

## *Kronieke / Chronicles*

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# Is 'n prokureur geregtig op die koste van geregtelike stappe teen 'n voormalige kliënt?\*

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## 1. Inleiding

Die vraag het onlangs ontstaan of 'n prokureur wat sy eie saak hanteer, geregtig is op dieselfde geregtelike koste asof hy 'n ander prokureur instruksies gegee het om namens hom op te tree.

In hierdie verband word die volgende gesê in Voet 3.1.7:

*Fees may be claimed by one who pleads his own suit and wins it, in Voet's opinion.*

Nay indeed should an advocate have himself handled a suit quite clearly his own, and his opponent in the event have been adjudged to pay him the costs of the suit, I would have no manner of doubt but that he would rightly credit fees to himself for work bestowed on his own case just as though he had afforded advocacy to the cause of another.

Voet verstrek die volgende redes vir sy standpunt:

*Reasons.* This is firstly because while attending to his own suits he was bound to neglect and put aside those of others, and so to lose the gains anticipated from them, on which the commentators have framed their calculation and form of reclaim for loss and damages. Secondly and specially it is to prevent the penalty which is to be imposed on rash litigants for their bad faith from mainly vanishing as otherwise it would. In truth if it seems just for a loser condemned in costs to be sued also by the winner to pay the fees due to the winner's advocate, even though the advocate on account of some tie of friendship or blood or other quite acceptable reason was willing to afford his advocacy to the winner for nothing, and thus in fact the victor spent nothing, I cannot see why in this case too the victorious advocate should not obtain the *douceur* for his work.

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\* Die hulp en bystand, sowel as die saamdink van Mnr GP Greyvenstein, voormalige Hoof Uitvoerende Beampte van die Prokureursorde van die Vrystaat, word met groot dank erken.

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Hierteenoor is daar egter verskeie skrywers wat die teenoorgestelde mening gehuldig het. Sien bv. Andreas Gail, Mynsinger en ook Paponius.

In die Engelse Reg het ons die ou beslissing van *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, 53 LJ QB551. Hier bevind Brett M R die volgende betreffende 'n prokureur wat sy eie saak suksesvol behartig het:

is entitled upon taxation to the same costs as if he had not been a party, subject to this, that such costs shall not include any item which the union of the two characters of party and solicitor renders impossible or unnecessary e.g., attendances on himself, and instructions to himself.

Dieselfde beginsels is van toepassing waar die prokureur deur middel van 'n prokureursfirma optree waarvan hy 'n vennoot is (*Bidder v Bridges* (1887) W N208) of waar hy instruksie aan sy London korrespondente gegee het om namens hom op te tree (*Reed v Gray* (1952) Ch 337, (1952) 1 All ER 241).

## 2. Suid-Afrikaanse Reg

Die eerste Suid-Afrikaanse beslissing wat ek kon vind wat die probleem aangespreek het, is *Lewin v Muller NO and Du Toit* 1914 ECD 467. In hierdie aansoek vir die hersiening van die taksasie van 'n kosterekening, het die vraag ontstaan of 'n prokureur wat sy eie saak behartig het in 'n aksie wat teen hom ingestel is, wel die reg het om prokureurskoste van sy opponent te verhaal indien die prokureur suksesvol is. Graham RP lewer die uitspraak en verwys na die *Chorley*-saak *supra*. Na aanleiding hiervan, sê hy (468-469):

It is a judgment of a very strong Court, upheld unanimously on appeal, and it lays down the rule that where an action brought against a solicitor, who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, *except in respect of items which the fact of his acting directly renders unnecessary. I am prepared to follow that case.* It is in the interests of the public that an attorney who conducts his own case should be allowed such costs as were claimed by the applicant, because as pointed out by Fry, LJ, if the rule were otherwise, an attorney who is party to an action would always employ another attorney to conduct his case, and, wherever successful, he would recover full costs, whereas under the rule of practice now laid down an attorney who sues or defends in person will be entitled, as if he is successful, to full costs, *subject to certain deductions of which his unsuccessful opponent will get the benefit.* (my kursivering)

Die volgende saak is *Ochse Bros v Brayshaw and Co* 1911 OPD 72. Op 75 vind ons die volgende:

The Court further intimated that the fact of Mr Ochse being a member of the firm of Ochse Bros. did not disentitle him under rule 56 of the Magistrate's Court Rules to charge fees in the case in question.

Die prokureur wat namens die Eiser-firma (nie 'n prokureursfirma nie) opgetree het kon dus wel sy fooie van die verweerders verhaal. Daar is egter na geen gesag verwys nie.

