

IMPLICATIONS OF THE AMENDMENTS TO THE UNIFORM RULES OF COURT REGARDING COUNSEL'S FEES

Category: Dispute Resolution

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On 8 March 2024, the Department of Justice and Constitutional Development issued a notice in [Government Gazette No 50272](#), informing legal practitioners about the Amendment Rules Regulating the Conduct of the Proceedings of the Provincial and Local Divisions of the High Court of South Africa ("**the Rules**"). According to the Rules, rule 4 was amended, rule 67 was inserted and rule 69 and rule 70 were amended. The Rules came into effect on 12 April 2024. For purposes of this article, we will discuss the new Rule 67A and its implications.

Cost Scales

Cost orders in civil proceedings are determined based on three scales: party and party scale, attorney and client scale and attorney and own client scale. Party and party costs entails that the party in whose favour an order is made may recover the reasonable costs it incurred, during the proceedings, as determined by the applicable court tariff. The attorney and client scale allows the party in whose favour an order is made to recover the additional costs incurred, more than they would have under the party and party scale. Specifically, they can recover fees that are closer to what they would have incurred for their professional attendances during the proceedings. Attorney and own client scale refers to the actual fees payable by a client to an attorney, determined by the specific fee arrangement between the client and attorney, wherein the fees are not restricted to the statutory court tariffs. Costs on this scale are typically not awarded by the courts. However, it is important to note that even under the attorney and client scale, and attorney and own client scale, the fees claimed must still be reasonable in the eyes of the court. The client may not be able to recover all the fees incurred by it during the proceedings, if they are deemed excessive or unreasonable.

New Rule 67A and its implications

The new rule 67A (“**the Rule**”) applies to the party and party scale and aims to regulate the rate at which counsel’s fees can be recovered when a cost order is made under this scale. In the context of the Rule, “counsel” refers to both advocates and attorneys with a right of appearance in court. The Rule establishes the maximum recoverable value for counsel’s fees. When making an order for costs, the court considers various factors to ensure fairness and reasonableness, including:

1. the importance of the relief sought;
2. value of the claim; or
3. the complexity of the matter.

The Rule must be read and interpreted in conjunction with Rule 69. Rule 69 specifies the tariff which a counsel who appears in a superior court may recover. The tariffs are in terms of scale A, B and C. Scale A allows for a maximum of R1,500.00 per hour. Scale B allows a maximum of R3,000.00 per hour and scale C allows a maximum of R4,500.00 per hour.

When making a cost order, the court must consider which scale should be used to determine counsel’s fees. Failure to indicate the scale will result in the lowest scale, scale A, being applied. Therefore, counsel must ensure that they include the scale in their draft orders to ensure that the appropriate cost order is made. Additionally, if multiple counsels’ are involved in a matter, each counsel will be entitled to fees determined by the scale corresponding to the work they have performed on the matter. With the Rule in effect, the responsibility to determine which scale of fees should be awarded now vests with the court, not the taxing master.

Case Law

In the recent case of [*Mashavha v Enaex Africa \(Pty\) Ltd \(2022/18404\) \[2024\] ZAGPJHC 387*](#), the High Court ordered the applicant, Mr Mashavha, to pay the costs associated with the application, on a party and party scale on 16 April 2024. However, during the proceedings, the Court became aware that the Rule had come into effect on 12 April 2024. As a result, the Court allowed the parties until 19 April 2024 to submit written representations, considering the implications of the Rule. The final judgment, in alignment with the Rule, was handed down on 22 April 2024. The Court highlighted that the Rule places a duty on courts to carefully consider the various factors related to each matter before it. As

mentioned above, these factors include determining the value of the matter, assessing the importance, and evaluating the complexity of each case. The court's task is to make informed and objective decisions based on these considerations.

The Court in this case held that, the facts were not as complicated as it was mainly discussed or made on the basis of jurisdiction or *locus standi*. As a result, the party and party costs were awarded based on Scale A.

Conclusion

It is essential for legal representatives to provide well-founded arguments in their court submissions.

They should objectively present the reasons behind their case and demonstrate its significance, as well as the nature of the claims and the complexity of the matters before the court. By doing so, they can increase the likelihood of being awarded the scale of fees which will enable them to recover most of their legal fees. Moreover, counsel should prove the above mentioned factors to justify claiming the highest scale. Being well-informed on the Rules will allow counsel to effectively recover their fees based on the applicable scales, which apply to counsel irrespective of their seniority.

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