

SOUTH AFRICA / JUDGMENT

Motor Finance Corporation (Pty) Ltd v Prinsloo and Another (2891/2014) [2016] ZAECGHC 105 (18 October 2016) [2016] ZAECGHC 105

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

2891/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE
DIVISION, GRAHAMSTOWN
CASE NO.
2891/2014

In the matter between:	MOTOR FINANCE CORPORATION (PTY) LTD Plaintiff and JOHNNY PRINSLOO Defendant STRAUSS AND RYNDERS CC t/a MOTORLAND Third Party
------------------------	---

JUDGMENT

Bloem J.

- [1] This is a review of taxation in terms of rule 48 of the uniform rules of court.
- [2] On 31 May 2011 the plaintiff issued summons against the defendant for the cancellation of an instalment sale agreement, repossession of a motor vehicle, damages and costs. The defendant filed a plea and counterclaim. The plaintiff joined the third party because it sought indemnification from it in “respect of the relief sought by the defendant against the plaintiff in his counterclaim”. On 14 March 2013 all the parties were given notice by the registrar that the action will be heard on 28 November 2013.
- [3] Prior to 28 November 2013 the defendant’s attorney, Deon Stander, entered into settlement negotiations with the plaintiff’s

attorneys, without a mandate it appears. The defendant terminated Mr Stander’s mandate and appointed Wheeldon Rushmere

& Cole as his attorneys. Having had a consultation with the defendant, his wife and counsel, the defendant’s new attorney, Fiona Bosman, addressed a letter dated 25 November 2013 to the third party’s attorneys, wherein she advised that Mr Stander had no mandate to make the settlement proposals and he failed to prepare for trial. She also advised of her instructions to request a postponement of the matter which was to commence after two days. It appears that there was no response to Ms Bosman’s letter with the result that on 27 November 2013 the defendant made an application to court, to be heard on 28 November 2013, for the postponement of the trial. On 28 November 2013 Roberson J granted an order postponing the trial sine die and ordering the defendant to pay the plaintiff’s and third party’s wasted costs occasioned by the postponement.

- [4] The third party prepared a party and party bill of costs which was taxed by the taxing mistress who disallowed the entire item 118 thereof. That item reads as follows:

“118 Fee charged for preparation for trial, including perusal of all necessary and relevant documentation and the day fee for trial.

(fee charged on the basis that the 3rd Party was ready to proceed with the trial and agreement was reached regarding the postponement less than three days before the allocated trial date)

(fee charged as attorney appearing in terms of Act 62 of 1995) 18 000.00”

- [5] Dissatisfied with her ruling as to item 118, the third party requested the taxing mistress to state a case for the decision of a judge. The third respondent’s main contention is that, because the attorney who was going to represent it during the trial, Roger Smith, has the right of appearance in the High Court, the appropriate way for the taxing mistress to have taxed the bill of costs relevant to the work done by Mr Smith was to allow for his work a fee appropriate to what would have been allowed an advocate for doing the same work.[1]

- [6] The third party relies on the unreported judgment of *Stevens v Maloyi*[2] wherein Tshiki J stated the following in paragraph [19]:

“An attorney with the right of appearance in the Supreme Court who appears in Court in preference to an advocate cannot be expected to be treated any differently from an advocate as regards his or her fees for appearance. When an attorney appears in the High Court, he is entitled to charge as though he were an advocate. The issue herein is for the work not done for which the attorney has to be paid. The main consideration which motivated Parliament to enact the relevant legislation (the Act) was to reduce the costs of litigation for the members of the public where such work can be done by attorneys who have a right of appearance in the Supreme Court. If the attorney can prove that he had not set aside any other work on the date of the trial which did not proceed

due to the settlement of the case, there is no reason why he cannot be compensated for the day on which he should have dealt with the settled case. The reasoning behind is not to equate the professions of attorneys and those of advocates but to do justice in similar cases involving both the advocates and attorneys. In my view, the only justifiable compensation in such circumstances is for the Taxing Master to allow a day's fee for the attorney which would be equivalent to what the advocate of the same experience would have justifiably charged.”

- [7] The reasoning in the quoted paragraph seems to be that, because an advocate would be entitled to a day's fee, an attorney is also entitled to a day's fee which would be equivalent to what an advocate of the same experience would have justifiably charged. The attorney's alleged entitlement to that fee is purportedly based on section 3 (4) of the Right to Appearance in Courts Act[3] which reads as follows:

“An attorney who has been granted the right of appearance in the Supreme Court shall also be entitled to discharge the other functions of an advocate in any proceedings in the Supreme Court.”

