HENNIE DE BEER GAME LODGE CC v WATERBOK BOSVELD PLAAS CC AND ANOTHER 2010 (5) SA 124 (CC)

Citation	2010 (5) SA 124 (CC)
Case No	106/09/2010
Court	Constitutional Court
Judge	Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J
Heard	February 4, 2010
Judgment	February 4, 2010
Counsel	No counsel supplied
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Costs - Taxation - Between party and party - Counsel's fees - Whether reasonable - Proper approach set out - Slow and inefficient work not to be C rewarded - Time required by competent professional acquainted with issues reasonable - Court in better position than taxing master to assess requirements of task in determining reasonable remuneration for counsel.

Headnote : Kopnota

The applicant's earlier application to the Constitutional Court had been D dismissed, and this had attracted a costs order against it. The applicant objected to fees allowed by the taxing master pursuant to the costs order, and took the taxation on review, disputing the fees allowed counsel in respect of the drafting of an affidavit resisting applicant's failed application. It argued that most of the substance of the affidavit had been ventilated in previous rounds of the litigation and that the fees were 'excessive' and E 'exorbitant'.

Held, that in essence applicant's complaint was that the same facts and arguments presented themselves during all the preceding court proceedings in which counsel was involved, rendering the hours allowed for the affidavit unreasonable. (Paragraph [5] at 126D.)

F *Held*, further, that, to the general principles guiding the review of a taxation, as set out in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002 (2) SA 64 (CC) (2002 (1) BCLR 1), was to be added the principle that time charged was not decisive in determining the reasonableness, between party and party, of a fee for that work, the reason being that time alone would put a premium on slow and inefficient G work and would be conducive to the charging of fees wholly out of proportion to the value of services rendered. (Paragraph [9] at 127C - E.)

Held, further, that the taxing master had erred in allowing counsel 61 hours for drafting an affidavit that was, in its greatest part, a rehearsal of issues that had been well traversed in previous court proceedings. A competent professional, acquainted with the issues, as counsel would have been in this H case, would have required no more than 20 hours for the task. (Paragraphs [13] - [14] at 128C - F.)

Held, further, that taxation was to afford reasonable remuneration for work necessarily and properly done. The taxing master's failure to find the correct and equitable balance warranted the court's intervention. In I determining reasonable remuneration for counsel, the court was in a better position than the taxing master to assess what went into the affidavit and, given that the sole dispute was the amount of hours charged, it was appropriate for the court to finalise the disputed bill itself without remitting it to the taxing master (Paragraphs [15] - [16] at 128F - H.) The relevant items of the taxing master's *allocatur* set aside and 61 hours replaced with J 20 hours.

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Cases Considered

Annotations A

Reported cases

JD van Niekerk en Genote Ing v Administrateur, Transvaal 1994 (1) SA 595 (A): referred to

Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others 1984 (3) SA 15 (A) ([2002] 4 All SA 723): referred to B

President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another 2002 (2) SA 64 (CC) (2002 (1) BCLR 1; [2001] ZACC 5): applied

Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa 2003 (3) SA 54 (SCA) ([2002] 4 All SA 723): referred to C

Scott and Another v Poupard and Another 1972 (1) SA 686 (A): referred to

Texas Co SA Ltd v Cape Town Municipality 1926 AD 467: referred to.

Case Information

Review of taxation. The facts appear from the reasons for the judgment. D

Judgment

The court:

[1] This is a review of a taxation in which the taxing master of this court allowed counsel's fees totalling 61 hours for drafting a 62-page affidavit[1] resisting leave to appeal. The matter originated from a dispute in which E the respondents (Waterbok) sought an interdict in the North Gauteng High Court to prevent the applicant (Hennie de Beer) from erecting a camp in a private nature reserve. Waterbok's application was dismissed at first instance, but on appeal, the interdict was granted by a full court of the High Court which reversed the refusal of relief. Application for F special leave to appeal to the Supreme Court of Appeal, which Waterbok resisted, was refused with costs. The proceedings culminated in Hennie de Beer's application for leave to appeal to this court, which was also dismissed with costs on 2 October 2007.