In die saak van *Du Plessis v Wilsnach* 1915 CPD 539 lewer Juta RP die uitspraak van die hof en sê (540):

It is laid down by *Voet* (3, 1, 7) that an advocate who appears to conduct his own case and is successful is entitled to claim his fees from the other party. The reasons given by him, viz: that he has to neglect the conduct of other cases, and principally, that a contrary rule would encourage litigation, apply with equal force to an attorney conducting his own case.

Hy vervolg (op 541):

On principle and authority therefore it seems to me to be sound that an attorney conducting his own case is entitled to his professional fees on taxation, where, as in this case, no claim is made for witness expenses.

Juta RP sluit sy uitspraak met die volgende af (541):

I cannot see any difference in principle where the attorney acts as such in his own case and is also a witness. If he claims his witness expenses, then he cannot claim fees as an attorney. So far, therefore, from the other party being prejudiced by an attorney conducting his own case, he receives an advantage: for the attorney might engage another attorney who would be entitled to the fees, and he himself could claim his witness expenses. As the plaintiff in this case did not claim any witness expenses, he should have been allowed his fees.

Dit is belangrik dat daar gewaarsku word teen die gevare wat mag insluip indien 'n prokureur as 'n getuie optree in sy eie saak of in 'n geding wat hy namens 'n kliënt mag voer. Dit is 'n ongewenste prosedure dat 'n regspraktisyn sy kliënt se vernaamste getuie is. Sien *Wronsky en 'n ander v Prokureur-Generaal* 1971 (3) SA 292 (SWA) te 293 F-G. In die saak van *Hendricks v Davidoff* 1955 (2) SA 369 (K) sê De Villiers RP die volgende (369 E-G):

I mentioned this morning that it is highly undesirable that an attorney conducting a case for a party should become a vital witness for that party, and that it is the more undesirable when the judgment of the magistrate is founded upon an acceptance of his version of issues of fact. *Now the law has always been quite clear on this point that although an attorney is not legally incompetent to give evidence, it is highly undesirable that he should do so; and I think members of the profession should bear that in mind because it can lead to great injustice.* I do not think however that it has in this case. (my kursivering)

Die aandag word ook gevestig op die woorde van Wessels R in *Elgin Engineering Co (Pty) Ltd v Hillview Motor Transport* 1961 (4) SA 450 (D & K) te 434 F-H:

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*I must digress at this stage to remark that in circumstances where his credibility may be in issue it would appear to be undesirable for an attorney who is to be an important witness in any matter to act as the attorney of record. The fact that the witness is the attorney of record for one of the litigants does of course not affect his competence as a witness in any way. It is important that an attorney should at all times retain his independence in relation to his client and the litigation which is being conducted. If he is to give important evidence in the case in circumstances where his credibility may be called into question, his independence as professional adviser to his client in the matter may, in my opinion, be affected. As a witness he acquires an indirect interest in the proceedings which may, in my opinion, tend to make it difficult for him to discharge his professional duty towards his client. It is also possible that his impartiality as a witness may become suspect by reason of the fact that he is also the attorney of record for one of the parties. (my kursivering)*

Hierdie waarskuwing mag die koste-aspek beïnvloed, maar daar word nie verder op ingegaan nie.

In die saak van *Ochse v Swarts* 1917 OPD 18 beslis die Vrystaat volbank dat 'n prokureur wat sy eie saak behartig nie fooie van die ander party kan vorder nie. Hierdie uitspraak was egter gebaseer op die bepalings van reël 56, skedule B van Ordonnansie 7 van 1902 wat nie in die ander provinsies gegeld het nie. Dit het bepaal dat 'n agent nie geregtig is op agentsfooie in gevalle waar hy namens homself optree nie. McGregor R sê byvoorbeeld (20):

*That sec. (56) is fairly explicit providing that an agent who conducts a case in his own behalf cannot charge agent's fees in such a case.*

Hierdie bepaling is egter nie in latere wetgewing herhaal nie en die uitspraak kan dus met vrymoedigheid oor die hoof gesien word.

