The apportionment of legal costs in South Africa: A comparative analysis

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Samevatting

DIE VERDELING VAN REGSKOSTES IN SUID-AFRIKA – 'N REGSVERGELYKENDE ANALISE

Een van die grootste hindernisse wat toegang tot die reg in siviele sake, soos gewaarborg in artikel 34 van die Suid-Afrikaanse grondwet, belemmer, is die toekenning van astronomiese regskoste aan die einde van 'n regsgeding. Daar is twee fundamentele reëls wat van toepassing is wanneer 'n hof 'n kostebevel toestaan aan die einde van regsverrigtinge in Suid-Afrika. Die eerste basiese reël bepaal dat die toekenning van regskoste in die diskresie van die hof is. Die tweede algemene reël bepaal dat koste die uitkoms volg, met ander woorde, koste word toegeken aan die suksesvolle party (die sogenaamde Engelse model).

Daar kan slegs van hierdie algemene reël afgewyk word waar daar goeie gronde of spesiale omstandighede teenwoordig is wat die toekenning van 'n alternatiewe kostebevel regverdig. Hierdie wye diskresie gee egter aanleiding tot sekere problematiese aspekte in gevalle waar beide partye 'n sekere mate van sukses behaal. In hierdie artikel word die reël dat koste in die algemeen die uitkoms volg in die afwesigheid van spesiale omstandighede, krities bespreek. Daar word aangevoer dat, alhoewel die toekenning van koste in die algehele diskresie van die voorsittende beampte is, die algemene reël dat koste die uitkoms volg, in die meeste gevalle slaafs nagevolg word, selfs waar daar 'n werklike dispuut tussen die partye bestaan.

Daar word aangetoon dat daar verskillende benaderings deur ons howe gevolg word by die toekenning van kostebevele wat regsonsekerheid tot gevolg het en wat dit moeilik maak vir 'n party om te besluit of dit die moeite werd is om regsverrigtinge in te stel of te verdedig. Daar word derhalwe aanbeveel dat die algemene reël behou moet word, maar dat die howe se diskresie vernou moet word en dat sekere voorafbepaalde faktore in aanmerking geneem moet word by die toekenning van 'n kostebevel, wat billik is teenoor al die partye.

Die algemene reël behoort ook gewysig te word om voorsiening te maak vir die verdeling van regskoste waar beide partye 'n mate van sukses behaal het tydens die verhoor. Die regsposisie in België, Duitsland, Nederland en Engeland en Wallis word krities bespreek en daar word aanbeveel dat sekere bepalings van hierdie buitelandse regstelsels met vrug in Suid-Afrika geïmplementeer kan word.

1. Introduction

Section 34 of the Constitution of the Republic of South Africa, 1996, states: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." In practice, however, there are several barriers that seriously impede this ideal of access to civil justice for all. One of these barriers is the excessive legal costs of civil litigation, which renders access to justice for the overwhelming majority of the South African population virtually impossible. This is precisely the reason why section 3 of the Legal Practice Act [1] states one of its objectives as the broadening of access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry.

It is not only the exorbitant costs of litigation that hampers access to justice but also the trite principles relating to the allocation of the payment of legal costs at the end of civil litigation, commonly referred to in international legal jurisdictions as the shifting of costs. [2]

In broad terms, a distinction can be made between two cost-shifting models worldwide. The first model, referred to as the English model, entails that the cost of litigation is shifted from the successful party to the losing party. The losing party must therefore bear its own litigation costs as well as those of the winning party. [3] The second model is commonly referred to as the American model and entails that each party must bear its own litigation costs, irrespective of the outcome. [4]

Recently there has been an international trend where the general cost-shifting rule has been modified to a certain extent. In *Evans Deakin (Pty) Ltd v Sebel Furniture (Ltd)*, [5] for example, the federal court of Australia held that:

> "However, in large scale commercial litigation, if parties see fit, in their own interests, to struggle exhaustively on every point, raising perhaps arguable but weak matters upon which they ultimately fail, it should be recognised that, where appropriate, there may be a price to be paid for the conduct of litigation in that fashion. In these circumstances commercial parties, whether applicant or respondent, should not expect, I think, that courts will simply make the loser pay all." [6]

When a court considers the granting of a cost order at the end of court proceedings in the South African legal system, there are two fundamental rules that govern this process. The first rule, which is sometimes also referred to as the basic rule, states that an award of costs is in the discretion of the court. The second rule, which is also referred to as the general rule, is that costs follow the result, in other words, that the successful party is awarded his or her costs (the English model). [7] This general rule can be departed from only where there are good grounds to do so or special circumstances that allow for a different cost order. [8]

This overly wide discretion, however, gives rise to certain problematic aspects in instances where both parties achieve a measure of success during the course of the litigation. These categories consist *inter alia* of instances where a plaintiff's delictual claim is apportioned in terms of the Apportionment of Damages Act, [9] instances where a plaintiff is successful on certain issues and the defendant on certain other issues and where a plaintiff is able to recover only a percentage of its claim.

This article will critically examine the general rule that costs should in the ordinary course follow the result in the absence of special circumstances. It will be argued that, although the allocation of costs is in the sole discretion of the presiding officer, the rule that costs follow the result is in most instances slavishly applied even in cases where there is a genuine dispute between the parties "which is a proper one for arbitrament by a court of law". It will be shown that there are several different approaches followed by our courts in awarding cost orders resulting in legal uncertainty and that this makes it very difficult for a party to decide if it is worth the risk to institute or defend civil proceedings. It will be recommended that the general rule that costs follow the event should be retained, but that the judicial discretion relating to the award of costs should be narrowed down and that the court should take into account certain predetermined factors when it makes a cost order that is fair to all the parties involved in the litigation. The general rule should also be amended to make allowance for the apportionment of costs where both parties achieved some measure of success at the trial of a matter. The position in Belgium, Germany and the Netherlands, as well as England and Wales, will be critically discussed and it will be submitted that some provisions of these foreign jurisdictions relating to the apportionment of costs should be incorporated by the legislature in the South African law.

2. South Africa

2.1 Introduction

Civil litigation in general can be a very expensive exercise, especially in the high court where counsel is generally briefed to appear on behalf of a party. In the high court an unsuccessful party may at the end of a trial or application be in the unfortunate position that he or she will not have to pay only his or her attorney and counsel, but also a substantial amount towards the costs of the successful opponent, which will generally also include the fees of the opponent's counsel. This may even be the case where the unsuccessful party had some measure of success at the trial.

