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New rule allows judges to clamp down on legal fee inflation

By Kaamilah Paulse

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Cost is one of the biggest problems for people needing legal help, especially if the case goes to court. A new rule applying to all high court litigation came into effect this month, aimed at keeping some kind of control over charges by counsel.

Image source: KATRIN BOLOVTSOVA from Pexels

This rule allows a judge to decide on what scale to award costs against the losing party, for payment of counsel on the winning side. Its impact can already be seen in a decision made less than a week later, where a judge flatly refused to award costs on the two higher scales set out in the new rules, saying courts shouldn't "help inflate fees still further", and that fees charged by some counsel were "unimaginable to all but a tiny minority of the most privileged".

Read the judgment

When people need legal help and their case ends up in court, the costs are often astronomical, with a sizeable chunk being fees paid to counsel, whether an individual or, in very complicated matters, more than one, arguing a case.

But a new rule took effect earlier this month, designed to help curb the fee spiral by giving judges more of a role in deciding the rate at which counsel on the winning side of a case may charge.

The rule establishes three rates of payment, A, B and C, with A being the lowest fee.

Court's new powers to help control counsel's fees

These new scales have already been quoted by a high court judge, as part of his decision on the legal costs to award. And

this week's comments by the judge concerned, Stuart Wilson, seems to show that the courts are determined to help control fees charged by counsel.

He said that now judges had to decide the scale at which counsel's fees can be recovered by the winning side, it would amount to a "substantial injustice" if judges helped inflate fees still further by applying the two higher scales except in very unusual circumstances.

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Not, of course, that the scales are even vaguely affordable for most people. The A category allows a maximum charge of R1500 per hour, or R15,000 for a 10-hour day, the B category a maximum of R3000 per hour or R30,000 per day, and the C category a top fee of R4500 per hour or R45,000 per day. Hardly funds accessible to the average person in the street.

Wilson's comments followed his decision on 16 April, dismissing an application and ordering the applicant to pay costs on the 'party and party scale' – the normal scale at which the losing side must pay the winning side.

Decision could help dampen fee inflation

That judgment was given orally, immediately after the matter was argued. Counsel for one of the parties then referred to the new court rules that had come into effect on 12 April, requiring a judge to award party and party costs at one of three scales.

Since none of the parties had dealt with this question during the hearing, Wilson gave them a few days to make written submissions on whether the new scales applied and if so, on what scale he should award costs.

Having studied these submissions, he has written a decision that seems to show the courts determined to help dampen 'fee inflation'.

Quite correctly, he found that the new rule only applied to cases filed before 12 April, and that any scale set by a judge would only apply to work done after that date.

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21 Aug 2018

Costs in most cases should be awarded at lowest scale

But where the rule applied, it was, in his view, a ‘potentially sophisticated mechanism for placing a value on advocacy’. It could, for example, send a message to the parties involved about the importance of their case ‘and how artfully and ethically counsel for the winning side’ dealt with the matter.

Under the new rule, the A scale is the default level. He said this was appropriate unless a higher scale had been justified ‘by careful reference to clearly identified features of the case’ showing why a higher scale was warranted. In his view, the vast majority of cases wouldn’t warrant more than an A scale order.

More than a decade ago, the Constitutional Court expressed concern about the rapid escalation of counsel’s fees. However complex a case might be, that court said, there was no justification in a country with such poverty and disparities of wealth, for a court to approve ‘advocates charging hundreds of thousands of rands to argue an appeal.’

High fees ‘unimaginable’ to almost all

But, said Wilson, "fee inflation" hadn’t slowed since then and counsel’s fees were at a level "unimaginable to all but a tiny minority of the most privileged". Even though counsel’s work was sometimes very hard, judges "would do substantial injustice if we were [to] help inflate fees still further" by approving scale B or C "in anything by truly important, complex or valuable cases."

While courts should be accessible to everyone, SA was not marked by equal access to justice and there were limits to what a judge could do to create such a situation. "But the least that can be expected of us is to exercise the powers we do have in a manner that avoids making things worse."

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New rule also allows judge to indirectly discipline counsel

The rule has other features that, while important, weren’t relevant to the case heard by Wilson. It allows the court to send a message to counsel, effectively disciplining them through their pockets, perhaps: it instructs the judge to consider whether other rules of court were infringed through, for example, presenting "over long" written or oral argument, or examination or cross-examination. All these could count in deciding the scale at which costs will be awarded.

So will "any other misconduct" that could justify a personal costs order, for example, where a legal representative has "seriously misconducted themselves". Several recent cases have seen behaviour by counsel that could well have fallen foul of this new rule, and it will be important for the courts to use their powers under the rule to prevent future misconduct.

Another factor that the court may consider in awarding costs, is whether the case could have been brought in the magistrates’ courts, where it is far less expensive to litigate, further reinforcement of the view that the new rule is intended to help keep costs down.

It’s a potentially vital new rule, one that needs to be widely known, and that the judiciary should apply consistently to help keep litigation costs from spiraling further out of control. But it has its limits, most significantly in that it applies only to recovering fees payable to the winning litigant, in respect of attorneys (with appearance rights in the high court) and counsel's fees.

Attorneys and counsel charging their own clients would not be hit by the rule and could still effectively charge in terms of

their mandates and hourly rates. Thus, while the new rule is to be welcomed because it allows the courts to go into battle against fee inflation, for members of the public, the best advice is often to settle, rather than going to court in the first place.

ABOUT THE AUTHOR

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