

Aspects of practice • Praktyksbrokkies

Leon Dicker
Pretoria Bar

Costs – Magistrate’s Court – not competent for magistrate’s court to grant order for costs as between attorney and own client – magistrate’s court has no power to grant order for costs of counsel as marked on brief – *War Systems Technologies CC t/a Systems Technologies v United Computer Systems (JHB) CC WLD case no A3111/00, 8 June 2000, unreported.*

The issue for decision in this appeal was whether a magistrate could grant a costs order on a scale higher than that between attorney and client.

Plaintiff had instituted action in the magistrate’s court and following the close of pleadings, had set the matter down for trial. The matter could not proceed, as a result of the failure by the defendant to discover. In all, the matter was postponed no fewer than three times, due to the defendant’s default. On the last two occasions, the defendant had been ordered to pay “the wasted costs of the postponement ... on the scale as between attorney and client ... taxable and payable immediately, including counsel’s fees as on brief taxable immediately” and “on the scale as between attorney and client including costs of counsel as marked on the brief”, respectively.

These orders for costs the courts described as a developing practice whereby magistrates made such orders in an effort to ensure that a litigant obtained a complete indemnity for disbursements (such as counsel’s fees) fruitlessly incurred when a matter had to be postponed because of some act or omission for which the other side was responsible.

On appeal, it was argued that the order to pay counsel’s fees as marked on the brief constituted at least an award of costs as between attorney and own client. Such an order, it was argued, was bad on two grounds.

The first ground was that (at least where no agreement regulated the

matter) a magistrate could at most make an order for costs on the attorney and client scale and that, in consequence, an order requiring a party to pay costs on a basis as between attorney and own client was beyond the court’s competence. The court accepted this submission. It held that s 48 of the Magistrates Court Act 32 of 1944 entitled the magistrate’s court to grant “such judgment as to costs (including costs as between attorney and client) as may be just.” The magistrate’s court, being a creature of statute, enjoyed only the powers conferred on it by statute. In the absence of any provision conferring the power to make special orders for costs, the power would have to be sought in an implication in the statute, and there was none to be found within its four corners. This meant that a magistrate’s court could not make an order for costs going beyond what s 48 permitted and that a magistrate could not therefore make an order for costs that was greater than costs on the attorney and client scale. As an order for costs on the basis between attorney and own client was such an order, a magistrate had no power to make such an order (at least in the absence of an agreement between the parties). In coming to this decision, the court left open the question as to the effect of a general agreement entitling a litigant to claim costs on a basis going beyond costs on the attorney and client scale or an *ad hoc* submission or consent to such an order of the sort that a litigant might be tempted to concede in the hope, say, of securing a postponement.

In an *obiter dictum*, the court held that an order requiring payment of counsel’s fees as marked on brief, ie, whatever the plaintiff’s counsel might charge, placed the ultimate determination of costs beyond the jurisdiction, and thus the *scrutiny*, of the taxing officer. This created scope for overreaching and could not be permissible. Such orders were, therefore *contra bonos mores*. In addition, the provisions of s 80 of the Magistrates’ Courts Act necessarily implied that the taxing

official exercised a supervisory power over all orders for costs made by the court and that an order giving someone else, a party or his or her representative, the ultimate right to determine the amount of costs to be paid would be irregular. This conclusion was in accordance with the general tenor of our law on costs, which emphasises the supervisory role of the taxing official even when a party consents to costs on the scale between attorney and own client.

Comment:

While there can be no quarrel with the court’s decision (albeit *obiter*) that the magistrate’s court cannot make a costs order in such terms as to place it beyond the taxing official’s scrutiny, it is respectfully submitted that the decision as to the competence of the magistrate’s court to grant an order for costs as between attorney and own client, is incorrect.

As far back as 1946, the then Appellate Division, in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 608, recognized a distinction between an attorney and client bill to be paid by an unsuccessful party to litigation and one where the costs were to be paid by the client to his attorney. The court held that the former “demands what may be termed an intermediate basis of taxation.” It seems clear from this decision that attorney and own client costs is, in fact, merely a *species* of the *genus* attorney and client costs.

That this is so emerges clearly from the following *dictum* in *Brooks v Taxing Master* 1960 (3) SA 225 (N) at 230B–D: The final question is one of selecting the correct attorney and client basis. According to the work of Mr. Roos on the subject of *Taxation of Bills of Costs* (see 1st ed. p. 8), there are three bases of taxation of attorney and client costs. The learned author describes them as follows:

- “(1) Where the costs are payable by the client to his attorney; or where the costs are payable out of a fund belonging entirely to the client.
- (2) Where the costs are payable out of a general or common fund.

- (3) Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest, or where the costs are payable by one party to another.”

The learned author adds:


“The taxation in the cases of (1) is more generous than in the case of (2) and (3), while in the case of (2) the taxation is not so generous as in the case of (1). The taxation in the case of (3) is the strictest, and, in effect, gives little more than a taxation as between party and party, except that any

necessary letters to and attendance on the client are allowed, Porter and Wortham Guide to Costs, 13th ed. p. 915 This is the English practice and is followed in the Union.’

I accept the views of the learned author.

It was held in *Fidelity Bank Ltd v Three Women (Pty) Ltd* [1996] 4 All SA 368 (W) that the effect of an attorney and client costs order was to place taxation in the third category set out by Roos, while an attorney and own client costs order clearly referred

to taxation on the basis of the first category.

Once it is accepted that an order for costs as between attorney and own client is merely a *species* of the *genus* costs as between attorney and client, there can be no objection in principle to the grant of such an order by the magistrate’s court. Then, too, the language of s 48 does not constitute any obstacle to the exercise of such a power, as the grant of such an order would merely fall within the power to grant an order for costs as between attorney and client. 

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The Association of the Bar of the City of New York (the Association) is seeking applicants for the South African Visiting Lawyer Program (the program). The program will bring up to six lawyers from historically disadvantaged backgrounds to work in corporate law firms and the legal departments of investment and commercial banks in New York City for one year. The program will begin in September 2002.

Applicants should have a minimum of two years of practice experience, including some experience of corporate practice.

Applicants are requested to provide the following information: curriculum vitae; law school transcript; a written

statement by a lawyer familiar with the applicant’s work indicating his/her capacity to work well at the junior level in either a major commercial transaction or a commercial litigation or arbitration.

The program will provide transportation and initial lodging for the participants. The visiting lawyers will receive an annual salary of \$85,000 along with health benefits provided by the firms or banks at which they are employed. After an initial two week period they will be expected to provide for their housing and living expenses.


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Lawyers interested in applying for the program should send the required materials to:

Andre van Vuuren, Executive Director Law Society of South Africa, P.O. Box 36626, Menlo Park 0102. A copy of the curriculum vitae only should be sent by e-mail to Joan Vermeulen, Program Coordinator: jvermeulen@abcny.org

Applicants should submit the required materials no later than March 29, 2002.

Candidates who have been selected for interviews will be notified in early April. Interviews will take place in South Africa from April 29 to May 1. 

Reading the record

Contributed by Hiram Slomowitz

An amusing tale comes to mind.

Junior Counsel appeared for the Appellant in a criminal appeal from the Magistrate’s Court. The Court of course consisted of two judges, with Becker, I pre-

siding. Counsel’s opening remark went this way:

“M’Lord, when I first read the record in this matter, I did not think the Appellant had any prospects of success, but, having read it a second time, I

came to the conclusion that the Magistrate was clearly wrong”, at which point Becker, J remarked:

“You will have to bear with us, Mr Jones. We have only read the record once!”