In *Camps Bay Ratepayers and Residents Association v Harrison* [10] the constitutional court expressed concern about the exorbitant cost of civil litigation. The court held that:

> "We feel obliged to express our disquiet at how counsel's fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal." [11]

2.2 The basic rule

The basic rule of costs was summarised in *Kruger Bros & Wasserman v Ruskin* [12] by Innes CJ as follows: "the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission." [13]

The rule is, however, subject to express enactments to the contrary such as section 48(d) of the Magistrates' Courts Act [14] which provides that a magistrate's court judgment for costs must be "just" and section 87(e) which provides that a high court, in an appeal from an order of costs made by a magistrate's court, may make an order of costs "as justice may require".

2.3 The general rule

The general rule of costs entails that costs follow the event and that the successful party should therefore be awarded his or her costs. Success is interpreted by the courts to mean *substantial* success. In *Fleming v Johnson and Richardson* [15] the court explained this notion in the following way: "It is a sound rule that where a plaintiff is compelled to come to Court, and recovers a substantial sum which he would not have recovered had he not come to Court, then he should be awarded his costs." [16]

In this regard it is not only the form of the judgment that must be considered, but its substance as well. [17] There can only be a departure from this general rule where there are good grounds for doing so. Good grounds can include, but are not limited to, the following:

(a) A court may deprive a plaintiff of his costs where the claim is exorbitant or if there is a gross disproportion between the claim and the award made by the court. [18] The normal attitude of the courts is, however, not to deprive a plaintiff of his costs due to the mere fact that a claim exceeds the award by the court, although it may be a factor that the court can consider in its discretion in awarding costs. [19]

(b) Where a court awards nominal damages to a plaintiff, it will not generally carry costs, [20] but there have been exceptions to this principle. [21] The situation is different where the plaintiff proved a substantial right with an award of nominal damages, in that the court will usually award costs in such an instance. [22]

(c) A party may be ordered to bear the costs for a failure to limit or curtail proceedings and costs. [23]

(d) A party who proceeded by way of motion proceedings instead of action proceedings will generally have to pay for the wasted costs occasioned thereby. [24]

(e) Where a party fails to except to a defective summons or plea, it will normally render such a party liable for any additional costs caused by this failure. [25]

(f) Misconduct by a party which may include, but is not limited to, the giving of false evidence, [26] dishonesty in pleading, [27] an attempt to bribe the legal representative of the opposing party, [28] attempting to mislead the court, [29] dishonesty pertaining to the terms of a contract [30] and recklessly charging fraud. [31]

(g) A vexatious litigant may be deprived of his costs even if successful. [32]

(h) A party that commences proceedings unnecessarily may be deprived of costs despite being successful. [33]

(i) Where a successful party litigates in a negligent way, such as non-compliance with the rules relating to pre-trial conferences, he may be partially deprived of his costs. [34]

(j) Ethical considerations may be taken into account to deprive a successful party of his costs. [35]

(k) Irresponsible conduct such as an attorney's disregard for the rules of court may also give rise to a successful litigant being deprived of the whole or part of his costs. [36]

(l) Where a party achieves a success of only a technical nature he may be deprived of his costs. [37]

2.4 The relationship between the basic and general rule

The basic rule of costs overrides the so-called general rule that costs should follow the event. The relationship between the two rules was aptly explained in *Graphic Laminates CC v Albar Distributors CC*: [38]

> "It is trite that liability for costs in civil proceedings is a separate issue that is governed by its own criteria. The fundamental principle is that liability for costs is in the discretion of the court that is called upon to adjudicate the merits of the issues between the parties (see *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69) on the basis of the facts and circumstances of each individual case (see

> *Cronje v Pelser* 1967 (2) SA 589 (A) at 593). *In the absence of express statutory provisions to the contrary, the general rule that costs follow the result is subservient to that fundamental principle* (see *eg Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 2003 (1) SA 204 (T) at 215E-F)." [39]

In *Ferreira v Levin* [40] the constitutional court confirmed this position by stating that, first, "the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer" and, second, "the successful party should, as a general rule have his or her costs". [41]

Although the general rule is subservient to the basic rule, the South African courts have in many instances followed the general rule slavishly without properly exercising their judicial discretion in the awarding of costs.

Cilliers argues convincingly that the basic and general rules co-exist in a curious relationship in that a judicial officer has the discretion to make a cost award whilst also prescribing how this discretion should be exercised. [42]

2.5 The court's discretion

The discretion of the court in the awarding of costs must be exercised judicially, which entails that it should not be exercised in an arbitrary way and should be fair to both parties. [43] This wide and undefined discretion, however, gave rise to several conflicting decisions over the years as to the exact scope of the court's discretion.

In some decisions it has been held that the discretion of the courts is "very wide", [44] "overriding" [45] and even "unfettered". [46]

On the other hand, there are decisions that stated that although the court's discretion is wide it is not unfettered. [47] In *Economic Freedom Fighters v Speaker of the National Assembly* [48] this discretion was, for instance, described as follows:

> "In the final analysis this court is clothed with a discretion to be exercised judiciously and reasonably when it considers the question of costs. There is a host of considerations that the court must take into account in the exercise of its discretion in this regard. It is unnecessary to set out such considerations because any conceivable listed factors can never purport to be exhaustive." [49]

There is also a third line of authority where it was held that the general principle that costs follow the event may be departed from only where there are "good grounds" upon which "a reasonable man could have come to the conclusion arrived at". [50] Some courts even went so far as to state that a presiding officer is allowed to depart from the general rule only in the presence of "special circumstances" and that

the court has no discretion at all in the absence of these circumstances. [51] These "special circumstances" have, however, never been specified in broad terms by our courts but were described in *Fripp v Gibbon* [52] by De Villiers JP as follows:

> "[I]n my view it is undesirable to lay down any hard and fast rules for the guidance of magistrates to which they will be expected to conform in the absence of exceptional circumstances. Where the law has given a magistrate absolute discretion, free and unfettered by any rules, it is not for the Court to lay down rules which, while purporting to guide him, will only have the effect of fettering his discretion." [53]

As a result of this wide discretion of a presiding officer in a court of first instance, a court of appeal has only a very narrow discretion to overturn an award of costs. A court of appeal will overturn the decision of the court a quo in relation to costs only if it can be shown that the court did not exercise its discretion judicially, for instance that the court "exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons". [54]

In light of this it is not surprising that many courts merely pay lip-service to the basic rule and that the general rule has thus been elevated as the main consideration in the awarding of costs. It is contended that this position can be rectified only if there is intervention by the legislature where the scope of the court's discretion in this regard is more clearly defined.

2.6 South African Law Reform Commission

In 2019 the South African Law Reform Commission undertook an in-depth investigation into the issue of legal fees and its symbiotic relationship with access to justice. After considering various submissions the commission published Paper 150 with certain preliminary recommendations. [55]

The commission stated that the fear of a litigant of having to pay the opponent's costs as well as one's own in an unsuccessful claim may serve as a deterrent, and thus a potential barrier to access to justice in civil matters. Courts should therefore be mindful of the consequences of such cost orders when ordering the losing party to pay the successful party's costs. [56] Some of the stakeholders who made submissions to the commission were of the opinion that the cost-shifting rule is necessary to ensure that no frivolous litigation takes place and to ensure that litigants litigate in a responsible way. On the other hand, an adverse cost order may have disastrous consequences for a litigant with limited means. [57] It is contended that the apportionment of costs may go a long way in mitigating the harsh application of the general rule in practice.

