

COST AND FEE ALLOCATION IN CIVIL PROCEDURE

REPUBLIC OF SOUTH AFRICA

Introduction

South African law is an uncodified civil law system with Roman-Dutch law, and originally Roman law, as its major formative element. Since the beginning of the nineteenth century a strong thread of English law has been woven into the fabric of that system.¹ As such, it is one of the so-called “mixed jurisdictions” at the intersection of civil law and common law.² In particular, procedural techniques have largely assimilated the English patterns. The legal profession is organised on the English model with a distinction being made between attorneys (solicitors) and advocates (barristers). Like his English counterpart, the South African advocate gets his brief from an attorney (solicitor) and not directly from the client. The modern South African law of costs, which in broad terms follows the English pattern, is to be found in a multitude of decided cases and a large number of statutory provisions.³

¹ See HJ Erasmus “the Interaction of Substantive and Procedural Law: the Southern African Experience in Historical and Comparative Perspective” (1990) 1 *Stellenbosch LR* 348; HJ Erasmus “The interaction of Substantive Law and Procedure” in *Southern Cross. Civil Law and Common law in South Africa* ed Reinhard Zimmermann and Daniel Visser (Clarendon Press, Oxford 1996) 140.

² See, in general, *Southern Cross. Civil Law and Common Law in South Africa* ed Reinhard Zimmermann and Daniel Visser (Clarendon Press, Oxford 1996); *Mixed Legal Systems in Comparative Perspective* ed Reinhard Zimmermann, Daniel Visser and Kenneth Reid (Juta & Co Ltd, Cape Town 2004)

³ The principal general work is that of AC Cilliers *Law of Costs* 3rd ed (LexisNexis, Durban 2008). Other major texts are the Chapter on “Costs” in *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed by Cilliers, Loots and Nel (Juta & Co Ltd, Cape Town 2009) and *Jones and Buckle. The Civil Practice of the Magistrates’ Courts in South Africa* 9th ed by Erasmus and Van Loggarenberg (Juta & Co Ltd, Cape Town 1996, 1997) vol II, 33-23 et seqq.

[1] The Basic Rules

The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*⁴:

The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, 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 this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.

The purpose of an award of costs to a successful litigant is –

..... to indemnify him for the expense to which he was been put through having been unjustly compelled to initiate or defend litigation, as the case may be. Owing to the operation of taxation, however, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.⁵

A costs order is not intended to be compensation for a risk to which a litigant has been exposed, but a refund of expenses actually incurred.

⁴ 1996 (2) SA 621 (CC) at 624B—C (par [3]).

⁵ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

A distinction is made between *party-and-party costs* and *attorney and client costs*. Party and party costs are those costs that have been incurred by a party to legal proceedings and that the other party may be ordered to pay. They do not include all the costs that a party to a suit may have occurred, 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. Those costs, charges and expenses will include only those costs incurred in the litigation itself. So, for instance, costs of obtaining counsel's opinion as to a party's prospects of success in a contemplated action will not be allowed as between party and party.

The taxing master of the court in which the litigation took place decides which costs, charges and expenses incurred by a litigant who has been awarded costs against his adversary, should be allowed as having been necessarily or properly incurred.⁶ A litigant who has an award of costs in his or her favour, submits a bill of costs to the taxing master for taxation. A bill of costs is drawn in accordance with the tariffs of fees set in the Rules of the court concerned, and in accordance with established practice where no fee is prescribed for a particular service.

Attorney-and-client costs are the costs that 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 attorneys' services were engaged and are not dependent upon any award of costs by the court. In the wide sense, it includes all the costs that the attorney is

⁶ The principal text is that by MS Jacobs and NEJ Ehlers *Law of Attorneys' Costs and Taxation Thereof* (Juta & Co Ltd, Cape Town 1979).

entitled to recover against the client on taxation of the bill of costs. The term is also used in a narrower sense as applying to those charges and expenses as between attorney and client that ordinarily the client cannot recover from the other party.

The costs and expenses of witnesses (including expert witnesses) are borne by the litigant who calls the witness to testify on his or her behalf. A successful litigant who gets a costs order in his favour will include such expenses in the bill of costs submitted to the taxing master. Such costs, especially the costs of expert witnesses, may constitute a significant factor in the litigation, and all the costs thus incurred may not, depending upon the circumstances, be recoverable in full on a party and party bill of costs.

