up to 100% of the normal fee provided however that the combination of the two does not exceed 25% of the capital amount which is recovered by the client. This is an agreement in terms of s 2 (1)(b) of the Act.

[12] Practically, taking guidance from the Act, when fees are recovered in terms of such agreements, the starting point is for the drawing of an attorney and own client bill of costs based on the 'normal fees'. This bill may either be agreed or may be subject to taxation by the taxing master. Insofar as s 2(1)(a) agreements are concerned, this is the process that applies to the calculation and assessment of all fees in litigious matters irrespective of whether or not they are subject to the Act.

[13] Insofar as s 2(1)(b) agreements are concerned, the starting point is the same as with the s 2(1)(a) agreement. An attorney and own client bill of costs must be agreed or taxed. It is after this has occurred, that the process by which the 'surcharge' is determined. The process is a simple one. The taxed or agreed attorney and own client costs are doubled ie the total taxed or agreed fees are multiplied by two.

[14] It is once this calculation has been done that a comparison occurs. The capital amount recovered by the client is multiplied by 25% and that amount is compared to the 'normal fee' plus the surcharge. The two together are the 'success fee'. If the 'success fee' is less than the 25% then that is what the legal practitioner recovers as a fee. If the 'success fee' is more than the 25% then only that amount that represents the difference between the success fee and the 25% is the additional amount that the legal practitioner may recover.

[15] It may even occur, subject to the assessment of 'normal fees' that such 'normal fees' once taxed or agreed, will exceed the 25% even if they are not increased by the surcharge. Whether or not this would occur, is one of the factors that is considered by the legal practitioner in the assessment of his risk when choosing which of the two agreements he is prepared to accept instructions on.

[16] Put simply, the 'normal fees' are earned and whether taxed or agreed, represent the value of the work done by the legal practitioner for his client. The 'surcharge' is not earned in the same way as the professional fees are. It bears no relation to the value of the actual services rendered other than to provide the basis for the calculation of the reward for taking a risk. This is distinguishable from the s 2(1)(a) agreement where the risk taken by the legal practitioner is borne solely by him/her and not by the client. In the case of the s 2(1)(b) agreement, the client agrees to pay a premium, calculated within the parameters of the Act, for the legal practitioner's assumption of risk of recovery of fees in the case.

[17] An additional issue arises. Does the 'success fee' attract Value Added Tax (VAT) in the same way as the normal fee does? In other words, should s 2(1)(b) of the Act be read to include VAT if double the 'normal fee' equals or exceeds the 25% of the capital recovered by the client?

[18] This question was answered in the negative in *Masango v Road Accident Fund*[8] and in *Van der Westhuizen v Road Accident Fund*.[9] In *Sello v Road Accident* Fund[10] this question was answered in the affirmative.

[19] Central to the question of whether VAT is to be included over and above the 25% referred to in s 2(2) of the Act, is whether the 25% limit imposed by the section represents a fee. It clearly does not. The only fees recoverable in terms of the Act are 'normal fees' which may be increased, subject to the amount of the 'surcharge'. S 2(2) provides the method for the calculation of both the normal fee together with the success fee and imposes a limit being 25% of the total amount recovered by the client. In entering into an agreement in terms of s 2(1)(b), the legal practitioner is aware that whatever percentage 'surcharge' is agreed, in the event of success, this is limited by the provisions of s 2(2).

[20] In other words, the total fee which includes both the 'normal fee' and the 'surcharge' – referred to in s 2(2) as the *"success fee"* is limited, how so ever it is calculated to be in total, no more than 25% of the amount recovered by the client. If the 25% is to be regarded as a fee upon which VAT is to be charged, this would mean that the effective rate being charged to the client is 28.75% based on the present VAT rate of 15%.

[21] This patently offends against the Act. Since VAT is charged on 'normal fees', the legal practitioner in the assessment of his risk and in the decision to enter into a s 2(1)(b) agreement with his client is aware that subject to the capital amount that is recovered, in the event that the double normal fee does not fall within the 25%, he may in respect of his 'surcharge' recover something less than double the 'normal fee' and that the lesser surcharge that is recovered because it is capped

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[8] Above n 5 at para [35].
[9] 2024 JDR 3333 (GP).
[10] [2025] ZAGPPHC 1077 (29 September 2025). See in particular paragraph [61] – [63] from which it is clear that the interpretation preferred by the Court was one in favour of the commercial interests of legal practitioners.

by the 25% is limited to necessarily include VAT. This is a function of the risk assessment of the legal practitioner. The legal practitioner is perfectly entitled to enter into a s 2(1)(a) agreement where this is not an issue[11].

[22] The dictum in *De La Guerre v Ronald Bobroff*, a decision of the Full Court of this Division, which was approved and applied by the Constitutional Court, is dispositive of the matter insofar as any application of the calculation of the 'success fee' is concerned. It is not permissible in terms of a s 2(1)(b) agreement for a legal practitioner to recover anything more than 25% of what is recovered by the client for his fees. To find otherwise would be inimical to the provisions of the Act.