2.7 Settlement offers

In terms of rule 34(11) of the Uniform Rules of Court a conditional or without-prejudice settlement offer may be brought to the notice of the court after judgment on the merits as being relevant to the question of costs. In *Van Rensburg v AA Mutual Insurance Co Ltd* [58] the court held that in the normal course, where a defendant has paid into court more than the amount which the plaintiff is ultimately awarded, a defendant is entitled to be awarded the costs incurred after the date of the payment. The reason for this principle is to deter plaintiffs from pursuing unnecessary litigation. The court, however, also stated that this principle can be departed from where there are special circumstances which justify that the court exercises its discretion in favour of the plaintiff. [59] The court in this case in any event rejected the plaintiff's settlement offer as it did not comply with the requirements of rule 34. [60]

In *Naylor v Jansen* [61] the supreme court of appeal categorically rejected the decision in the *Van Rensburg* case to the effect that there is a "rule" that a plaintiff has to pay a defendant's costs from the date of the settlement offer, from which departure is justified only in the case of "special circumstances". The court went on to state that:

> "All it means is that the exercise of the Court's discretion as to costs in this way would usually be proper and unimpeachable, and failure to do so would, if unjustifiable, amount to a misdirection. But it needs to be emphasised, as the proviso to Rule 34(12) makes clear, that the Rule does not dictate this result, even provisionally. Where the law has given a Judge an unfettered discretion, it is not for this Court to lay down rules which, while purporting to guide the Judge, will have the effect only of fettering the discretion. If, therefore, there are factors which the trial Court, in the exercise of its discretion, can and legitimately does decide to take into account so as to reach a different result, a Court on appeal is not entitled to interfere – even although it may or even probably would have given a different order." [62]

Defendants who admit part of a plaintiff's claim can therefore protect themselves to a certain extent against adverse cost orders by making a conditional settlement offer in terms of rule 34 as soon as possible from the date of the commencement of the action. This position is, however, qualified by the following: [63]

(a) The settlement offer must comply strictly with the requirements of rule 34. No other settlement offer will be considered in the awarding of costs.

(b) The court still has an unfettered discretion to ignore the settlement offer.

(c) There is no rule that a court can only deviate from the principle that a plaintiff should pay the costs of the defendant from date of the settlement offer if special circumstances are present.

2.8 Apportionment of costs

In *Dumbe Transport CC v Alex Carriers* [64] the court identified three different approaches in the awarding of legal costs where there is an apportionment of damages arising from negligence on the part of both the plaintiff and the defendant,

and where there is a counterclaim by the defendant. Firstly, costs are awarded in full to the party who was substantially successful due to the fact that a balance arises from the determination of the success of the claim and counterclaim in that party's favour. [65] The decision in *Bhyat's Store v Van Rooyen* [66] serves as a good example of this approach. The court, following the decision in *Fripp v Gibbon & Co*, [67] held that if the costs in a matter where both parties achieved a certain measure of success were apportioned, it would import into matters of joint negligence a moral consideration, which is totally inappropriate to the apportionment of costs. [68] The court therefore came to the conclusion that it was "desirable to award the costs of the whole action to the party in whose favour the final balance between the opposing claims to found to be". [69] Boberg severely criticised this decision on the basis that the final outcome in terms of a monetary balance in favour of one party may well turn on which party suffered the greater loss, which is purely coincidental. [70]

In a second approach, costs of the claim are awarded to the plaintiff and costs of the counterclaim to the defendant. [71]

A third approach is to apportion the costs in accordance with the relative blameworthiness of the parties. [72] In *Stolp v Du Plessis* [73] the court followed this approach and held:

> "The position as emerges from that judgment [in the *Botha's* case] and elsewhere is that there is no rigid rule which can be laid down as to what order as to costs will produce a fair result, but each case must be dealt with on its own facts and an order appropriate to those facts should be

made. It is almost impossible to arrive at a formula which will produce a mathematically accurate apportionment to costs and what the Court should do is to make an order which will produce a result which is substantially fair. In my view a fair order as to costs would be that the plaintiff is to have one-third of [*all*] her costs as against the defendant and the defendant to have two-thirds of [*all*] his costs as against the plaintiff." [74]

The second and third approaches have been criticised on the basis that they will result in the need to prepare two bills of costs and engage in the taxation of both. [75] As a result our courts have in general been reluctant to apportion the costs of the parties in matters falling within the ambit of the Apportionment of Damages Act or where the defendant achieved some measure of success.

Bamford points out that the courts mostly tend to be in favour of the first approach, namely to award the full costs of a matter to the party who was substantially successful. [76]

These different approaches by our courts are problematic for a number of reasons. Firstly, it gives rise to a situation where there is no uniformity in the approach

followed by the courts in matters where a party is only partly successful. As a result, it leads in the second instance to legal uncertainty, [77] which may once again make parties more reluctant to take the risk in approaching a court for legal relief, which in turn negatively impacts access to justice in civil matters. It is submitted that a presiding officer should retain a general discretion in deciding on a fair cost award as well as the general rule that costs should follow the event, but that the presiding officer should be compelled to consider certain predetermined factors when exercising its discretion and in its decision on when to deviate from the general rule that costs should follow the event. Provision should also be made for the apportionment of legal costs in certain instances. In this regard valuable insight may be gained from the approach followed in Belgium, Germany, the Netherlands and England and Wales.

3 Belgium

Article 1021 of the Belgian Judicial Code provides that in every final judgment the court will determine the total litigation costs and the party who has to bear these costs. It is required from parties to provide a clear estimate of their costs in their respective pleadings. [78] The general principle is that the unsuccessful party must reimburse the costs of the litigation of the successful party. [79] In terms of article 1018 these costs include the following:

(a) The court and registration fees.

(b) The price, emoluments and wages for judicial deeds.

(c) The price for the authenticated copy of the judgment.

(d) The expenses related to investigative measures, which includes the expenses of witnesses and experts.

(e) Travelling and accommodation expenses of judges, clerks and the parties if their trip has been imposed by the court as well as the expenses relating to deeds drafted with regard to the legal proceedings.

(f) The expenses related to the judicial proceedings as set out in article 1022.

(g) The fees, emoluments and costs of a mediator in cases of judicial mediation.