[2] As was its due, Waterbok presented its bill of costs, which was taxed G on 22 May 2008. The only item in issue was counsel's fee for the 62-page affidavit resisting leave to appeal in this court. Counsel billed R129 504 for 71 hours' work on the affidavit, but allowed a discount of ten hours. His total fee for the affidavit was therefore R111 264 for 61 discounted hours.

[3] This court's taxing master allowed the full discounted time billed of H 61 hours, but taxed down counsel's fee per hour from over R1800, to R1200. The total fee granted for the affidavit was therefore reduced to R73 200.

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A [4] Hennie de Beer objected to this fee, lodging a notice of review of taxation.[2] Hennie de Beer complained that in view of the prior application to the Supreme Court of Appeal and the full

court appeal that preceded it, counsel's fees for drafting the affidavit resisting leave to appeal in this court were 'excessive' and 'exorbitant'. Hennie de Beer B pointed out that the same counsel represented Waterbok from the inception of the proceedings and had charged extensive hours on preparing the initial urgent application (46 hours); on preparing Waterbok's replying affidavit in the urgent application (61,5 hours); on preparing heads of argument for the full court appeal and preparing for the appeal (45 hours); and on attending to the full court appeal C (22 hours). Even though Hennie de Beer was not in possession of counsel's bill for the unsuccessful Supreme Court of Appeal proceedings, it averred, and Waterbok did not deny, that he was also on brief.

[5] In essence Hennie de Beer's complaint was that 'the same facts and D arguments presented themselves' during all the preceding court proceedings in which counsel was involved, rendering a further 61 hours for the affidavit in this court unreasonable.

[6] Waterbok, in opposing the review, contended that 'although the facts giving rise to the application for leave to appeal were similar to the facts giving rise to the earlier matters, the nature of the application and E applicable legal principles were substantially different'. Here Waterbok relied on the fact that its opposing affidavit in this court had to deal with whether a constitutional issue was raised, the horizontal application of the Bill of Rights, the interests of justice, and the prospects of success.

[7] In his report the taxing master states that in fixing counsel's fees, he F took into account the complexity of the matter, the total hours spent on the work, prevailing levels of counsel's fees, and that counsel must be fairly compensated. He further observes that counsel did not foresee when preparing the opposing affidavit that the application would be dismissed and that 'therefore he needed to prepare himself on the G constitutional dispute'.

[8] The principles guiding the review of a taxation in this court were settled in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*:[3]

- Costs are awarded to a successful party to indemnify it for the H expense to which it has been put through, having been unjustly compelled either to initiate or defend litigation.[4]
- A moderating balance must be struck which affords the innocent party adequate indemnification, but within reasonable bounds.[5]

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- The taxing master must strike this equitable balance correctly in the A light of all the circumstances of the case.[6]
- An overall balance between the interests of the parties should be maintained.[7]
- The taxing master should be guided by the general precept that the fees allowed constitute reasonable remuneration for necessary work B properly done.[8]
- And the court will not interfere with a ruling made by the taxing master merely because its view differs from his or hers, but only when it is satisfied that the taxing master's view differs so materially from its own that it should be held to vitiate the ruling.[9] C

[9] To these general principles must be appended one of particular importance in this case. The Supreme Court of Appeal has taken note of 'the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related'.[10] The principle flowing from this is that time charged is not decisive. An objective assessment of the features of the case is primary, and time actually spent D in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work.[11] The reason is that time alone would put a premium on slow and inefficient work and would conduce to the charging of fees wholly out of proportion to the value of the services rendered.[12] E

[10] That principle applies here. Counsel charged 61 hours for preparing an affidavit opposing leave to appeal in this court. It is difficult to find any measure by which that time can be considered reasonable. Here, the prior history of the dispute is relevant. Counsel had already

traversed the principal issues in three previous courts. It is true and the impugned affidavit shows that constitutional issues, as well as the factors relevant to this court's grant or refusal of leave to appeal, were canvassed.