[23] For these reasons, I agree with the dicta in *Masango* and *Van Der Westhuizen* and that the cap on fees set out in s 2(2) of the Act insofar as it may be applicable in a particular case, is absolute. If the interpretation preferred in *Sello* were to be followed, the consequence would be entirely self-serving in favour of the legal practitioner and to the detriment of the client. This is in direct contrast to the very purpose for which the Act was enacted. It was not enacted to provide legal practitioners with a financially preferential method of determining their fees over and above normal fees but rather to facilitate access to court for those who would otherwise not have been able to do so.

[24] Turning now to the appeal in the present matter.

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[11] See *Rex v Canestra* 1951 (2) SA 317 (A) at 324H, it was held: *"The only necessity compelling the appellant to risk contravening the regulation is economic and that is not a form of necessity that the law recognises. If he cannot avoid infringing the law without abandoning his occupation then he and his fellow fishermen must seek some other means of livelihood."* This was a case dealing with fishing rights but which finds application in the present case. Legal practitioners have a choice which of the two agreements they wish to enter in terms of the Act and are obliged to ensure that they comply with the Act in doing so. Their choice should they be unable to comply in any respect with the requirements for a particular agreement is to choose another agreement with which they are able to comply.

[25] The Court *a quo* had regard to the following paragraphs in the contingency fee agreement in question:

> "6.1 *Die partye kom ooreen dat indien die klient suksesvol of gedeeltelik suksesvol is soos bedoel in die ooreenkoms, sal die regspraktisyn, benewens" sy normale fooi ook geregtig wees op 'n suksesfooi (hoër fooi) onderhewig aan die bepalings dat:*
>
> 6.1.1 *Enige sodanige fooie wat hoër is as die regspraktisyn se normale fooi (synde "suksesfooi"), sal nie die normale fooie met meer as 100% oorskry nie, en in eise van "klinkende munt", sal sodanige suksesfooi nie 25% van die klient se kapitale skikking wat uit die aksie voorspruit oorskry, welke bedrag nie koste of uitgawes insluit nie.*
>
> 6.2 *Die partye tot die ooreenkoms kom ooreen dat, indien die klient gedeeltelik suksesvol is soos bedoel in die ooreenkoms, sal die regspraktisyn, benewens sy normale fooi, ook geregtig wees op 'n suksesfooi (hoër fooi) onderhewig aan die volgende:*
>
> 6.2.1 *Enige sodanige fooie wat hoër is as die regspraktisyn se normale fooi (synde "suksesfooi"), sal nie die normale fooie met meer as 100% oorskry nie, en in eise van "klinkende munt", sal sodanige suksesfooi nie 25% van die klient se kapitale skikking wat uit die aksie voorspruit oorskry, welke bedrag nie koste of uitgawes insluit nie."*

[26] It then went on to find:

> *[20] The important word in the above paragraphs is the word "benewens" which I have highlighted, which means that, save for the normal fee, a further success fee is charged in addition to the normal fee. The agreement explains the method of calculation, which is the following: Firstly, the attorney's fees are calculated on the attorney/client scale. Then the "success fee" is calculated as double the attorney/client fee, or 25% of the claim, whichever is the least. Finally, the attorney client fee and the "success fee" are added together to*

determine the total fee payable to the attorney. Finally, VAT is added to the total amount. The example used in the agreement explains that out of a hypothetical settlement of R 500 000, the client would be entitled to payment of R 272 000.00, slightly more than 50% of the claim, instead of 75% as the CF Act provides."

[27] The appeal was argued on the basis that the quoted clauses in their terms did not fall foul of the provisions of the Act. It was further argued that regarding the word *"benewens"*, this also did not render the agreement invalid because *"the word benewens does not fall foul of the definition of 'a success fee' and is in line with the words "is in addition to" and 'together with the additional amount' as contained in the definition of 'a success fee.'"* In this regard the Court was referred to the translation of "benewens" as set out in a bilingual dictionary.[12]

[28] The argument went on to refer to the rules published by the Legal Practice Council in terms of s 6 of the Act[13] and the definition of a 'success fee'. The definition is:

> *"1.12 A success fee means a fee contemplated in Section 2(1)(b) read together with Section 2(2) of the Act which is in addition to the normal fee. To be clear: the entire higher fee to be charged, comprising the normal fee together with the additional amount will constitute the success fee. The success fee is not just the additional amount, but the total of those two amounts, being the normal fee plus the additional amount."* [My underlining]

[29] The Court was also referred to rule 6.7 which provides:

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12 Tweetalige Woordeboek/Bilingual Dictionary by Professor DB Bosman, Professor IW van der Merwe and Doctor LW Hiemstra, published by Pharos 8th Edition at page 57.

