



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

SIGNATURE

DATE: 22 April 2024

Case No. 2022-18404

In the matter between:

LUCKY EPHRAIM MASHAVHA

Applicant

and

ENAEX AFRICA (PTY) LTD

First Respondent

SASOL LIMITED

Second Respondent

AFRICA ARISING CAPITAL (PTY) LTD

Third Respondent

ENTERPRISE OUTSOURCING

Fourth Respondent

EOH NETWORK SOLUTIONS

Fifth Respondent

Summary

Rule 67A – meaning and application discussed.

JUDGMENT

WILSON J:

1 On 16 April 2024, I gave judgment *ex tempore* in my opposed motion court dismissing this application. I came to my decision in part because I lacked jurisdiction to decide the application, and in part because the applicant lacked standing to bring it. Most of the applicant's claim fell within the exclusive jurisdiction of the Labour Court. The rest of the claim was an attack on the first respondent's award of a contract to the fourth respondent, which was a decision in which the applicant could show no legal interest. I ordered the applicant, Mr. Mashavha, to pay the costs of the application, on the party and party scale.

2 After I had given judgment, but before I called the next case, Mr. Coertze, who appeared for the fourth respondent, Enterprise, pointed out that, on 12 April 2024, rule 67A of the Uniform Rules of Court had come into effect. Rule 67A (3) (a) now requires that party and party costs in the High Court be awarded on one of three scales: "A", "B", or "C". In light of the fact that none of the parties had made out a case under the new rule, I afforded them until 19 April 2024 to make written submissions on whether rule 67A applies to this case, and, if it does, the scale on which I should award costs. Before addressing those submissions, I shall briefly outline the purpose and scope of the new rule.

Rule 67A

3 Costs orders in civil proceedings are made on one of two scales: the "party and party" scale, or the "attorney and client" scale. A costs award on the

party and party scale allows the person in favour of whom it is made to recover the costs they had to incur in bringing or defending a civil suit, but only to the extent allowed by a set of tariffs designed to keep recoverable costs within reasonable limits. Those tariffs rarely keep pace with the actual cost of legal services, meaning that a party and party costs order seldom permits the recovery of the legal costs really incurred by the party in favour of whom it is made.

4 Attorney and client costs orders, on the other hand, allow the party to whom they are awarded to recover an amount much closer to the actual costs of the legal services they purchased to participate in the suit. These orders are generally made against a party that has misconducted themselves in the course of the litigation; against a party that has brought a suit or raised a defence which was so devoid of merit as to be a waste of the court's time; or against a party who has agreed that, if they are successfully sued in a particular set of circumstances, they will pay costs on the attorney and client scale. However, the amounts recovered under an attorney and client order must still, in the opinion of the taxing master, have been reasonably incurred, meaning that even an attorney and client costs order might not reimburse a litigant for everything they spent.

5 Rule 67A addresses itself only to awards of costs as between party and party. Its purpose is to permit a court to exercise control over the maximum rate at which counsel's fees can be recovered under such an award. "Counsel" in this context should be understood to mean any legal practitioner, whether a referral advocate, a trust account advocate or an

attorney with higher appearance rights, who actually does the work of counsel. The focus is accordingly on assigning a maximum value that may be recovered in respect of the work done in the presentation of the case before court. The professional affiliation of the person undertaking the work does not matter.

6 The court sets a maximum recoverable rate for that work having regard to the importance, value and complexity of the matter (Rule 67A (3) (b)). The court may also take into account any failure to observe the provisions of rules 30A, 37, 37A and 41A; any over-long written argument, oral argument, examination or cross-examination of witnesses; or any other misconduct that might justify a personal costs order (a costs order made against a person other than one of the litigants – usually a legal representative, or someone else acting in an official capacity, who has seriously misconducted themselves). It may also be relevant that the case fell within the jurisdiction of the Magistrate’s Court, and might have been better determined there. Rule 67A (2) identifies these considerations, and emphasises their relevance to the making of a costs order under the rule.

7 Rule 67A (3) provides that a court “shall”, when making a party and party costs order, “indicate the scale in terms of rule 69, under which costs have been granted”. Those scales have been inserted into rule 69 (7) under the amendment that created rule 67A. They are scales “A”, “B”, and “C”. They set the maximum rate at which counsel’s fees may be recovered on a party and party bill. Scale “A” provides a maximum tariff of R375 per quarter hour;

scale “B” sets a maximum tariff of R750 per quarter hour; and scale “C” sets a maximum tariff of R1125 per quarter hour.