[11] The brunt of the affidavit is to urge that the application for leave to appeal should be dismissed on the ground that there is no constitutional issue, since the property rights clause in the Bill of Rights has no horizontal application, and that the interests of justice will not be served by granting leave to appeal because the issue is neither of constitutional

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importance nor of public interest, and can be decided without determining the constitutional issue. The affidavit in addition asserts that the prospects of success are in any event remote.

[12] But issues uniquely within the contemplation of this court form only a minor part of the deposition. The major portion canvasses the facts in detail and sets out Waterbok's contentions on the servitudinal rights at issue and on the duties of co-owners. Signally, the affidavit confirms Hennie de Beer's assertion that the constitutional arguments were already in play before the full court and therefore no less in the application for leave to appeal to the Supreme Court of Appeal.

[13] In its greatest part the affidavit is thus a rehearsal of issues that had already been well trampled out before the full court and in the application to the Supreme Court of Appeal. The taxing master therefore erred in allowing counsel 61 hours for drafting the affidavit on the basis that counsel 'needed to prepare himself on the constitutional dispute'.

[14] At most, 20 hours could be considered reasonable for collating the response to the application from the preceding papers in the other courts, for marshalling the constitutional arguments and for propounding Waterbok's contentions on the particular tests appropriate to the determination of leave to appeal in this court. A period of 20 hours represents two days and a half of what may be considered full-time effort within normal working hours. It is difficult to conceive how a competent professional acquainted with the issues, as counsel would have been in this case, could require more time for this task.

[15] Taxation, it must be borne in mind, should afford 'reasonable remuneration for work necessarily and properly done'.[13] Twenty hours at R1200 per hour does this more than adequately. Any more would fail to strike the 'moderating balance' this court requires. The taxing master's omission to find the correct and 'equitable balance' that this court alluded to in *Gauteng Lions*[14] therefore warrants intervention.

[16] In determining reasonable remuneration for counsel, this court is in a better position than the taxing master to assess what went into the affidavit. Waterbok makes no complaint about the hourly amount the taxing master has allowed, namely R1200. The parties' sole dispute is about the number of hours. It is therefore appropriate for this court to finalise the disputed bill itself. It is therefore not necessary to remit the matter to the taxing master.

Order

[17] In the result, the following order is made:

(a) The taxing master's *allocatur* for items 21 - 33 of the respondents' bill of costs is set aside.

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(b) In its stead, a total of 20 hours at R1200 per hour is allowed.

(c) The respondents are to pay the applicant's costs of the review of taxation.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J.

1 The parties to this dispute have all proceeded on the assumption that the contested deposition is 38 pages long. This averment appears in both Hennie de Beer's contentions, as well as in Waterbok's submissions on the taxing master's stated case. However, the original court file reveals that the deposition is in fact 62 pages long.

2 In terms of rule 22 of the rules of this court, read with rule 17 of the Supreme Court of Appeal Rules.

3 2002 (2) SA 64 (CC) (2002 (1) BCLR 1; [2001] ZACC 5).

4 *Per* Innes CJ in *Texas Co SA Ltd v Cape Town Municipality* 1926 AD 467 at 488, applied in *Gauteng Lions* above n3 at para 15.

5 *Gauteng Lions* above n3 at para 15.

6 Id in para 16.

7 Id in para 15.

8 Id in para 45.

9 *Ocean Commodities Inc and Others v Standard Bank of SA Ltd and Others* 1984 (3) SA 15 (A) ([2002] 4 All SA 723) at 18F - G, applied in *Gauteng Lions* above n3 at para 13.

10 *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) ([2002] 4 All SA 723) at para 15.

11 *Scott and Another v Poupard and Another* 1972 (1) SA 686 (A) at 690C - D, endorsed in *JD van Niekerk en Genote Ing v Administrateur, Transvaal* 1994 (1) SA 595 (A) at 602D - E and applied in *Gauteng Lions* above n 3 at para 28.

12 *Gauteng Lions* above n3 at para 28.

13 *Gauteng Lions* above n3 at para 45.

14 Id in para 16.

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