The basic principles set out above also apply to appeals. The principle is encapsulated in Rule 18 of the Rules of the Supreme Court of Appeal which provides as follows:

With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him or her in relation to his or her claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been made, the taxing master shall on every taxation allow such costs, charges and expenses as appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred them, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to counsel or by other unusual expenses.

In the case of an appeal there is the additional expense of preparing the record of the proceedings of the court of first instance. In the case of a complex and lengthy trial in the court of first instance, the cost of preparing the record may be prohibitive. The Supreme Court of Appeal requires the parties to an appeal to restrict the record to the evidence relevant to the issues raised in the appeal. Unreasonable failure to do so, may result in an adverse order as to costs.⁷

There is no difference in principle between the Constitutional Court and the Supreme Court of Appeal in relation to the law of costs although, for reasons of policy dictated by and related to its constitutional jurisdiction, its approach to awards of costs differs in some respects from that in the other courts.⁸ In 1996 the then Deputy President of the Constitutional Court, having referred to the general rule that subject to the discretion of the court, costs should follow the result and the losing party should be ordered to pay the costs of the successful party, pointed out that litigants seeking to test the constitutionality of a statute usually seek to ventilate an important issue of constitutional principle.⁹ Thus in *Transvaal Agricultural Union v Minister of Land Affairs*¹⁰ the President of the Constitutional Court said:

⁷ A recent example is *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2003 (3) SA 54 (SCA); [2004] 1 All SA 20 (SCA) in which the respondent's attorney was deprived of part of his fees for insisting on the inclusion in the record of seven volumes of documents which were largely irrelevant to the issues raised in the appeal.

⁸ *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) at 72E.

⁹ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at 183B—C.

¹⁰ 1997 (2) SA 621 (CC) at 635H.

There may be good reasons why a losing litigant who raises a substantial constitutional issue before this Court ought not to be ordered to pay the costs of the successful party.

This is, however, not an inflexible rule, and where the grounds of attack on the impugned statute are frivolous or vexatious, or where the litigant has acted from improper motives or there are other circumstances which make it in the interest of justice that such costs be paid by the losing party, the Constitutional Court might direct that a losing party pay the costs of the other parties.¹¹

[II] Exceptions and Modifications

There are isolated cases in which a statute expressly authorises a court to depart from the general rule that costs follow the event. Thus, for example, section 32(2) of the National Environmental Management Act 107 of 1998 authorises a court not to award costs against unsuccessful litigants in certain proceedings aimed at the protection of the environment. In terms of section 21(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Regulations promulgated under the Act, a court may depart from the general rule “in the interest of equity and fairness”.¹² There are other statutes which contain provisions pertaining to costs, but these provisions are all subject to the overriding principle that the award of costs, unless

¹¹ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at 183B—C. This approach was underscored by the Supreme Court of Appeal in *Kini Bay Village Association v The Nelson Mandela Metropolitan Municipality, Chase Street Properties (Pty) Ltd and Pierre Kolesky* 2009 (2) SA 166 (SCA) at 166.

¹² The provisions of the Act are considered in *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town* 2009 (1) SA 644 (EqC).

expressly otherwise enacted, is in the discretion of the presiding judicial officer. An example of such a statutory provision is the Income Tax Act 58 of 1962 which deals with costs in appeals against assessments of income tax to the tax court established in terms of section 83 of the Act. Another example is the Expropriation Act 63 of 1975 which in section 15(2) makes provision for a special order as to costs under certain circumstances.¹³

There are no mandatory pre-litigation procedures, such as mandatory mediation, which may impact on cost and fee allocation. However, Rule 37 of the Rules of the High Court makes provision for a mandatory pre-trial conference aimed at narrowing the issues and reaching agreement on matters which may expedite the proceedings. Costs may be disallowed to a party who unreasonably neglects to take advantage of the provisions of the rule or who unreasonably fails to co-operate with his opponent in doing so.¹⁴

Commercial contracts often contain an agreement for the payment of costs on the scale as between attorney and client. Though a court will in general enforce such an agreement, it retains a residual judicial discretion not to enforce the agreement in circumstances it considers inappropriate or undeserved.¹⁵

¹³ The application of the section can result in unjust results and in *Mooikloof Estates (Edms) Bpk v Premier, Gauteng* 2000 (3) SA 463 (T) at 492 it is made clear that a court may depart from its provisions.

¹⁴ *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W).

¹⁵ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055I; *Geldenhuis v East and West Investments (Pty) Ltd* 2005 (2) SA 74 (SCA) at 77C—E.