These costs are not exhaustive, [80] and a judge has a certain freedom of appreciation towards other costs not included in article 1022. [81] Some of these costs may, for example, include expenses relating to the obtaining of a certificate of the defendant's domicile or a copy of a criminal file needed to sustain a divorce claim. [82]

There are two exceptions to the general principle that the losing party must reimburse the winning party, [83] namely cases relating to social security law [84] or where a party has incurred useless or vexatious costs. [85]

The expenses related to the judicial proceedings as set out in article 1018 refer to the compensation for attorneys' fees and expenses. Before 2007, article 1022 covered only the costs of "material acts" performed by an attorney. The amounts of the recoverable costs in terms of section 1022 were set out in a Royal Decree of 1970, [86] which did not refer to the attorneys' fees. Each party therefore had to pay its own irrecoverable attorneys' fees. The amounts of these costs depended upon the court or tribunal adjudicating on the matter and the value of the claim, but were in general rather limited.

In 2007 article 1018 was drastically amended and it now also covers the partial recoverability of attorneys' fees awarded to the successful party on a fixed or flat-rate lump sum indemnity (*rechtsplegingsvergoeding*). The amount of this compensation depends on the type, importance and monetary value of the claim. These amounts are set out in a Royal Decree of 26 October 2007, which provides for a basic, maximum and minimum amount. [87] As a general principle, the court awards the basic amount to the successful party, but this amount may be increased or reduced on the request of a party as long as the fixed maximum and minimum amounts are not exceeded. In its decision the court will take into account the following criteria:

(a) The financial capacity of the losing party (in order to decrease the amount payable).

(b) The complexity of the litigation.

(c) The contractually agreed compensation for the winning party.

(d) The manifestly unreasonable nature of the litigation. [88]

No party is obliged to pay additional compensation for the attorney's intervention of the opposing party over and above the fixed lump sum allowance awarded by the court. [89]

In terms of article 1017 of the Judicial Code, Belgian courts may also apportion the costs between the parties where the claim is only partially granted, or when the parties are spouses, legal cohabiting partners, family members in the ascending line, brothers or sisters or family members in the same degree. In the latter case, the court has a discretion in this regard and in practice this often implies that the court will order each party to bear its own costs and expenses. [90]

4. Germany

In Germany every final judgment must contain a decision on the costs of the proceedings. In principle, the losing party is responsible for the payment of all costs, to the extent that these costs were required in order to bring or defend an appropriate action, in civil and commercial matters, except in exceptional circumstances. [91] These costs include:

(a) Court fees.

(b) Costs for witnesses and experts.

(c) The opponent's necessary expenses, which includes attorney fees. [92]

Proceedings before the civil courts in Germany involve the payment of court fees. The Court Fees Act [93] (*Gerichtskostengesetz*) determines the amount payable and is progressive in nature, depending on the value of the claim, which is not uniformly proportional and is referred to in Germany as a reclining scale (*regressiv*). [94] These costs also cover expenses incurred by the court. These costs must be borne by the party who initiated proceedings in that court, but it is entitled to recover these court fees from the losing party against whom a cost order was made. [95]

The losing party's attorneys' fees are limited to statutorily fixed amounts as determined in the Attorneys Remuneration Act [96] (*Rechtsanwaltvergütungsgesetz*) and depend on the amount in dispute (*Streitwert*). These fees are also on a progressive scale depending on the amount in dispute and the extent of the attorney's effort. [97] Attorneys are allowed to negotiate higher fees with their clients, but these additional fees will not be borne by the unsuccessful party. [98]

It is interesting to note that German law provides for two major incentives to encourage settlements in civil disputes. First, any renouncing of litigation, including settlements, are subject to considerably lower court fees [99] and, secondly, attorneys receive an additional settlement fee. [100]

Paragraph 92 of the German Code of Civil Procedure provides for the proportional apportionment of costs where a plaintiff achieves only partial success. This section provides that where each party has prevailed for a part of its claim but has been unsuccessful in enforcing another part of its claim in the dispute, the costs must be cancelled against each other, or they should be shared proportionally. If the costs are cancelled against each other, each party is responsible for the payment of half of the costs. [101]

Hess and Huebner are of the opinion that the principles relating to the awarding of legal costs in Germany are designed to provide equal access to justice of a high

standard at reasonable costs. On the one hand, the "loser pays" rule encourages potential claimants to pursue valid claims and, on the other hand, it discourages the pursuit of unmeritorious claims. Due to the high level of regulation of the German legal costs system, civil litigation costs are highly predictable, which is perceived as a strong advantage of the German legal system. [102]

5. The Netherlands

In the Netherlands, the losing party will be ordered to pay the costs of the prevailing party. [103] This principle is considered to be justified on the grounds of procedural risk and policy. [104] These costs include the following:

(a) The court registry fee.

(b) The costs of the service of the writ.

(c) Costs of attachments.

(d) Costs relating to the compensation of witnesses and experts.

(e) Attorneys' fees. [105]

(f) If relevant, extrajudicial collection costs (*buitengerechtelijke incasskosten*). [106]

As a general principle, the attorneys' fees awarded to the prevailing party are not the actual fees incurred but calculated on the basis of a court-approved scale of costs (*liquidatietarief*). These costs are contained in non-binding but generally applied court guidelines and award a fixed amount per written statement or court appearance depending on the amount of the claim involved. [107] The rationale for this is to discourage a party from incurring excessive costs. [108]

According to Van Hooijdonk and Eijsvoogel this scale results in an award that covers only a small portion of the attorneys' costs actually incurred by the successful party. [109] The prevailing party has no legal right to recover the balance of the actual attorneys' fees [110] incurred from the losing party, even if it was clear from the beginning that this party would be unsuccessful in defending the claim. [111]

Article 237 also provides for the apportionment of costs in instances where the parties are married to each other or each other's registered partners or otherwise live together, if they are family in the direct vertical relation, or each other's siblings or the partner thereof. Similarly, a court may award costs in full or partially if the parties have both won and lost aspects of the case. [112]

6. England and Wales

England and Wales adhere to the main rule that a victorious party should generally recover costs from the losing party on the "standard basis". This English rule that costs should follow the event is derived from public policy considerations of deterring spurious or bad claims and defences as well as the notion of basic fairness by indemnifying the victorious party at the end of the litigation. [113]

The Civil Procedure Rules in England and Wales were made on 10 December 1998 and came into force on 26 April 1999. The purpose of these rules was to consolidate the existing rules of civil procedure in England and Wales and to give effect to the recommendations by Lord Woolf as set out in his Access to Justice Report of 1996.