In 1917 lewer die Transvaalse volbank uitspraak in die saak van *Webb v Union Government* 1917 TPD 195. Die kopnotas is kort en bondig (195):

*An attorney successfully conducting his own case is entitled to charge for his services as an attorney.*

Mason R se standpunt is die volgende (202):

*The theory upon which costs are awarded is somewhat obscure. In the olden days it is clear that it was regarded as a penalty. Penalties of course were extremely numerous in all legal proceedings in ancient times. But penalties have become obsolete, and therefore the tendency in modern times, and even in the time of Justinian, was to regard costs as an indemnity given to the victorious party – that is, an indemnity to refund to him all the loss which the action has imposed upon the victor. When that principle is properly acted upon one can see that it would make no difference whether the litigant in person were a doctor or any other professional man, or an advocate. If you act on that principle to the fullest and complete extent, all the loss which any person sustains by having to devote his time to*

litigation in which he is successful, which he could have devoted to other more profitable enterprises, should be refunded to him. That is quite a fair and equitable principle if it can be properly applied.

Op 203 bevind Mason R:

There is no doubt a great deal to be said for the view which has been adopted both in the English Courts and in our own South African Courts, that an attorney conducting his own case is to be treated really as an attorney and not merely as an unqualified litigant.

Mason R sê verder (204):

*Voet* is a clear and definite authority in favour of the general proposition that a professional lawyer remains a professional lawyer even when conducting his own case and is therefore subject to the jurisdiction of the Court in that respect.

Hy sluit sy uitspraak af met die volgende woorde (204):

I have therefore come to the conclusion that, seeing that, so far as our own Roman-Dutch law is concerned, there is certainly a difference of authority, we should not be justified in departing from the practice which, as I am told, prevailed in the Transvaal, and the decisions which have been adopted both in the Cape and in Natal, *allowing the attorney who is a litigant in person the same fees, substantially, as if he were acting for another person. There is, of course, a qualification. An attorney cannot charge, for instance, for instructing himself or attending on himself – what were very rightly referred to as “fictitious charges.” Those naturally will be disallowed. But subject to that, it seems to me that there is no injustice in adopting the rule set forth in Voet, and that is in accordance with the decisions and the practice in South Africa.* (my kursivering)

Die derde regter Bristowe R verwys na die Engelse Reg en bevind dat die posisie daar soos volg is (205):

*Where a litigant employs a solicitor attendances and correspondence are necessary to place the solicitor in possession of the facts with which he will have to deal. When a solicitor appears in person this is not merely unnecessary, but it cannot take place. It cannot therefore be charged for. But with this exception the costs of a solicitor litigant are, as I understand the rule, exactly the same as those of a solicitor who is not a litigant.* (my kursivering)

Die enigste foenie wat 'n prokureur nie kan vra nie is dus vir opwagtinge wat hy nie gehad of werk wat hy nie gedoen het nie.

Die tafel was nou gedek vir 'n beslissing van die Appèlhof. Dit volg 9 jaar later in die saak van *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467. Die volgende woorde van Innes HR word as *locus classicus* t.o.v. kostes beskou (488):

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Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based. Speaking generally, only amounts which the suitor has paid, or becomes liable to pay, in connection with the due presentment of his case are recoverable as costs. But there are exceptions. It has been held by the English Courts that a *solicitor who personally and successfully conducts his own case is entitled to be paid the same costs as if he had employed another solicitor, save costs which under the circumstances are unnecessary.* (see *London Scottish Benefit Society v Chorley* (13, Q.B.D. p 872). And that view has been approved by South African Courts. (my kursivering)

Innes HR vervolg dan (489):

*So that an attorney successfully litigating in person may recover costs which represent not an expenditure or a liability but an earning.* And a party to a suit is entitled to claim his own witness expenses, provided he is duly declared to have been a necessary witness. Whether the qualifying expenses of a suitor-witness would be covered by the same rule need not now be discussed. It does not arise in this case. The items at issue here are the qualifying expenses, not of a litigant, but of professional witnesses in the employ of the litigant. And the general principle must be applied, for I am aware of no exception governing the matter. Against what expense is the Council seeking an indemnity? (my kursivering)

Die Appèlhof het dus reeds in 1926 bevind dat 'n suksesvolle litigant prokureur wat sy eie saak hanteer, geregtig is op sy normale koste behalwe dié wat onnodig is. Die vraag ontstaan egter wat die posisie is wanneer 'n prokureur nie namens homself optree nie maar waar hy opdrag aan sy vennoot gee om namens hom op te tree?