- [8] With respect, I do not agree with the reasoning in paragraph 19 of *Stevens v Maloyi*, for two reasons. Firstly, section 3 (4) does not create an entitlement for an attorney with the right of appearance in the High Court to charge a fee equivalent to that to which an advocate of the same experience is entitled. That subsection instead entitles such an attorney not only to appear in the High Court and Constitutional Court, but also to discharge the other functions of an advocate in any proceedings in the High Court and Constitutional Court. The entitlement to discharge functions of an advocate is not and should not be confused with the entitlement to charge a fee of an advocate. Secondly, a distinction must be drawn between the trial fee which an attorney with the right of appearance in the High Court may charge where the trial is settled before the trial date and the trial fee which an advocate may charge in such a situation. That distinction was drawn in *Road Accident Fund v le Roux*[4], a judgment to which Thsiki J referred.

- [9] Blieden J gave the reason for an advocate's entitlement to a first day trial fee as follows at 756E-F in *Road Accident Fund v le Roux*:

“The structure of the advocate's profession is such that the settlement of a trial and the loss of a first-day trial prejudices counsel who runs a real risk of not being compensated for reserving a day for trial. An attorney, on the other hand, in the time set aside for the first day of the hearing, can do other lucrative work.”

- [10] Insofar as the charging of fees is concerned, a distinction must be drawn between a fee for preparation for trial and a fee for the trial itself. If an advocate did not do work in preparation for trial he is obviously not entitled to a fee for preparation for trial. If he had done work in preparation for trial but the trial does not proceed (because it either settled or was postponed), an advocate will, in addition to a fee for preparation for trial, be entitled to a first day trial fee only if he suffered loss of opportunity as a result of the trial brief. An advocate is entitled to a first day trial fee to compensate him for the loss of opportunity to claim fees from other work suffered in consequence of his acceptance of the trial brief in respect of the trial which did not proceed because the matter either settled or was postponed. In *General Council of the Bar of South Africa v Geach and others*[5] Wallis JA said at 99C-D that an advocate who wish to claim payment of a fee on the footing that he has been prejudiced by accepting the brief (in which the matter was settled or postponed), should be able to demonstrate that he had to turn other work away as a result of the trial brief. An advocate is entitled to a first day trial fee because an advocate's practice centres mainly around appearance in court. He is accordingly required to hold himself available to appear in court on the first day of the trial and thereafter, depending on the anticipated length of the trial.
- [11] An attorney's practice is different from an advocate's practice. As Bliden J put it at 757C-D in *Road Accident Fund v le Roux*:
- “[W]hat has been said about the profession of an advocate cannot be said about the practice of an attorney. Unlike an advocate the attorney is at all times at the 'coalface' of the litigation. He knows what the chances of settlement are, both through his constant contact with his client as well as the attorneys acting for the other side. The advocate is not in such a position. The latter gets his brief on trial and until otherwise advised must assume that the trial will proceed and is therefore compelled to turn away all other work offered him for the reserved date and possibly dates thereafter, depending on the anticipated length of the trial”.*
- [12] In addition, an attorney, because of his constant contact with the attorney acting for his client's opponent, will have a fair idea whether the matter is likely to be heard. There might be interlocutory applications before court shortly before the hearing, as was the position in the present matter, which might cause the trial not to proceed on the first day.
- [13] In *Pretorius v Santam Bpk*[6] van Dijkhorst J with reference to *I D Myburgh en M J Fourie NO v Guardian Nasionale Versekeringsmaatskappy Bpk*[7] illustrated why there cannot be a direct comparison between fees charged by advocates and attorneys for trial work. The learned

Judge said the following at 867G-868A:

“My bevinding (in I D Myburgh en M J Fourie NO v Guardian Nasionale Versekerings Maatskappy Bpk (TPA saak 23858/95 van 25 September