In *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [114] Lord Woolf MR stated that a too robust application of the rule that costs should follow the event encourages the litigants to increase the costs of litigation as they will leave no stone unturned in an effort to win when they know that they will recover all their costs if successful. [115]

Similarly, in his report on legal costs Jackson LJ stated that the rule that costs should follow the event may create perverse incentives. Firstly, the consequence of the costs shifting rule is sometimes that while each party is running up costs, it does not know who will be paying the bill. In some instances a litigant may believe that the more he or she spends in costs, the less likely he or she is to foot the ultimate bill because the costs liability will be shifted. If both parties take this view, then costs escalate upwards without any proper control and ultimately result in one or other party picking up an enormous and disproportionate bill. [116] Secondly, both parties sometimes know that the defendant will be paying costs, for example where there is no defence on liability (or liability has been admitted) and no part 36 offer has been made. In such a situation the claimant has no incentive to control costs. The only restraint upon the claimant's lawyers will be their perception of what may be disallowed on assessment. [117]

Jackson also pointed out that academic research confirms that the rule that costs should follow the event tends to drive up the costs of litigation, but that the policy that underlies the rule justifies the general retention thereof, subject to modification of the operation of the rule in certain instances.

In 2013 the Civil Procedure Rules were extensively amended to incorporate the legal cost reforms by Jackson LJ. Rule 44 of the Civil Procedure Rules deals specifically with legal costs and the entitlement thereto. Rule 44.2 states that if the

court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order.

In deciding what order to make about costs, the court must have regard to all the circumstances of the matter, including:

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with part 36).

The conduct of the parties includes:

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

The orders which the court may make under this rule, inter alia, include an order that a party must pay:

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only; and

(d) costs relating only to a distinct part of the proceedings.

Rule 44.2 (7) states that where the court would otherwise consider making an order under paragraph (d), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

In *Fox v Foundation Piling* [118] the court held that there are good reasons to respect the general rule that costs follow the event. This will discourage parties from wasting time and resources with granular analysis of issues relating to costs. The court held that one should guard against a culture of satellite litigation which may generate substantial additional cost to the parties. This approach will also lead to uncertainty to other litigants. [119]

In *Burchell v Bullard* [120] the supreme court of judicature, in an appeal from the Bournemouth county court, held that the court *a quo* erred in its cost award as the court fettered its discretion and did not consider the alternatives available to an order that costs should follow the event. Ward LJ held:

> "The most obvious and frequently most desirable option is that signposted in Civil Procedure Rules 44.3 paragraph (6)(a), namely to order a proportion of the party's costs to be paid. The recorder had directed his mind to paragraph 6(f), namely ordering costs relating only to a distinct part of the proceedings but he seems to have overlooked paragraph (7) which required him, where he would otherwise have considered confining costs to part of the proceedings only, to make instead, where practicable, an order under (6)(a) for a proportion of the costs. Ordering a proportion of costs obviates

> all the difficulties he acknowledged in an assessment of how much is properly to be allocated to each and every issue considered in isolation. Better by far to decide, despite the difficulty and imprecision of the calculation, that the relevant issue or issues should bear a percentage of the costs taken overall. As the recorder erred in principle, the appeal on this aspect must be allowed." [121]

Similarly, in *AB v CD* [122] the conduct of the claimant's litigation conduct had "fallen short of what might be expected of him in terms of his conduct in relation to the litigation" and the court therefore held that it justified a reduction of 50 per cent of his legal costs.

In *Welsh v Walsall Healthcare NHS Trust (Costs)* [123] the court adopted the following approach in the apportionment of costs:

> "The starting point that the unsuccessful party pays the successful party's costs remains strong. However, the circumstances I have identified lead me to a limited departure from the general rule. Having weighed all the circumstances, I have decided that the appropriate order is that the Defendant should pay 85% of the Claimant's costs, to be agreed or assessed. In arriving at that percentage, I have looked at the approved costs budget for each party. I have considered how the costs break down and thought about the parties' conduct as it relates to the various costs stages. I have acknowledged that the Claimant may initially have been acting reasonably in exploring the consent issue and that there is scope for disagreement as to which costs might be properly allocated to the consent issue. I do not pretend to have conducted any precise mathematical analysis. Rather, I have reached a judgment as to how best to do justice between the parties considering all the circumstances I have identified. The result is that the Claimant will be responsible for a meaningful proportion of her own costs to reflect the wasted expenditure on both sides in relation to the consent issue. However, in line with the general principle that the unsuccessful party pays the costs, the Defendant will be paying the bulk of the Claimant's costs and all its own costs. I suspect that the Defendant will consider that I have not moved far enough from the general rule and that the Claimant will maintain that I should not have moved at all. However, standing back and taking a broad view in the particular circumstances of this case, I consider that it is fair that the Claimant should recover most, but not all, of her costs." [124]

In *Morrow v Shrewsbury Rugby Union Football Club Ltd* [125] the issue of an engrained exaggeration of the claimant's claim amount arose. The claimant was struck on the head and injured by a rugby post while watching a game of rugby on the defendant's pitch. The liability of the defendant was not in dispute, but the quantum and causation remained contested. The claimant had been employed as an independent financial adviser before the accident and he alleged that as a result of the accident he was, on psychological and/or psychiatric grounds, unfit to work as a financial adviser. He alleged that he would now only be capable of a minimum wage role until he retired at the age of sixty-five and that if he had continued with his employment as an independent financial adviser he would have been promoted and his overall earnings would have followed an upward trajectory. The claimant therefore instituted a claim of more than one million pounds including a claim for future loss of earnings of £946,097. The defendant alleged that the accident had not impacted on the claimant's ability to work as an independent financial adviser as the claimant had experienced psychological and psychiatric difficulties before the accident which would have prevented him from continuing to work as an

independent financial adviser irrespective of the accident. [126] On 8 June 2018 the defendant made a part 36 offer in the sum of £110 000 and shortly before the trial on 8 October 2019, the claimant made a part 36 offer to accept £800 000. [127]

In her judgment relating to the costs of the matter only, Farbey J held that the claimant was not dishonest but that he had substantially exaggerated his claim for future loss of earnings. [128] With reference to *Widlake v BAA Ltd*, [129] Farbey J held that the primary protection for defendants against paying the costs relating to exaggerated claims is a part 36 offer which sets out the value of the claim likely to be accepted by the court. [130] As the claimant had beaten the defendant's part 36 offer by a considerable margin, the court could not consider the defendant's offer in this instance. [131]

Farbey J held that the costs had to be decided by way of a two-stage approach. At the first stage of the enquiry it should be ascertained whether there are any reasons to deviate from the general rule that costs should follow the event, and, if indeed so, during the second stage, the extent of the deduction that should be made. [132] Farbey J held that the claimant's exaggeration prolonged the cross-examination of several witnesses and therefore the overall trial. She was therefore of the opinion that a deduction of 15 per cent of the claimant's costs was appropriate to compensate for the additional costs incurred by the claimant's exaggerated claim. Each case, however, will be fact sensitive.

7. Critical analysis

If one analyses the criticism levelled against the rules pertaining to the granting of a cost order, it seems clear that there is no real concern over the basic rule which entails that costs are in the discretion of the court. It is submitted that this rule should be retained in its current form. What is problematic, however, is the second general rule that costs should follow the outcome, and, more specifically, that a successful party should be entitled to a full cost order where he is "substantially" successful.