8 Rule 67A (3) (c) states that if a court declines to indicate a scale in its order, the lowest scale – scale “A” – applies.

9 Rule 67A (4) provides for the right to apply for an order determining which parts of the proceedings, if any, were urgent, and whether the costs of more than one counsel may be recovered. The effect of that subrule is, notionally, that a different scale could be assigned to the services of each counsel whose fees are allowed under the rule. Given that each of the parties in this case was represented only by one counsel, I leave open the question of whether, when and how such an order should be made.

10 Rules 67A (1), (5) and (6) instruct the taxing master on the performance of their duties under the new rule.

11 It seems to me, therefore, that the approach to setting a scale of costs under Rule 67A (3) should be, first, to identify the appropriate scale (“A”, “B” or “C”) in light of the importance, value and complexity of the case, and then consider whether, because of inartful or unethical conduct of the nature identified in Rule 67A (2), that scale should be reduced, such that the successful party should not be able to recover counsel’s costs to the extent that they would otherwise have been entitled.

The application of the rule to pending cases

12 It seems to me that the 12 April 2024 amendments can only apply prospectively. This means that a costs order under Rule 67A (3) should be

made on cases instituted before 12 April 2024 but heard thereafter. The scale nominated in the order will only apply to work done on the matter after 12 April 2024. Take, for example, a motion instituted in 2023, in which written argument was filed in January 2024, and in which oral argument was presented on 15 April 2024. A party and party costs order on the “C” scale is made on 15 April 2024. The “C” scale will only apply to counsel’s preparation and attendances (if they are otherwise recoverable) after 12 April 2024, to the appearance itself, and to any recoverable post-hearing attendances. Fees for work done before 12 April 2024 will be recoverable under the rules applicable to the taxation of counsel’s costs as they were then.

- 13 To hold otherwise would either fail to give effect to the rule, or retrospectively revalue legal services purchased under a different dispensation and structure of expectations. Neither of these alternatives is desirable.

The application of Rule 67A to this case

- 14 Despite its brevity, Rule 67A contains a potentially sophisticated mechanism for placing a value on advocacy. Although it has no direct impact on what counsel will be able to recover from their attorney or client, it has the potential to send a message to the parties about the importance of their case, and how artfully and ethically counsel for the winning side has pressed the case entrusted to them. When setting a scale under the rule, a court will generally be careful to say whether its decision has been influenced only by the nature or complexity of the matter, or also by the way the case was presented to it.

- 15 It also seems to me that the rule implies that the power to reduce the scale on which counsel's costs are awarded should be exercised sparingly, and only where a case for its exercise has been made out. A Judge generally approaches a case on the assumption that it has been competently litigated, that counsel has done what is within their power to ensure substantial compliance with the applicable rules, and that argument and evidence has taken as long as it needs to take. It is only where there has been a marked departure from these norms that a court should consider lowering the scale on which counsel's costs are awarded.
- 16 Likewise, the default position set under the rule is that, in the absence of contrary indication, counsel's costs will be recovered on scale "A". Scale "A", it seems to me, is the appropriate scale on which to make an award unless the application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.
- 17 In the case presently before me, the issues were uncomplicated. The entire case was determined on the bases of jurisdiction and standing. The merits never became relevant. The hearing lasted well under an hour. The case was competently and ethically pursued by all concerned. The "A" scale is plainly applicable.
- 18 Perhaps predictably, both counsel for the first respondent, Enaex, and Mr. Coertze, motivated for an order on the "C" scale. Mr. Alli, who appeared for

Enaex, emphasised that Mr. Itzkin, who drew Enaex's heads but did not appear at the hearing, had asked for an attorney and client costs order in his written submissions. Mr. Alli did not press for that order at the hearing, however, and I would not have been inclined to grant it if he had.

19 There mere fact that punitive costs were sought by the successful party does not mean that a higher scale of counsel's costs ought to be awarded on the party and party scale. The focus of Rule 67A is not on the conduct of the losing party. It is primarily on the nature of the case, and, secondarily, on the way that the successful party presented it. The misconduct of the unsuccessful party, if any, is irrelevant once a court has declined to award a punitive costs order against them.

