IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN ***REPORTABLE***

CASE NO: D178/2000

Date heard: 28/02/03
Date delivered: 5/03/03

In the matter between:

THEMBEKLIE ELSIE SIBISI **APPLICANT**

and

SARASWATHEE GANPATH **RESPONDENT**

J U D G M E N T

PILLAY, J

1. This is a review of a taxation. The taxing officer refused to allow the applicant's attorney, Mr Jafta, fees as if he were an advocate, for appearing in the Labour Court in an opposed application.

2. The taxing officer allowed a fee of R100,00 per fifteen minutes. As the

hearing, in her view, did not last more than five minutes, he was not entitled to more than R100,00.

3. If he wanted to be paid as an advocate then he should have obtained a special order for costs from the Court, she maintained.

4. She further submitted that although the Labour Court is of equal standing with the High Courts, the practice regarding rights of appearance differed. The difference was that in most cases the litigant can represent itself or be represented by an attorney. The fees of counsel should be allowed only in trial or complicated opposed matters. The "going rate", she submitted, for opposed matters was hardly as much as R3000, 00, the lowest amount recommended for opposed motions in the *Guideline for Taxation of Junior Counsel's fees (Natal Bar)* ["the Guideline"].

5. Mr Jafta objected firstly to the conduct of the taxing officer during the taxation. He denied that he was given a fair hearing. I do not intend to traverse this route as the review of a taxation is wider than the common law grounds of review. I am entitled to set aside any decision of the taxing officer even if she had exercised her discretion properly. (Erasmus: Superior Court Practice B1-349)

6. Secondly, he contended that he should be allowed to charge on the same basis as junior counsel would for appearing in the High Court in an opposed motion.

7. Thirdly, he maintained that the matter was sufficiently complex that a fee of at least R3000,00 should be allowed for the appearance. He had asked for R5000,00 in the bill of costs.

8. He relied on the matter of B Neethling and N Parmee v Peach & Hatton Heritage (Pty) Ltd unreported Case No D 623/98 and D717/98 (per Ncgamu AJ) at the taxation and in this review.

9. I have been referred to the judgments of my learned brothers in Darrien Ivan Stubbs v Johnson Brothers Properties CC and 2 Others (case No 2817197-955/2000) reported at http://www.derebus.org.za.archives/2001feb/new/magidspeech.htm (per Magid J) and Neethling (*supra).* I have also had the benefit of the judgment of Blieden J, (Cachalia AJ and Jordaan AJ concurring) in Road Accident Fund v Le Roux 2002 (1) SA 751 (W).

10. Citing with approval the decision of Van Dijkorst J in Promine Agentskap en Konsultante Bk (At) v Du Plessis en 'n Ander (TPD unreported case No

20028/69), Magid J agreed that

> "the proper approach to the taxation of the fees of an attorney with right of appearance is to assess those fees by reference to what would have been allowed to an advocate under similar circumstances".

11. Underpinning this view were the absurdities that arose upon an analysis of the sub-rules of Rule 69 of the Uniform Rules of Court when applied to attorneys as directed in terms of Rule 70.

12. For different reasons Ngcamu AJ also refused to distinguish between the fees allowable to advocates and attorneys who appear in the Labour Court. He reasoned as follows at paragraph 5 of the judgment:

> "The Labour Court is equal to the High Court in status. Accordingly the fees are assessed using the High Court tariff. The High Court tariff does not provide fees of the appearance by an attorney. If this Court has the same status as the High Court, I cannot see any reason for not granting the attorneys appearing fees equal to those of junior counsel. There should not be any difference between an attorney who has the right of appearance in terms of Act 62 of 1995 and the one who does not. In my view,

> there is no reason for making such differentiation. This is so because the Labour Relations Act does not make that difference. To me, it does not make sense to allow the attorneys to appear in this Court but disallow them fees for such appearance on the basis that they are not advocates or do not have the Right of Appearance in terms of Act 62 of 1995. If there should be such a difference, the Rules Board should make this clear. I however conclude that the attorney appearing in the Labour Court is entitled to fees equal to that of a junior counsel." (*sic*)

13. The full Bench in Road Accident Fund above is critical of the "gloss" that the generalisation of Magid J puts over the judgment of Van Dijkorst. The learned judges in Road Accident Fund clarified the matter which I summarise thus : An attorney who is acting as counsel is entitled to a reasonable fee provided that she or he in fact did the work and can satisfy the Taxing Master of this fact. Nevertheless, a distinction must be drawn between the trial fee which an attorney may charge where the trial is settled before the trial date and the fee which counsel may charge in that respect because of the difference in nature of the practice of an attorney as opposed to that of an advocate. 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, can do other

lucrative work in the time set aside for the first day of the hearing. It would be discrimination to disallow an attorney who appears in the High Court fees on the same basis as an advocate for actual work done.