It is contended that this second rule should be modified in this regard. The question is how this can be achieved in a way which ensures a just and fair result towards both parties. A cost order at the end of civil proceedings should have two clear objectives, namely to discourage unmeritorious claims or defences and to enhance access to justice in meritorious matters. Both of these objectives will have to be incorporated into the South African law.

7.1 Unmeritorious claims or defences

In unmeritorious civil matters the basic and general cost-shifting rules cannot be faulted. It is contended that in making a cost order every court should first have regard to the merits of the claim or defence, depending on who the successful party was. If the court finds that the

claim or defence was indeed unmeritorious, the general rule should be elevated to be the default position. In other words, a successful plaintiff (where there was an unmeritorious defence) or a successful

defendant (where there was an unmeritorious claim) should be awarded its costs unless there are special circumstances present to deviate from this rule. These special circumstances should not be exhaustive, but some of the factors that a court can consider in this regard should be clearly defined. Some of these factors may, for example, include the vexatious or unconscionable conduct of the successful party in instituting or defending the claim.

7.2 Meritorious claims or defences where a party is fully or partially successful

In *Greenspan Bros (Pvt) Ltd v Commissioner of Taxes* [133] Young J criticised the general rule that costs follow the event as follows in these instances:

> "In ordinary litigation the rule is, of course, that in the absence of special circumstances costs follow the event; and judicial discretion is geared to that principle. The justice of the rule is, if I may say so, hardly conspicuous; and the rule is not, I understand, of general application outside the Commonwealth. In arbitration too it is commonly disregarded. If there is a genuine dispute between two parties which is a proper one for arbitrament by a court of law, it is difficult to see why the loser should bear all the costs. It is rare that the fault is all on one side. It is not uncommon for the rule to operate to deny justice to a party who cannot afford to run the risk of having to pay the other side's costs." [134]

Cilliers submits that there is considerable substance in these observations [135] as costs are, in the words of Schreiner JA, "usually regarded as a separate issue to be decided on their own peculiar principles". [136]

It is contended that in these matters, article 1022 of the Belgian Judicial Code and rule 44.2 of the Civil Procedure Rules in force in England and Wales should be adopted in the South African law. The starting position should therefore be that the successful party should be awarded its costs. The court must however have regard to certain predetermined factors such as the financial capacity of the losing party, the complexity of the litigation, the unreasonable nature of the litigation, the conduct of the parties, whether a party has succeeded on only part of its case, and any admissible offer to settle made by a party which is drawn to the court's

attention. [137] When making its award the court should then also, inter alia, consider if the successful party should pay a proportion or a stated amount in respect of another party's costs.

This approach may be especially helpful in matters where a plaintiff's delictual claim is apportioned in terms of the Apportionment of Damages Act, instances where a plaintiff is successful on certain issues and the defendant on certain other issues and where a plaintiff is able to recover only a percentage of its claim. It is contended that the approach followed by the English courts in *Welsh v Walsall Healthcare NHS Trust (Costs)* and *Morrow v Shrewsbury Rugby Union Football Club Ltd (Costs)* and, in a South African context, *Stolp v Du Plessis*, can offer valuable insight into how our courts should approach the awarding of costs in these kinds of matters. The cost award should thus not be based on a formula which will produce a mathematically accurate apportionment of the costs between the parties, but rather an order which will produce a substantially fair result having regard to all the predetermined and other relevant factors, as determined by the specific, peculiar facts of the matter at hand.

In relation to meritorious claims or defences, even if a party is not fully or partially successful, a cost system similar to those in force in Belgium, Germany and the Netherlands, where the costs are statutorily predetermined and linked to the value of the claim amount in dispute, may be incorporated into the South African law. It is contended that especially the Belgian system, where a basic amount is awarded to the successful party, which may be increased or reduced on the request of a party as long as certain fixed maximum and minimum amounts are not exceeded, may be a viable model in the South African context. This will give rise to a higher degree of predictability of the legal costs involved in a civil dispute, which may indirectly enhance access to civil justice.

The next question of course is what the best way would be to implement these recommendations in practice. Due to the fact that the current principles are so entrenched in the South African law, it is difficult to see how the courts would be the architects of any proposed amendment to the general rule that costs should follow the outcome. It is therefore submitted that the only viable option left would be for the legislature to intervene.

8. Conclusion

The general unqualified rule that costs should follow the event can no longer be upheld in a modern society where the outcome of litigation should be fair to both parties. Section 34 of the constitution guarantees the right to a fair trial, which, by implication, also entails that the costs awarded by a court of law should be fair to all parties involved. Civil litigation is in general very expensive and the rule in its current form will only contribute to the, already alarming, lack of access to justice by the general South African public. On the other side of the coin one should be careful not to embrace a too liberal approach when it comes to cost awards. The basic rule (that costs are in the discretion of the court) and the general rule (that costs should follow the event) should be retained in the South African law, but the latter should be modified to make provision for meritorious claims where a party is fully

or partially successful. It is recommended that both the Superior Courts Act 10 of 2013 and the Magistrates' Courts Act should be amended to incorporate a provision similar to article 1022 of the Belgian Judicial Code and rule 44.2 in force in England and Wales. This would hopefully result in cost orders which are transparent, predictable and fair to both parties while simultaneously also enhancing access to justice in civil matters.

PROCEDURAL RULES SAFEGUARD THE RULE OF LAW

"Justice is best served when all parties to the litigation are governed by the same rules and play by them. It is denuded of its value and purpose when others deliberately ignore the rules and frustrate the system. In time, it will collapse and the social order upon which it is predicated will be adversely affected. The court has a duty to protect its own processes against those who seek to abuse it for their own selfish ends" – *Van der Westhuizen NO v The Land and Agricultural Development Bank of South Africa* (3173/2020) 2022 ZALMPPHC 11 (14 February 2022) par 20 per Mangena AJ.

"The purpose of the uniform court rules is to regulate the litigation process, procedures and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves" – Rampai J in *Louw v Grobler* (3074/2016) 2016 ZAFSHC 206 (15 December 2016) par 18.

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1 28 of 2014.

2 Hodges, Vogenauer and Tulibacka *Costs and Funding of Civil Litigation: A Comparative Study* (2009) 19.

3 Pato *Jurisdiction and Cross-Border Collective Redress A European Private International Law Perspective* (2019) 62.

4 Hodges *et al* (n 2) 19.

5 2003 FCA 282.

6 par 13. The court also referred with approval to the statement of Lord Woolf in *R v Secretary of State for Transport; Ex parte Factortame Ltd* 1998 EWCA 2999 that if "the court, without concluding that the party has been improper in any way, comes to the conclusion that the costs have been increased because the approach has not been reasonable, that is certainly a matter which should be reflected in an order for costs."