13 General Notice 525 in Government Gazette 42739 of 4 October 2019.

"The 'success fee' is referred to in Section 2(2) of the Act, is the total of the 'normal' fee and the 'higher than normal' fee. The limitation and cap referred to in Section 2(2) applies to the total fee charged by a legal practitioner or practitioners in any one claim."

[30] It was argued that properly construed, having regard to paragraphs 2.1.4[14] and 7.1.3 [15] of the contingency fee agreement, there was only ever going to be a single fee charged which is a composite fee and for that reason, the fee agreement ought to be held valid.

[31] If the agreement were to be construed in terms of the operative provisions of it, the meaning of *"benewens"* argued by the appellant, could reasonably be ascribed to it. This is however not the end of the matter.

[32] In the case of written agreements, regard must be had to the contents of the agreement. From these contents, given their ordinary meaning, the intention of the parties is ascertained. It is trite that this is to be done contextually and in a businesslike manner.[16]

[33] Despite *prima facie* compliance with the terms of the Act insofar as sections 2(1)(b) and 2(2) are concerned, the contingency agreement contains the following example of how the agreement would be implemented:

"7.3 Voorbeeld van berekening:

Kapitale bedrag	*R500 000.00*	*(aksie sukesevol interme van paragraaf 4.1.1)*

[14] *"Ingelig is dat die suksesfooi die normale fooi is wat met a spesifieke persentasie aangepas word en tussen die partye ooreengekom word soos per par 4 en 6 hiervan."*
[15] *"Die normale fooi word dan vermeerder met die bedrag van die suksesfooi ten einde die regspraktisyn se fooi uit die ooreenkoms te bepaal."*
[16] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at para [25]; *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another* 2024 (1) SA 103 (SCA).

25% daarvan	*R125 000.00*	*(perk van suksesfooi)*
Normale fooi	*R100 000.00*	*(soos getakseer op 'n prokereur-en-klient skaal)*
Suksesfooi	*R100 000.00*	*(maar word beperk op 25% of dubbel normale fooie welke die minste is)*
Regpraktisyn se fooi	*R228 000.00*	*(plus 14% BTW)*
Kapitaal na fooie	*R272 000.00*	
Plus koste bydrae	*R96 000.00*	*(betaalbaar aan klient)*
Totaal aan klient	*R388 000.00"*	

[34] It is readily apparent from the above example that the contingency fee agreement in question in this case is not going to be implemented by the legal practitioner in accordance with the provisions of the Act.

[35] Firstly, the normal fee of R100 000.00, if VAT was to be charged, would be R114 000.00. This figure is then multiplied by two and amounts to R228 000.00. It is against this R228 000.00 that the 25% limit provided for in section 2(2) is to be applied. In other words, the maximum fee that can be recovered by the legal practitioner if the case were settled for R500 000.00 is R125 000.00.

[36] The difference between the normal fees of R114 000.00 and the R125 000 (25% limit) is the applicable surcharge. This difference is, in the present example, R11 000.00 which means that the client is to obtain the sum of R375 000.00 from a capital settlement of R500 000.00.

[37] Insofar as the costs recovery is concerned, the R96 000.00 in the example is to be paid to the client, having regard to the proviso in s 2(2) of the Act, which excludes the costs recovery from the calculation completely. On the example

given, were the Act to have been correctly applied, the client would have received R471 000.00 (being R375 000.00 plus R96 000.00) and not the R388 000.00.

[38] The example makes it plain that the legal practitioner, the author of the agreement, did not enter into it on the basis that it would be implemented in terms of the Act but rather on a basis, as set out in the example, that serves his interest and not that of the client.

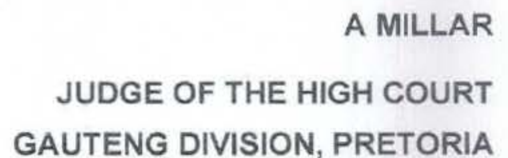
[39] Since the only way in which a valid contingency fee agreement can be entered into is in terms of the Act, any such agreement which does not comply either in its terms or in its application, is unlawful. It is for this reason that the Court *a quo* was correct in setting aside the contingency fee agreement and that this appeal must fail.

[40] Insofar as costs are concerned, since the appeal was unopposed, there will be no order for costs.

[41] In the circumstances, I propose the following order:

[41.1] The appeal is dismissed.

[41.2] There is no order for costs.



A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

N MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE,

S NYATHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	9 OCTOBER 2025
JUDGMENT DELIVERED ON:	7 NOVEMBER 2025
COUNSEL FOR THE APPELLANT:	ADV. MCC DE KLERK
INSTRUCTED BY:	GERT NEL INCORPORATED
REFERENCE:	MR. D OELOFSE

NO APPEARANCE FOR THE RESPONDENT