14. I respectfully agree that there is no rational basis to distinguish between the fees allowable to an attorney and advocate for the same work actually done in labour matters. Constitutionally speaking, it could be unfairly discriminatory.

15. Whenever the Rules of the Labour Court do not provide for a situation, the Labour Court, in the exercise of its discretion in terms of Rule 11(3) of the Rules of the Labour Court, has relied upon the Uniform Rules of Court (Van Rooy v Nedcor Bank Ltd (1998) 3 LLD 376 (LC); Botha v Gensec Asset Management (Pty) Ltd (2000) 21 ILJ 1999 (LC); Maharaj v Bartel Kabel Werke (Pty) Ltd (2000) 21 ILJ 2269 (LC); Mafuyeka v Commission For Conciliation, Mediation & Arbitration & Others (1999) 20 ILJ 2386 (LC)).

16. There is no tariff promulgated as yet for taxation in the Labour Court. Rule 48 of the Uniform Rules of Court which provides for taxation in the High Court may therefore be applied. This has been the practice thus far in the Labour Court.

17. Based on the cases cited and the obvious intention of Rule 70 read with Rule 69 of the Uniform Rules of Court the taxing officer erred by requiring the applicant to have first obtained a special order from the Court for Mr Jafta's fees to be paid as if he were junior counsel.

18. However, I respectfully differ with my brother Ngcamu AJ in so far as his opinion might imply that the tariff applicable in the High Court for junior counsel should automatically apply in the Labour Court. The Guideline relied on by Mr Jafta is just that : a guideline. It is:

> "designed to cater for the majority of matters in which counsel's fees require taxation, it is not a scale of minimum and maximum fees or a tariff. It is not designed to cater for matters which are extraordinarily simple or extraordinarily complicated and in such matters a fee which is lower than the minimum fee or higher than the maximum fee reflected in the guide may be justified."

19. For opposed applications, it provides a fee on brief and for the first day (exclusive of heads) between a range of R3000,00 and R7500,00. In determining a reasonable amount the Guideline suggests that factors such as the following be considered:

"i. the length of the matter;

ii. the time required to complete the matter and any urgency attaching thereto;

iii. the complexity of the factual and legal issues involved in the matter."

20. In Stubb's (*supra*), the criteria were summarised as follows:

"a. the complexity and importance of the case viewed objectively;

b. the degree of expertise and seniority required of (not possessed by) whomever appears in the matter;
c. the traditional ways in which advocates charge for their appearances – e.g. fee on brief, refreshers etc.
d. generally speaking, the value of the work done."

21. In determining the kind of expertise that is required for a particular dispute the nature of the dispute needs to be carefully analysed. The expertise required may be that of a specialist in particular fields of law or generally as a practitioner. Senior counsel of many years of practice may have less expertise in labour law than a seasoned trade unionist who recently qualified as an attorney. To the extent that seniority may determine the expertise of the practitioner, it would be relevant. Otherwise it is irrelevant.

22. In my view there are special considerations for determining a reasonable

amount to be allowed as fees in the Labour Court:

23. The legislature intended to provide a less costly means of resolving labour disputes. This is evidenced firstly from the overarching attempts to simplify the law and procedures so that they are accessible to lay people. Secondly, the tariff for the High Court provides *inter alia* for the payment of Court fees when proceedings are instituted (Rule 67 of the Uniform Rules of Court). No fees are charged by the Labour Court when proceedings are launched.

24. Thirdly, section 213 of the Labour Relations Act 66 of 1995 [LRA] provides for the less expensive methods of service by registered post, telegram, telex, telefax or delivery by hand. Rule 4 of the Uniform Rules of Court require service by the Sheriff. A tariff of fees is prescribed for Sheriffs (Rule 68 of the Uniform Rules of Court).

25. In deciding on the complexity of a case the following objective factors apply generally to labour disputes. Unlike the High Courts, the Labour Court has a limited jurisdiction. Furthermore, over time many controversies about the interpretation and application of the law and procedures have been settled through the cases. There is therefore a substantial degree of predictability and certainty on matters regularly dealt

with in the Labour Court. Such matters are not complex.

26. Conversely, disputes e.g. about mass dismissals and strikes could involve massive monetary claims and have serious socio-economic implications. Certain labour disputes derive their complexity because they involve one or other constitutionally entrenched fundamental right. Consequently, even though the quantum of claims may be insignificant, the legal issues may not be so.