Parties are allowed to represent themselves but it is in general regarded as undesirable for very few litigants are capable of handling their own cases in a competent manner. In the Small Claims Courts, legal representation is not allowed and parties are obliged to appear for themselves.

[III] Encouragement or Disencouragement of Litigation

The rules governing cost and fee allocation are not expressly designed to encourage or discourage litigation. In terms of its general discretion in awarding costs, the court may deprive a successful party, in whole or in part, of the costs it may recover from the other party if by unreasonable conduct in the litigation it has increased the burden of costs of its opponent.¹⁶

The amount a party will have to pay up front will differ from case to case. It will depend upon factors such as whether the litigation takes place in a magistrate's court or a High Court, the nature of the case, the amount of preparatory work envisaged, whether expert evidence will be required, and so forth. Attorneys will usually require an up front payment or deposit sufficient to cover (at least) initial expenses and disbursements. The cost of litigation is high, especially in the High Courts, and there undoubtedly are cases in which prospective litigants are discouraged by up-front payment requirements. Court fees and sheriff's fees (for the service of documents) are not such as to discourage litigants.

¹⁶ In this regard the recent example of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2003 (3) SA 54 (SCA); [2004] 1 All SA 20 (SCA) may again be referred to, in which the respondent's attorney was deprived of part of his fees.

[IV] The Determination of Costs and Fees

Most of the questions under this head have been dealt with in on Section [I] above.

There are Tariffs of Fees set out in the Rules of the magistrates' courts and the Rules of the High Courts and the Constitutional Court. These set out in detail the amounts that can be recovered in respect of various services rendered by a legal representative upon the taxation of a bill of costs. The actual costs incurred by a party may exceed what can be recovered in terms of the tariffs upon taxation.

In determining the reasonableness or otherwise of counsel's (advocate's) fee for the purpose of the taxation of a party and party bill, the taxing master must give consideration to factors such as the importance and complexity of the matter, its financial value to the parties, the volume of the record, the work actually done by counsel and the fact that counsel must be fairly compensated for preparation and presentation of argument. In *City of Cape Town v Arun Property Development (Pty) Ltd and Another*¹⁷ it was said that a comparison between the rate charged by counsel (who was a member of the Cape Bar) and the Cape Bar Council's fee parameters provides a sound basis for determining the reasonableness of the rate charged by counsel.

¹⁷ 2009 (5) SA 227 (C).

[V] Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims and Litigation Insurance

Agreements providing for success-orientated fees in any form, called *pacta de quota litis*, were known to Roman and Roman-Dutch law and were looked upon with disfavour. The reason for this was that they were considered to encourage speculative litigation and consequently amounted to an abuse of the legal process. During the nineteenth century, such a contract was often in South Africa referred to as “maintenance and champerty”. Some of the rules of English law relating to maintenance and champerty were adopted without an attempt being made to reconcile those rules with the principles of the Roman-Dutch law. Be that as it may, the South African courts took an uncompromising view of such agreements and refused to entertain litigation following such agreements or to enforce them. One exception was acknowledged: it was accepted that if any one, in good faith, gave financial assistance to a poor suitor, and thereby helped him to prosecute and action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void.¹⁸

The Contingency Fees Act 66 of 1997¹⁹ legitimises contingency fee arrangements which would otherwise be prohibited by the common law. The Act makes provision for two forms of contingency fee agreements: first, a “no win, no fees” agreement, and secondly an agreement in terms of which a legal practitioner is entitled to fees higher than the normal fee

¹⁸ This exception was first enunciated by Kotze J in *Thomas and Möller NO v Transvaal Loan, Finance and Mortgage Company* (1894) 1 OR 336 at 340.

¹⁹ The provisions of the Act were considered in detail by the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2003 (3) SA 54 (SCA); [2004] 1 All SA 20 (SCA).

if the client is successful. The second type of agreement is subject to certain limitations. Any contingency fee agreement not covered by the Act is illegal. By permitting “no win, no fees” agreements, the Legislature has made speculative litigation possible, and by permitting increased fee arrangements, the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action.

While there are well-developed principles and rules in regard to liability for costs when more than two litigants are involved, the rules of court do not deal with class actions, nor, apparently does the common law provide for them.²⁰ It would appear that a court will deal with costs in such a matter in the exercise of its overriding discretionary powers.