20 Mr. Alli also submitted that the "C" scale is appropriate because the matter was one of considerable importance to Enaex. There are two reasons why that submission cannot be accepted. The first is that there is no information on the papers that tells me just how important the case really is to Enaex. I am happy to accept that litigation is *per se* important to the parties embroiled in it, but the facts necessary to draw the inference that this case is particularly important to Enaex are not on the papers. The second reason is that the importance of a case must be assessed objectively. Whatever Enaex subjectively believes about the case, the facts on the papers suggest that this litigation – a claim brought by a disgruntled ex-employee – is an ordinary business hazard. It is the sort of case that any corporate entity ought at some point to expect to have to fight. Objectively, it is neither important nor unusual.

- 21 Finally, Mr. Alli submitted that the matter was one of some complexity. Perhaps there might have been complex questions had I reached the merits. But the bases on which I dismissed the claim were far from complicated. I accept that a litigant who takes a simple point *in limine*, such as the absence of standing or the court's lack of jurisdiction, will generally plead over and deal with the matter on its more complex merits just in case their submissions *in limine* fail. However, what counts under Rule 67A is the complexity of the argument that actually had to be advanced by counsel, rather than the potential complexity of the case in all its facets. In this case, the argument that had to be advanced was short and straightforward.
- 22 Mr. Coertze also suggested that this is a particularly complex case. For the reasons I have already given, that submission must be rejected.
- 23 Mr. Coertze finally argued that the amount of damages Mr. Mashavha claimed in the event of success (some R27 million), also took the case out of the ordinary. It seems that Mr. Coertze may have overlooked that the claim for damages was never advanced against his client. It follows that, formidable though they no doubt are, Mr. Coertze's skills, and the maximum that may be recovered to remunerate them, cannot be assessed in light of the size of Mr. Mashavha's damages claim.

No order necessary

- 24 Over a decade ago, the Constitutional Court expressed "disquiet" at how "counsel's fees have burgeoned in recent years". "To say that they have skyrocketed" the Court held, "is no loose metaphor". "No matter the complexity of the issues" the Court could "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” (see *Camps Bay Ratepayers and Residents Association v Harrison* 2012 (11) BCLR 1143 (CC) at paragraph 10).

25 There is no indication that fee inflation has checked itself since then. Rule 67A is perhaps an acknowledgement of this reality. An advocate remunerated at the top end of scale “C” will be able to charge R4500 per hour (R45000 per day under the ten-hour per day billing system on which the referral bar operates). At the top end of scale “B”, the figures are R3000 per hour and R30000 per day. I emphasise that these figures are the maximum that can be recovered on these scales from the losing party for the winning party’s counsel’s fees on the party and party scale. They do not represent what may actually be charged. At the upper end of the commercial bar, counsel’s day fee is often much higher than the top end of scale “C” would allow. As a result, and notwithstanding the Constitutional Court’s strictures, counsel’s fees in contested matters in the High Court regularly run to the “hundreds of thousands of rands”.

26 Twelve years after the judgment in *Camps Bay*, these levels of remuneration remain unimaginable to all but a tiny minority of the most privileged in our society. They are handsome rewards for long hours of sometimes very hard work in matters that can be forensically challenging. But when Judges are required to assign a maximum recoverable value to counsel’s work, which is what rule 67A now requires us to do, we would do substantial injustice if we were help inflate fees still further by allowing parties to recover on the “B”

and “C” scales in anything but truly important, complex or valuable cases. The “duty of diffidence” that the Constitutional Court urged on the legal profession in *Camps Bay* (at paragraph 11) ought also, in my view, to be observed by Judges in applying rule 67A.

27 To do otherwise would surely push the cost of legal services still further beyond the means of the vast majority of South Africans. In a society based on constitutional rules and a supreme law bill of rights underwritten by an independent judiciary, the courts should ideally be accessible to everyone on equal terms. We do not live in a society marked by equal access to justice for all, and there are limits to what a Judge can do to create one. 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.

28 In this case, recovery of counsel’s fees on scale “A” is more than sufficient. Given that, under Rule 67A (3) (c), the application of the “A” scale is the effect of my judgment as it currently stands, I decline to make any further order.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 22 April 2024.

HEARD ON: 16 April 2024

DECIDED ON: 22 April 2024

For the Applicant:	Z Buthelezi Instructed by Letheba Makgato and Associates
For the First Respondent:	Y Alli (heads of argument on the merits having been drawn by R Itzkin) Instructed by Webber Wentzel
For the Fourth Respondent	A Coertze Instructed by Pritchard Attorneys Inc