7 See the discussion below. There are certain exceptions to the "loser pays all" principle in the South African law. In constitutional and public interest litigation, for instance, the normal rule is that each party should pay their own costs even if the plaintiff is unsuccessful. See *eg Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) par 43, where this rule was confirmed by the constitutional court.

8 See the discussion below.

9 34 of 1956.

10 2012 11 BCLR 1143 (CC).

11 par 10. See also *MB v NB* 2010 (3) SA 220 (GSJ), where Brassey AJ stated: "[T]he death of this marriage, or at least the manner in which the last rites have been pronounced over it, represents a tragedy of an especially painful sort" (223G). From the evidence it seemed to emerge that the cumulative costs of the parties had been at least between R500 0000 and R750 000. In this matter the court, in its discretion, held that both parties, as well as their legal representatives were at fault for the excessive costs that were incurred and therefore ordered both parties to pay for their own costs and also capped the respective attorneys' fees to the taxed party and party costs or the agreed costs following the advice received from an independent legal practitioner (241J-242B). Although decisions such as these are commendable, it is unfortunately the exception rather than the norm.

12 1918 AD 63.

13 69.

14 32 of 1944.

15 1903 TS 319.

16 325.

17 *Kruger v Die Sekretaris van Binnelandse Inkomste* 1970 (4) SA 687 (A).

18 *Merrington v Davidson* (1905) 22 SC 148.

19 *Rowles v Isipingo Beach Revision Court* 1966 (3) SA 751 (D) 753.

20 *Mahomed v Kassim* 1973 (2) SA 1 (RA) 13; *Fraser v De Villiers* 1981 (1) SA 378 (D) 382.

21 *Kriel v Conradie* 1916 CPD 687 689, 691; *Van Schalkwyk v Esterhuizen* 1948 (1) SA 665 (C).

22 *Labuschagne v Mulligan* 1903 CTR 940.

23 *Scheepers and Nolte v Pate* 1909 TS 353 356.

24 *First Consolidated Leasing and Finance Corporation Ltd v Marthinus t/a NoordKaap Ingenieurs* 1979 (4) SA 363 (NC).

25 *Porter v Union Government* 1919 TPD 234; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) 676.

26 *Naylor v Wheeler* 1947 (2) SA 681 (D) 685.

27 *SA Tungsten Mines Ltd v Van Zyl* 1928 CPD 122 130.

28 *Rau v Venter's Executors* 1918 AD 482 488.

29 *Van der Merwe v Strydom* 1967 (3) SA 460 (A).

30 *Radnan v Rabinowitz* 1949 (4) SA 497 (C).

31 *Jacobsohn and Woolf v Municipal Council of Johannesburg* 1906 TH 99.

32 *Lyons v Weir* 1916 CPD 226 229.

33 *Jaffer v Parow Village Management Board* 1920 CPD 97.

34 *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 239-240.

35 *Mahomed v Nagdee* 1952 (1) SA 410 (A) 420.

36 *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) 655-656.

37 *The London and South African Exploration Company Limited v Cathapadyachy* (1891) 6 HCG 82; *Rouxville Municipality v Haupt* 1909 ORC 35; *Cape and Transvaal Land and Finance Co Ltd v De Villiers* 1926 CPD 59. See also Cilliers *The Law of Costs* Service Issue 29 (May 2014) par 3.01 – 3.20; Mlambo "The reform of the costs regime in South Africa: part 2" 2012 *Advocate* 26-28; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (2) SA 621 (CC) 624 (in the context of costs awards in constitutional matters).

38 2005 (5) SA 409 (C).

39 412 – emphasis added.

40 (n 37).

41 (n 37) par 3.

42 Cilliers (n 37) par 2.03. Also see Humby "Reflections on the Biowatch dispute – reviewing the fundamental rules on costs in the light of the needs of constitutional and/or public interest litigation" 2009 *PELJ* 95 98.

43 *Ward v Sulzer* 1973 (3) SA 701 (A) 706; *Bruwer v Smit* 1971 (4) SA 164 (C).

44 *K & S Dry Cleaning Equipment (Pty) Ltd v South African Eagle Insurance Co Ltd* 2001 (3) SA 652 (W) 668G.

45 *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) 549A-B.

46 *Trustees Biowatch Trust v Registrar, Genetic Resources* case no A831/2005 (unreported) 6-11-2007 (GNP) par 21.

47 *Moller v Erasmus* 1959 (2) SA 465 (T) 467.

48 2018 2 All SA 116 (WCC).

49 (n 48) par 48.

50 *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR) 227B-D.

51 Cilliers (n 37) par 2.08.

52 1913 AD 354.

53 (n 52) 364.

54 *Naylor v Jansen* 2007 (1) SA 16 (SCA) par 14.

55 The South African Law Reform Commission "Investigation into legal fees including access to justice and other interventions" Discussion Paper 150, Project 142 (2020).

56 (n 55) 56.

57 (n 55) 56-58.

58 1969 (4) SA 360 (E).

59 (n 58) 366-367.

60 (n 58) 368.

61 (n 54).

62 (n 54) 23.

63 as set out in *Van Rensburg v AA Mutual Insurance Co Ltd* (n 58) 368 and *Naylor v Jansen* (n 54) 23.

64 2011 (3) SA 664 (KZP).

65 (n 64) par 7.

66 1961 (4) SA 59 (T).

67 (n 52).

68 (n 66) 67B.

69 (n 66) 69D.

70 Boberg "Costs and the Apportionment of Damages Act" 1962 SALJ 141. Also see *Viriri v Wellesley Estate (Pvt) Ltd* 1982 (4) SA 308 (ZS) 316H.

71 (n 64) par 7.

72 *Invernizzi v Port Elizabeth Municipality* 1954 (2) SA 288 (E) 299; *Graham NO v Trackstar Trading 363 (Pty) Ltd* 2003 1 All SA 181 (SE) 209 210-211 par 98-101.

73 1960 (2) SA 661 (T).

74 (n 73) 663-664.

75 the *Bhyat's Store* case (n 66) 68C-D and 69D-E; *Smith v WH Smith & Sons Ltd* 1952 1 All ER 528 (CA) 530A; the *Viriri* case (n 70) 316H.

76 Bamford "The Conventional Penalties Act 1962" 1972 *SALJ* 229 235.

77 In light of these precedents it will be very difficult, if not impossible, to predict the outcome of a cost order where a party is partially successful and therefore difficult for a legal practitioner to properly advise its client on the cost implications and risks in instituting or defending a civil claim.

78 a 1021 of the Belgian Judicial Code. See also Taelman and Van Severen *Civil Procedure in Belgium* (2021) par 432-436; Voet "Relief in small and simple matters in Belgium" 2015 *Erasmus Law Review* 147 and Sagaert and Samoy *International Academy of International Law 19th World Congress Washington DC Cost and Fee Allocation in Civil Procedure, National Report for Belgium* (2010).