27. The complexity of a case would go to determining the expertise required of the representative for the particular matter. This approach is objective. I respectfully agree with the view in Stubb's (*supra*) that actual experience and the seniority of the practitioner are not appropriate criteria. They are subjective and irrelevant. If applied, they would lead to significant disparities amongst those burdened with cost orders as such disparities would have no relation to the cause giving rise to the orders. Thus if employers A and B each ignore an application to make an award an order of court, A might pay higher costs for the appearance if a more senior practitioner is used by the applicant in the case against him than in the case against B. The objective approach would standardise the penalty of costs to prevent some litigants being burdened more than others for the same transgression.

28. In the Labour Court economic issues are often at the heart of the dispute. Parties may be unemployed, indigent or struggling small businesses and trade unions. Legal fees cannot be pitched so high as to exacerbate their plight or render the Court inaccessible to them. Irrespective of their economic status, the rate of fees allowed must be standardised for all litigants. If the standard is set on the basis of what the wealthy can afford, then the poor would suffer.

29. In this case Mr Jafta stated in the Application for Review of Taxation that the matter was sufficiently complex to justify the fee claimed in that the respondent had

> "filed an eighteen (18) page opposing Affidavit seeking a two (2) relief for condonation as well as the dismissal of the applicant's claim with costs. The Respondent was raising *inter alia* a jurisdictional point as to whether the matter was properly before the Labour Court or that it is a matter justiciable only by the CCMA."(*sic*)

30. When the Labour Court ruled in favour of having jurisdiction, the respondent, he submitted, sought a postponement which would have been

refused were it not for a tender of costs.

31. Mr Jafta made no reference in that document to the fact that the main application was for an order in terms of section 158(1)(c) of the LRA. He also made a statement there, which he later withdrew, that the respondent had been represented by senior counsel.

32. However, subsequently when reinstating his application to make the award an order of court Mr Jafta described the proceedings simply as follows :

> "I confirm that on 15th October 2002 the employer party applied for a postponement of the hearing of an application to make an arbitration award an order of the Labour Court. The said application was granted and the Labour Court proceedings relating thereto were stayed pending a finalization of the pending CCMA rescission application."

33. In this case the respondent opposed the application to make an award to the Commission for Conciliation Mediation and Arbitration [CCMA] an order of Court in terms of section 158(1)(c) of the LRA on the basis that there was an application pending in the CCMA for rescission. The

rescission application had not been properly made. The Court granted an application for a postponement against a tender for costs and directed the respondent to launch a proper rescission application in the CCMA within ten days. The hearing was brief. There was nothing complex about the matter at all. There were no material disputes of fact or of law. The Court grants such orders as a matter of routine. Comparatively, an unopposed divorce matter would be more complex as it would involve the leading of oral evidence and a change of status.

34. Any practitioner with a modicum of expertise in labour law would have predicted this result. Mr Jafta appears regularly in similar matters and ought to have anticipated this outcome.

35. Mr Jafta persisted that the lowest amount of R3000,00 in the Guideline should be allowed because firstly, the Labour Court was of the same status as the High Court. It demanded a similar high standard of care by practitioners. To award a fee that was less than that stipulated in the Guideline would imply that the Labour Court was inferior to the High Courts. Secondly, a lower fee would discourage practitioners from appearing in the Labour Court.

36. Neither of these submissions are valid considerations when determining

an appropriate fee. A higher fee cannot be allowed out of concern for diminishing the status of the Labour Court. It seems quite immoral to me that fees higher than the value of the work done should be extracted from any litigant, especially the unemployed, indigent, and struggling small businesses and trade unions, merely to encourage lawyers to do business in the Labour Court. The "value for money" test which I endorse will not discourage practitioners from appearing in the Labour Court. In a free market system, where there is work there will be practitioners to do it. Practitioners continue to appear in the Magistrates' Courts despite its lower tariff.

37. The value of the work involved was hardly R3000,00. After considering the criteria discussed above the appropriate fee that should be allowed for the appearance in Court is in my opinion R300,00.

38. It was submitted that as the review sought to establish general principles of interest to practitioners there should be no order as to costs.

39. Order:

    a. The assessment of R100,00 for the appearance in court by the taxing officer is reviewed and set aside.
    b. The applicant is allowed an amount of R300,00 for the appearance

in Court.

c. There is no order as to costs.

PILLAY D, J

APPEARANCES:
For the Applicant: Mr. Jafta
Jafta & Co. Attorneys

For the Respondent: Ms. P. Govender
Pravina Govender Attorneys