Top court rebukes ‘skyrocketing’ legal fees

Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another

(CC) (unreported case no CCT 76/12, 20-9-2012)

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In a unanimous judgment handed down in September, the Constitutional Court reduced the fees of both senior and junior counsel involved in a lengthy litigation matter by more than half the amount originally charged. The matter related to a dispute between neighbours over building plans, which was heard in several courts over the years.

In reaching its conclusion, the court was required to balance the interests of practitioners in receiving fair compensation and the public’s right of access to justice. The judgment also comes at a time when legal professionals’ fees are in the spotlight and, as the court noted, ‘considerable debate on counsel’s fees is current’.

In the fairly recent North Gauteng High Court decision in *Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP), for example, six advocates were disbarred and seven were suspended for unprofessional conduct relating to fees. The 13 advocates had been charged with double briefing and overreaching, which the court found had been motivated by greed. The court held that the practitioners had acted dishonestly by obtaining a greater reward than that which they were entitled to by means that misled those responsible for the payment of their fees. (Note: This matter has been taken on appeal to the Supreme Court of Appeal).

Recent case notes published in *De Rebus* have also highlighted some of the discussions currently happening around legal fees, including whether practitioners should be charging for day fees when matters are settled (see p 4 of this issue; 2012 (Sept) *DR* 20 and 2012 (Oct) *DR* 48, for example).

In addition, changes brought about by competition laws and the Consumer Protection Act 68 of 2008 are relevant to the debate, as are those proposed in the Legal Practice Bill (B20 of 2012), which provides for litigants to brief one legal practitioner rather than two in certain circumstances, with the potential for a concomitant saving in legal costs.

The *Camps Bay Ratepayers' and Residents' Association* case

The Constitutional Court made use of the opportunity presented by the current matter to speak out about steep legal fees, especially in appeals where issues are not raised for the first time:
'We feel obliged to express our disquiet at how counsel's fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal.'

In this matter the court was asked to review the taxation of counsel's fees in this court for one of the successful parties, which were originally R 453 150 for senior counsel and R 263 500 for junior counsel (including VAT) before being reduced to R 240 000 and R 160 000 (plus VAT) respectively by the taxing master after the unsuccessful party objected to the 'high' fees. The fees were inclusive of both court appearances and preparation.

Despite this reduction, the unsuccessful party claimed that such reduced amounts were still ‘excessive’, a submission with which the Constitutional Court ultimately agreed: ‘[T]here is ample reason to endorse the unsuccessful applicants’ complaint that the taxed fees allowed for counsel are excessive’, the court held at para 2. The court accordingly set aside the taxing master’s decision and replaced it with one affording senior counsel R 180 000 and junior counsel R 120 000 (plus VAT).

Principles of taxation

In coming to this conclusion, the court considered the principles relating to taxation of a bill of costs as laid out in case law. The court referred to *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC), which set out the basic principles in this regard, as well as *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 2010 (5) SA 124 (CC), which expanded on these principles.

Their ‘nub’, according to the court, was that the idea behind granting a costs order in favour of a successful party is to indemnify it for its expense in ‘having been forced to litigate’. Further, a balance must be struck ‘to afford the innocent party adequate indemnification within reasonable bounds’.

As in *Stevens NO v Maloyi* (ECP) (unreported case no 1205/08, 26-4-2012) (Tshiki J), which was reported in 2012 (Sept) *DR* 20, the court noted that it would not lightly interfere with a taxing master’s discretion and would only do so when the taxing master’s view is ‘so materially different as to vitiate the ruling’ (at para 4).

In order to achieve the necessary balance, the individual circumstances of each case must be taken into account. In this matter, one of the more significant factors was the litigation history, which took place in previous courts. Like in the 'analogous' *Hennie de Beer* case, here counsel had already 'traversed the main issues' in previous courts and arguments in this court were largely a 'rehearsal of issues that had already been well trampled out' before previous courts.

Application of principles

Applying these principles to the matter at hand, the Constitutional Court held that, although the dispute was dressed with 'a constitutional garnish' in this court, the issues had largely been 'thoroughly trampled out' before the High Court and the Supreme Court of Appeal. It therefore concluded: 'We can find no warrant at all to impose, on the losing party, counsel's fees of respectively R 240 000 and R 160 000, plus VAT.'

The court noted that the taxing master had not erred in taking into account factors such as the complexity of the matter, prevailing legal fees and the need for fair compensation; however it held that the amount awarded by the taxing master was 'so disproportionate to what is fair and reasonable that the … award is vitiated and must be set aside'.

The court noted the sting in terms of the effect of its judgment, in that the successful party remained liable for the balance of the legal fees to the extent these were reasonable. This would seem to fly in the face of the general rule of costs following the suit. However, the court hoped – through its judgment – to influence this requirement of reasonableness, especially in a country such as South Africa where there were 'gross disparities and poverty is rife'.

In this regard, the court considered how the billing of legal fees by skilled professionals should be viewed in the South African context. In its concluding remarks, the court held:

‘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 goes 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, as here. It is with these considerations in mind that we fix the fees as we have.’

The court therefore used its discretion to strike a balance between the sometimes competing interests of legal practitioners and the public they serve. It will be interesting to see how the profession reacts to this judgment and whether other courts will follow suit in similar matters now that the country’s highest court has taken such a stance.

A wider malaise?

It is worth mentioning that the court referred to the article ‘High fees and questionable practices’ (April 2012) vol 25(1) *Advocate* 40, in which advocate Owen Rogers indicated that the *Geach* case revealed ‘that a number of advocates of considerable experience allowed themselves to be led astray by the allure of money’. He added: ‘The elements of dishonesty and impropriety, which were held to have characterised their conduct should not, however, be allowed to mask the possibility that their behaviour is simply a gross manifestation of a wider malaise.’

He emphasised that members of the legal profession had a greater duty to society: ‘As members of an honourable profession we should be distinguished by our absence, not our presence, at this feeding trough.’

The court also referred to an article by United States lawyer Willem Gravett ‘“I am not overcompensated enough”: The moral compass of the American lawyer’ (April 2012) vol 25(1) *Advocate* 43, in which he claimed that the legal profession is ‘obsessed with money’. In the article, he cites some examples of billing abuses including billing 50-hour work days, billing clients for four hours of work for drafting one-sentence long letters, massages during litigation, dry cleaning of a toupee and charging clients for the law firm’s air conditioning and heating. Another example cited is of a lawyer billing 13 000 hours in a 13-month period, which only consisted of 9 500 hours in total. His defence, Gravett writes, was that ‘everybody does it’.

It is worth repeating Gravett’s sober warning at the end of his article in the form of the description of the slippery slope to which some lawyers succumb:

‘None of the little things that you will do, almost unthinkingly, will seem to be so bad in itself – an added 15 minutes to a time sheet here, a little white lie to cover a missed deadline there. After a few years, you will not even notice that you are lying and cheating and stealing every day that you practise law. Your entire frame of reference will change.’