

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 11036/2015

In the matter between:

AYANDA SILINDOKUHLE MIYA

PLAINTIFF

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH KWAZULU NATAL**

RESPONDENT

JUDGMENT

Mngadi J

[1] The issue for determination is whether the collapse fee is recoverable as part of the party- and- party costs.

[2] The plaintiff, on behalf of her minor child, instituted action for damages against the defendant for injuries sustained at birth rendering the minor child permanently disabled. The defendant firstly admitted liability. Thereafter, the matter was enrolled for trial for a period of fifteen (15) days to determine quantum. A day prior to the commencement of the trial, the defendant made an offer to settle the damages. The plaintiff accepted the offer, and court made the draft consent order an order of court..

[3] In the consent order made an order of court, provision was made for the amount settling the claim and all the costs but the parties could not agree on the issue of the collapse fee. Collapse fee means a fee in excess of one refresher, charged by counsel

in respect of days reserved for the hearing of the matter, which for any reason the trial does not run on those days.

[4] The defendant agreed to pay costs including costs of senior and junior counsel engaged. The trial was enrolled for hearing from 3 May 2022 to 20 May 2022. The plaintiff claimed collapse fee for both counsel for the dates 3, 4, 5, 6 and 9 May 2022. Counsel's fee is based on the work necessary and actually done. It is determined by the time and labour expended, the novelty and difficulty of the issues involved, and the skill and expertise required to deal with the issues properly. It is rounded off by the customary charges charged by counsel of similar status for similar work.

[5] Plaintiff counsel submitted that due to the special circumstances of the case the collapse fee should be included as part of the party and party costs. He indicated that when the pleadings had been closed and the matter ready for trial, the defendant in February 2020 amended its plea by raising the so called 'Public Health Defence'. The matter had to be enrolled for hearing for a period of three (3) weeks; counsel had to do extensive preparation. He argued that the collapse fee is meant to compensate counsel in that they had to reserve themselves for the matter and not take any work during that period.

[6] The defendant contends that's collapse fee is not part of the party- and-party-costs; the defendant has settled the claim including undertaking to pay party- and-party costs; the defendant relied on public funds to settled the claim.

[7] The Taxing Master determines whether costs incurred were necessary and whether they are reasonable or not. It may not be the function of the Taxing Master to determine whether a collapse fee is part of the party-and-party costs or not. Rule 69 provides for taxing of advocates fees where the amount of the claim is within the jurisdiction of the Magistrate's Court according to the tariff of minimum fees for advocates between party and party scale referred to in Part IV of Table A of annexure 2 of the Rules of the magistrate's Court. In other cases the fees are taxed in accordance

with the tariff and where the tariff does not apply, the taxing master allows such fees, as he considers reasonable.

[8] The action instituted by the plaintiff against defendant is a matter of which costs are regulated by the tariff. The taxing Master does not have the authority to tax items in the bill of costs, which are not party- and-party costs. Party-and-party costs are those costs charged and expenses incurred by a party to legal proceedings that appear to the taxing Master to have been necessary or proper for the attainment of justice. It is trite that the purpose of an award of costs is to indemnify the successful party for the expense he has been put through by the litigation. The party-and –party costs are part of the judgment given by the court and are strictly regulated.

[9] Attorney–and-client costs on the other hand are costs that an attorney is entitled to recover from a client for the disbursements made on behalf of the client and for professional services rendered. The costs are regulated by any agreement between the client and his attorney. *Francis-Subbiah R. Taxation of Legal Costs in South Africa* (2013) 56 states that attorney-and –client costs have a double meaning. Firstly, they refer to the costs that an unsuccessful party is ordered to pay to the successful party. Secondly, they refer to costs that a client has to pay to her attorney for legal services rendered. The author states that strictly speaking the latter type of costs should be called ‘attorney- and- own client’ costs. Thus, attorney-and-client costs are fees that a client has to pay to his or her attorney regardless of the outcome of the case.

[10] Generally, the Rules of the Society of Advocates regulate the charging of a collapse fee by a member. They provide that unless specifically agreed upon on acceptance of a brief or only an exceptional circumstances, the collapse fee may not be charged. Even if charged, it must still be reasonable in the circumstances. It is regarded as reasonable if it equals no more than half the time a member required to reserve himself (See *Fluxman Incorporated v Lithos Incorporated of SA* (No1) 2015 (2) SA 295 GP at para 79/91).

[11] It is irrelevant that the other party agreed to pay counsel collapse fee in order to determine whether the collapse fee forms part of party-and-party costs or not. The underlying factor for determining party-and-party costs are reasonable costs actually and necessarily incurred. If there other counsel who could accept the brief without an agreement to charge a collapse fee, it is difficult to say the collapse fee in that case was a necessary expense. It is not in the interest of a party to assist his opponent to retain services of a particular counsel.

[12] Litigation has been going on for many years. There are no records showing collapse fee being regarded as part of the party-and-party costs. It must be accepted that counsel who made no provisions for charging a collapse fee separately, they provide for the risk of the matter not proceeding in the fee they charge to mitigate material financial prejudice.

[13] In my view, the collapse fee is not part of the party-and -party costs. The plaintiff has not explained any basis that I this case the collapse fee be regarded as party-and-party costs. I also find no exceptional circumstances in this case, for example, in *Fluxmans* counsel continued working on the case during the period reserved for hearing of the case. In other matters, counsel may do other remunerative work relating to other matters during the days that had been reserved for the matter.

[14] In the result, it is ordered as follows:

1. The application is refused.

Mngadi J

APPEARANCES

Case Number : 11036/2015

For the applicant : Gajoo SC with Ms Gajoo

Instructed by : Justice Reichlin Ramsamy
Durban

For the Defendant : Mr Rajinath

Instructed by : Norton Rose Fulbright South Africa
La Lucia Ridge

Heard on : 3 May 2022

Judgment delivered on : 11 May 2022