1998) was die ou gebruik dat advokate ‘n eerste dag fooi of deel daarvan betaal word waar ‘n verhoor betreklik kort voor die verhoordag deur die mat val, sy grondslag het in die feit dat advokate se beroep hoofsaaklik sentreer om verskynings in die Hof. Die etiese kode van advokate verbied dubbel brevettering en dit kan gevolglik in die algemeen gesproke aanvaar word dat indien ‘n saak kort voor verhoor deur die mat val, die advokaat waarskynlik geen ander brevet vir verskyning op die betrokke dag sal ontvang nie. Op ‘n meevaller kan nie gereken word nie. Uiteraard het hy soms (en party advokate dikwels) pleitstukke en opiniewerk wat sy aandag verg, maar dit sou hy waarskynlik tog na-ure of oor naweke gedoen het. Die gyskaal het dus ten grondslag gehad die gedagte dat hoe nader aan die verhoordatum ‘n saak deur die mat val hoe onwaarskynliker dit is dat ‘n plaavervangende brevet ontvang sal word. Die situasie het nie verander nie en daar is gevolglik geen rede om te bevind dat die praktyk wat voortgeduur het sedert 1990 onredelik is nie. Na my mening was dit billik. Gevolglik het ek beslis dat die toelating van ‘n eerste dag verhoorfooi redelik was”.

[14] Wallis JA did not level any criticism against Pretorius v Santam Bpk. To the contrary, the learned Judge of Appeal referred to it as an illustration why the fees charged for trial work by an advocate cannot be compared with the fees charged by an attorney.[8]

[15] In Pretorius v Santam Bpk van Dijkhorst J referred to an advocate returning to his chambers after the postponement or settlement of the trial and drafting

pleadings and opinions. The reality is that, since the commencement of the Right of Appearance in Courts Act, more and more

advocates have less pleadings to draft because, in a number of cases, attorneys draft pleadings themselves. An example is an action against the Road Accident Fund. Generally advocates no longer draft particulars of claim or pleas in such matters.

[16] In this regard reference is made to rule 70 of the uniform rules of court which deals with the taxation and tariff of fees of attorneys,

not advocates. Rule 70 (1) (a) specifically empowers a taxing master “to tax any bill of costs for services actually rendered by an attorney in his capacity as such in connection with litigious work ...”. (own underlining). In terms of rule 70 (1) (a) an attorney is accordingly entitled to a fee only for services actually rendered. Charges for work not actually done cannot be allowed on taxation.[9] Item A10 of the tariff of fees of attorneys (under rule 70) entitles an attorney to a fee in accordance with the tariff under rule 69 for appearance in court or the performance by an attorney of any of the other functions of an advocate, in terms of the Right of Appearance in Courts Act. That item does not entitle an attorney to charge a fee as if he is an advocate.

[17] I now deal with the facts of this case. If Mr Smith prepared for trial he is entitled to a reasonable fee in respect of such

preparation. The taxing mistress will obviously take into account whether or not the matter was ripe for hearing.

[18] Regarding the third party's claim that Mr Smith is entitled to a first day trial fee, he is not entitled to a first day trial fee. He is entitled only to a reasonable fee for his appearance at court when the order was granted postponing the action. The time spent at court is one of the factors to be taken into account for determining a reasonable fee.

[19] In the result, it is ordered that:

19.1. The ruling of the taxing mistress in terms whereof she disallowed item 118 of the third party's party and party bill of costs is set aside.

19.2. The aforesaid bill of costs is returned to the taxing mistress for taxation in accordance with this judgment.

19.3. There shall be no order as to costs in this review.

G H BLOEM

Judge of the High Court

Date of delivery of the judgment: 18 October 2016

[1] Stubbs v Johnson Brothers Properties CC and others 2004 (1) SA 22 (N) at 30B.

[2] Stevens v Maloyi delivered on 26 April 2012 in the ECP under case number 1205/08.

[3] Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995).

[4] Road Accident v le Roux 2002

(1) SA 751 (W).

[5] General Council of the Bar of South Africa v Geach and others 2013 (2) SA 52 (SCA).

[6] Pretorius v Santam Bpk 2000

(2) SA 858 (T).

[7] I D Myburgh en M J Fourie v Guardian Nasionale Versekeringsmaatskappy Bpk (unreported judgment delivered in the TDP on 25 September 1998 under case number 23858/95).

[8] General Council of the Bar of South Africa v Geach and others (supra) at 99G-H.

- [9] City Deep Ltd v Johannesburg City Council 1973 (2) SA 109 SA (W) at 119F-G where Galgut J made reference to Spira v Weber 1912 TPD 353, where Bristowe J said at 356 that “if the work referred to in a particular item of a bill of costs has not been done the Taxing Master ought to disallow the item”.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2016/105.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/motor-finance-corporation-pty-ltd-v-prinsloo-and-others-unknown-topic-aecghc-2016>

Prepared on 12 October 2026 · Esheria