79 a 1017. This is not applicable where the parties have entered into an agreement in relation to the litigation costs.

80 Laenens, Broeckx, Scheers and Thiriar *Handboek Gerechtelijk Recht* (2008) 484.

81 Meersschaut "Draaglast van de gedingkosten" 1986 *Jura Falconis* 277.

82 Sagaert and Samoy (n 78) par 6.

83 a 1017.

84 Costs are always borne by the social security institution even if it is the successful party.

85 These costs must always be borne by the party who has incurred these costs even if such party wins the case.

86 Royal Decree of 30 November 1970 published in the *Belgian Official Gazette* dated 3 Dec 1970.

87 *Belgian Official Gazette* (9 Nov 2007), as amended by a Royal Decree of 29 March 2019, published in the *Belgian Official Gazette* (10 April 2019). The staggered scale relating to the indemnity of procedural costs ranges from €90 (the minimum amount payable for claims with a value of up to €250) to €36 000 (the maximum amount payable for claims where the value exceeds €1 000 000,01). In matters where no monetary value can be assigned, the reference sum of the indemnity payable is €1 200, with the minimum amount being €75 and the maximum amount €10 000.

88 a 1022.

89 a 1022.

90 supreme court 17 March 1966, *Pasicrisie* 1966, I, 920; Taelman and Van Severen (n 78) par 434.

91 par 91 of the German Code of Civil Procedure. These include cases where the plaintiff has filed the action without due warning and the defendant has immediately acknowledged the claim.

92 par 91.

93 of 2004.

94 Foster *German Legal System and Laws* (2010) 126.

95 par 91.

96 of 2004.

97 Robbers *An Introduction to German Law* (2012) 241.

98 Hess and Huebner *International Academy of International Law 19th World Congress Washington DC Cost and Fee Allocation in Civil Procedure, National Report for Germany* (2010) 3.

99 appendix 1 to par 3(2) of the Court Fees Act of 2004.

100 appendix to par 2(2) of the Attorneys Remuneration Act of 2004.

101 A court may, however, award the entire costs of the proceedings to the prevailing party if the amount claimed in excess was relatively small or the amount claimed depended on the judges determining it at their discretion, on the assessment by experts, or on the parties settling their reciprocal claims.

102 Hess and Huebner (n 98) 20.

103 a 237 par 1 of the Code of Civil Procedure.

104 Snijders, Ynzonides and Meijer *Nederlands Burgerlijk Prosesrecht* (2002).

105 a 237.

106 a 6:96 of the Civil Code of the Netherlands and the Decree on the Refund of Extrajudicial Collection Costs (*Besluit Vergoeding voor Buitengerechtelijke Incassokosten) Legal Gazette* (2012) 141. From 1 July 2012 these costs are calculated as a percentage of the claim on the merits with a minimum of €40 and a maximum of €6 675.

107 www.rechtspraak.nl (27-04-2022).

108 This general principle also has the negative aspect that the prevailing party will always incur some costs even if the claim should not have been contested by the opposing party. Loos *International Academy of International Law 19th World Congress Washington DC Cost and Fee Allocation in Civil Procedure National Report for the Netherlands* (2010) 1.

109 Van Hooijdonk and Eijsvoogel *Litigation in the Netherlands Civil Procedure, Arbitration and Administrative Litigation* (2012) 51-52. The authors illustrate this principle with the following example: in a claim of €1 000 000, where two statements are submitted by the parties, followed by closing arguments, the amount awarded for attorneys' costs will amount to only €11 000.

110 For instance where the attorney had to spend an extra amount of time on the case without performing additional procedural acts (Loos (n 108) 1).

111 Van Hooijdonk and Eijsvoogel (n 109) 52. The position is different in intellectual property cases, specifically in patent litigation, where the prevailing party's costs are now fully recovered. See EC Directive of 29 April 2004 on the enforcement of intellectual property rights, no 48/2004, OJ Eur Comm (no L 157) 45 (2004).

112 a 237 par 1.

113 Andrews *On Civil Processes:* I *Court Proceedings* (2019) 526. This basic rule is also contained in the American Law Institute/UNIDROIT Principles which states that "the winning party ordinarily should be awarded all or a substantial portion of its reasonable costs".

114 1999 1 WLR 1507 CA.

115 (n 114) 1522-1523.

116 Jackson *Review of Civil Litigation Costs: Final Report* (2009) 47.

117 Jackson (n 116) 47-48.

118 2011 6 Costs LR 961.

119 (n 118) par 62.

120 2005 EWCA Civ 358.

121 par 30.

122 2016 EWHC 2482.

123 2018 EWHC 2491 (QB).

124 (n 123) par 43-45.

125 2020 EWHC 379 (QB).

126 (n 125) par 1-19.

127 the *Morrow* case (n 125) par 10.

128 (n 125) par 32.

129 2010 3 Costs LR 353 par 42.

130 (n 129) par 15.

131 (n 129) par 29.

132 (n 129) par 29.

133 1960 (1) SA 454 (SR).

134 (n 133) 462. Mlambo (n 37) 30 is also of the opinion that, subject to the exercise of a judicial discretion, the rule that costs should follow the result has reached its sell-by date. In his view the basic rule should be amended to a rule that each party should pay his or her own costs, as this will more likely give rise to the true resolution of disputes. As an example he refers to the indigenous African tradition of a *lekgotla* where the merits of a dispute are fully argued in the presence of the elders and leaders and where much effort is devoted to finding a solution that all parties will accept and implement. A result where one party is declared the "winner" and the other the "loser", who is responsible for the payment of all the costs, would be more likely to give rise to further conflict than to resolve the dispute. Although this argument of Mlambo has considerable merits, it should be pointed out that this solution can be viable only where there is a real *bona fide* dispute between the parties. If the defendant raises a defence which is not *bona fide*, it will hardly be fair to except the plaintiff to pay for his or her own costs in recovering the relevant claim amount. The proposal also does not cater for the situation where a plaintiff or applicant is substantially successful in his or her claim. Once again it is difficult to see why such a party should be penalised by an order that he or she is responsible for payment of his or her own costs. A court should furthermore still retain a general discretion to deprive a party of his costs where it is in the interests of justice to do so. It is therefore submitted that the proposal by Mlambo swings the pendulum too far in relation to cost orders pertaining to general civil litigation. The proposed solution may perhaps be more fruitful in family law disputes such as opposed divorces where there is a real dispute between the spouses.

135 Cilliers (n 37) par 2.10.

136 *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A) 872.

137 It is contended that a court should be able to take cognisance of any settlement offer made even if the offer does not comply with the requirements of rule 34 of the Uniform Rules of Court or if the judgment awarded by the court is higher than the offer made.