



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 76/12
[2012] ZACC 17

In the matter between:

CAMPS BAY RATEPAYERS' AND RESIDENTS'
ASSOCIATION

First Applicant

P S BOOKSELLERS (PTY) LIMITED

Second Applicant

and

GERDA YVONNE ADA HARRISON

First Respondent

MUNICIPALITY OF THE CITY OF CAPE TOWN

Second Respondent

Decided on : 20 September 2012

JUDGMENT

THE COURT (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J, Yacoob J and Zondo J):

[1] This is a review of the taxation of counsel's fees in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*.¹ Senior counsel retained by

¹ [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC).

one of the successful parties charged a fee, inclusive of hourly preparation and appearance, of R453 150, while junior counsel for the same items charged R263 500, both including VAT. After objection by the losing party, this Court’s Taxing Master taxed these down to an inclusive fee of R240 000 for senior counsel and R160 000 for junior counsel (plus VAT).² The losing party still considers this too high, and now seeks a review of the Taxing Master’s award (*allocatur*).

[2] The complaint is that these fees are excessive, and that the Taxing Master had no reason to depart from a guideline dating from 2006, which is apparently applied in the Supreme Court of Appeal (Guideline). According to the Guideline, counsel’s fees, in the absence of “acceptable special circumstances”, should be taxed at no more than R75 000 for senior counsel and R50 000 for junior counsel, with allowance made for annual inflation. The successful party in these proceedings disputes the applicability and force of the Guideline. In the view we take of the matter, it is not necessary to decide whether the Guideline should apply in this Court. Rather, there is ample reason to endorse the unsuccessful applicants’ complaint that the taxed fees allowed for counsel are excessive.

[3] The litigation has a long history. The Camps Bay Ratepayers’ and Residents’ Association, one of the applicants challenging the taxation before us now, has lost most of its bouts. It started as an urgent application in the High Court for an interdict (which

² It is not clear from the Taxing Master’s records, or from the parties’ contentions, why counsel’s initial charges did not match, but what is clear is that the Taxing Master taxed both fees down to an inclusive fee for the senior and junior, of which the latter was two-thirds of the former.

succeeded),³ followed by a review application (which failed).⁴ Thereafter there was an unsuccessful appeal to the Supreme Court of Appeal.⁵ The unsuccessful appellants in that Court then mounted a constitutional challenge in this Court. Although they secured a hearing, they were eventually refused leave to appeal, and their application was dismissed with costs, including the costs of two counsel.⁶

[4] The principles applying to a taxation of a bill of costs in this Court were established in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*,⁷ and were restated in slightly expanded form in *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another (Hennie de Beer)*.⁸ Their nub is that a successful party gets costs as an indemnification for its expense in having been forced to litigate, and that a moderating balance must be struck to afford the innocent party adequate indemnification within reasonable bounds. All circumstances must be taken into account, and an overall balance struck. The Court will not interfere with the Taxing Master's award simply because its views are different. It will interfere only when the Taxing Master's view is so materially different as to vitiate the ruling.

³ *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC).

⁴ *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Others* [2008] ZAWCHC 316 available at <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2008/316.html&query=camps%20bay%20ratepayers>, accessed on 10 September 2012.

⁵ *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA).

⁶ *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC).

⁷ [2001] ZACC 5; 2002 (2) SA 64 (CC); 2002 (1) BCLR 1 (CC).

⁸ [2010] ZACC 1; 2010 (5) SA 124 (CC); 2010 (5) BCLR 451 (CC).

[5] *Hennie de Beer* established a principle of particular relevance to this dispute. It is that, in this Court, the previous litigation history is especially significant. It held that where counsel had already traversed the main issues in three previous courts, and where the arguments in this Court were largely “a rehearsal of issues that had already been well trampled out” before previous courts, counsel’s fees should be adjusted accordingly.⁹ In that case, counsel charged 61 hours for an affidavit resisting leave to appeal in this Court. The Taxing Master allowed the hours, and granted a fee of R73 200. This Court intervened. It disputed the hours allowed, and found instead that 20 hours for the work put into the affidavit was more than adequate. The total amount allowed was thus reduced from R73 200 to R24 000.

[6] This case seems to us analogous. Although the parties’ dispute was in this Court dressed with a constitutional garnish, for the greatest part the issues had already been thoroughly trampled out before the High Court, in the interdict and review proceedings, and in the Supreme Court of Appeal before the hearing before us. We can find no warrant at all to impose, on the losing party, counsel’s fees of respectively R240 000 and R160 000, plus VAT.

[7] The Taxing Master, in a brief stated case, noted that he had taken into account the complexity of the matter, which entailed what he considered important and complex constitutional questions, the prevailing levels of counsel’s fees, and inflation. He also

⁹ Id at paras 10 and 13.

took into account the preceding traversal of the principal issues and the need for fair compensation.

[8] In our view, none of these considerations were amiss, but in assessing their total impact, the amount awarded was so disproportionate to what is fair and reasonable that the Taxing Master's award is vitiated and must be set aside.

[9] In our view, total reasonable remuneration for counsel's work on the appeal, inclusive of hourly preparation and the appearance in this Court, bearing in mind the two appearances in the High Court, and one before the Supreme Court of Appeal, entitles counsel to no more than R180 000 and R120 000.

[10] We are aware that our judgment affects only what the winning party may recover, in party and party costs, from the loser. The winner remains liable, as between attorney and client, for counsel's full fees, to the extent that these are reasonable. It is the concept of what it is reasonable for counsel to charge that this judgment hopes to influence. 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.

[11] 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.¹⁰

[12] The following order is made:

1. The review succeeds.
2. The Taxing Master's award (*allocatur*) in respect of counsel's fees in this Court is set aside.
3. In its stead, there is substituted the amounts of R180 000 for senior counsel and R120 000 for junior counsel, plus VAT.

¹⁰ Considerable debate on counsel's fees is current. 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.