Die volgende waarna ek wil verwys, is die uitspraak van Blackwell R in die saak van *Knoll v Van Druuten and Another* 1953 (4) SA 145 (T). Hy sê (147 E-F):

It is an accepted principle both in the English Courts and in South Africa that if an attorney is himself a successful litigant he is not debarred from taxing a bill for professional work done by him, as a layman would be, *but he is not allowed to charge fees for consulting with or instructing himself, for the simple reason that such items would, in effect be unreal and fictitious.* (my kursivering)

Blackwell R vervolg dan (148 C-G):

None of these cases deal with the crisp point in issue in the present application, that is to say, *where an attorney employs his partner*, but following the principles applied in the authorities I have referred to it seems clear that the costs thus incurred should be allowed in taxation. If the attorney litigant were to employ a brother attorney outside his firm these costs would follow as a matter of course. *If he*

*chooses to go to a partner inside the same office the work has nevertheless to be done. In the present case it is conceded that the work described in the items objected to was actually performed and was essential to the proper presentation of the respondent's opposition. The effect of the performance of this work was, apparently, to convince the applicant that he had no case and to cause him to withdraw. This is not a matter of an attorney instructing himself or holding conferences with himself; this work was external to the litigant and represented his employment of a professional man to prepare his case, and I feel that it would be unfair to allow the unsuccessful applicant in the original proceedings to benefit as to costs by reason solely of the fact that the attorney acting against him happened to be a partner of the objecting erfholder. (my kursivering)*

In die geval waar 'n prokureur sy vennoot opdrag gee om namens hom op te tree, is hy dus ook geregtig op instruksie en konsultasie-fooie.

Daar is egter ook 'n derde tipe geval naamlik waar 'n prokureursfirma opdrag aan 'n professionele assistent in hul diens gegee het om te dagvaar en provisionele vonnis te verkry teen 'n voormalige kliënt vir professionele dienste. Van Heerden R vat die posisie soos volg saam in *Bester & Grove v Benson* 1980(1) SA 276 (K) op 277 D-E:

An attorney who personally and successfully conducts his own case is entitled to be paid the same costs as if he had employed another attorney, save costs which under the circumstances are unnecessary. So an attorney may recover costs which represent not an expenditure or a liability but an earning. An attorney cannot however charge for instructing himself or attending on himself as this is unnecessary and cannot take place and such items would be unreal and fictitious.

Van Heerden R verwys na die *Knoll*-saak *supra* en som dit soos volg op (277 G-H):

In that case an attorney who was himself a litigant had employed his partner to successfully act for him and it was held that the partner was entitled to recover the costs incurred in work actually performed and essential for the proper presentation of his partner's case. In allowing the costs Blackwell J pointed out that it was not a matter of an attorney instructing himself or holding conferences with himself; that the work was external to the litigant and represented his employment of a professional man to prepare his case; that had he employed an outside firm of attorneys the costs would have followed as a matter of course; and that, although he chose to go to a partner inside the same office, the work nevertheless had to be done.

In hierdie geval is die prokureursfirma egter die eiser van die koste wat hul professionele assistent aangegaan het op instruksies van 'n vennoot van die firma (277 G). Van Heerden R bevind hieromtrent (277 H- 278 A):

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The principle to be applied however seems to be exactly the same. If the work has actually been done it cannot be classed as unreal or fictitious and I can see no valid reason why applicant should not be allowed to be remunerated for the time and effort expended by the professional assistant on their behalf.

### 3. Samevatting

Die volgende afleidings kan van die bevindinge in die bogemelde hofbeslissings gemaak word:

- 'n Prokureur wat sy *eie saak* behartig, is geregtig op dieselfde fooie asof hy 'n prokureur versoek het om namens hom op te tree.
- Wanneer sy *vennoot* namens 'n prokureur optree, is sy vennoot geregtig om die koste te vorder vir werk wat werklik verrig en essensieël is om die vennoot se saak te stel.
- Waar 'n prokureur 'n nie-prokureursfirma verteenwoordig waarin hy 'n vennoot is, is hy geregtig op sy normale prokureursfooie.
- Wanneer 'n vennoot van 'n prokureursfirma 'n *professionele assistent* van die firma aanstel om namens die firma op te tree, is die firma geregtig op die assistent se fooie.

In al hierdie gevalle is daar egter 'n baie belangrike voorbehoudsbepaling wat altyd in gedagte gehou moet word: die fooie wat geëis word, moet wees vir werk wat werklik verrig is. Dit moenie skyn, onwerklike of fiktiewe fooie wees nie maar moes inderdaad aangegaan wees. Wanneer 'n prokureur namens homself litigeer, moet dit besef word dat sekere fooie soos byvoorbeeld vir instruksies en konsultasies fiktief is. Geen onnodige kostes kan aangegaan word nie.