[VI] Legal Aid

1. There is a publicly funded Legal Aid System. In terms of Sections 28 and 35 of the South African Constitution, a person who cannot afford the services of a lawyer is entitled to free legal representation. The Legal Aid Board, established in terms of the Legal Aid Act 22 of 1969, has as its principal objectives the rendering and making available of legal aid to indigent persons and to provide legal representation as contemplated in the Constitution. State funded law clinics have all been absorbed in to the Legal Aid Board’s Justice Centres. The bulk of the Legal Aid Board’s efforts and funds are, however, devoted to criminal litigation.

²⁰ See Cilliers *Law of Costs* 3rd ed (LexisNexis, Durban 2008) who in footnote 1 at 11—3 refers to *Congress of Traditional Leaders of South Africa v Minister of Local Government, Eastern Cape* 1996 (2) SA 898 (Tk) at 903A—B and *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) at 373F—G.

2. There are arrangements for *pro-bono* work by lawyers. For example, in the Western Cape all attorneys younger than 55 years, must do 24 hours compulsory *pro-bono* work for people who cannot afford a lawyer. Certain large firms have a *pro-bono* section dealing with such matters. The various Bar Councils in South Africa make provision for *pro bono* work by its members.

All the law faculties and law schools at South African universities operate law clinics.²¹ They employ directors who are practising attorneys or advocates, and they are accredited to the local law society. The Attorneys Fidelity Fund subsidises accredited clinics by providing funds to enable them to employ a practitioner (attorney or advocate) as director to manage the clinic. Other funds are provided by outside donors with contributions from some universities.

3. Legal aid is generally available only to people who qualify in terms of a prescribed means test.
4. For people who do not qualify in terms of the means test, access to justice remains a problem, except for the wealthy.
5. Civil matters where the plaintiff is an individual and the claim does not exceed R7500.00 can be heard in the Small Claims Courts where legal representation is not permitted and litigants must appear for themselves. In the magistrates' courts where the jurisdictional limit in

²¹ The 5th International *Journal of Clinical Legal Education* Conference was held at the University of the Witwatersrand in Johannesburg during July 2007. The theme of the Conference was University Law Clinics and Clinical Legal Education in Southern Africa. The papers delivered at the Conference were published in 2008 in a special issue of the *Journal for Juridical Science* (published by the University of the Free State, Bloemfontein) and in (2007) 12 *International Journal of Clinical Legal Education* (published by Northumbria University).

civil cases is R100 000.00, the costs of the litigation may become a discouraging factor if the claim is complex or such that the trial runs into several days.

[VII] Examples

The examples given below of total costs for both sides at first instance are no more than approximations. The cost of any litigation is ultimately determined by the nature of the issues, the bulk of the documentation, the need (or otherwise) of expert testimony, and the amount of work the legal representatives have to do. In a given case, the sum total of costs and fees may be considerably higher than the examples given.²²

1. Small claim: if within the limit of jurisdiction of the Small Claims Court (R7500.00 or less): there will be no costs.
2. Small to medium claim: if within the limit of jurisdiction of the Magistrate's Court (R100 000.00): R25000-R40 000.
3. Medium to large claim (say a claim for R750 000.00 in High Court): R250 000.
4. Large claim (say a claim for R7 500 000.00 in High Court): R450 000.
5. The total cost liability of a plaintiff who loses a claim of R10 million may, depending on the issues, the need for expert

²² The estimates are based upon an exchange rate of R7.50 to one US dollar.

testimony, length of trial, bulk of documentation, be between R250 000.00 and R700 000.00.

6. The total cost liability of a defendant who loses a claim of R10 million may will be in a similar range to that of a losing plaintiff.

Conclusion

The debate about the high cost of civil litigation is endless. In South Africa that debate at the moment lacks direction and focus. Attempts in recent years to introduce more effective and cost-saving case-management techniques have not been successful. The courts endeavour in an *ad hoc* manner to limit the escalation of costs by making adverse orders where unnecessary costs have been unreasonably incurred. Lawyers' fees feature prominently in the current debate around personal injury claims arising from motor vehicle accidents against the statutory Road Accident Fund. The authorities are of the view that excessive legal costs drain the assets of the Fund. Lawyers say their expert intervention is essential otherwise injured parties would recover much less or in some cases nothing from the Fund. The authorities have proposed the introduction of legislation that would regulate the payment awards, and (not for the first time) has the introduction of a no-fault system with a fixed tariff has been mooted. The debate is ongoing.

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