

Recovering legal costs from defaulting tenant/owner

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There is more than one interpretation of the law that governs the ability of any litigant, particularly a landlord or body corporate, to recover a contribution towards legal costs from an opponent in litigation. This article reviews the law and interpretation.



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Cost scales

There are three 'scales' that a successful litigant could be awarded costs in respect of.

1. The 'party and party scale' is the default scale, which applies if the court grants a litigant costs but does not make any other special ruling. There is a tariff prescribed in the applicable rules for the court in which you are litigating, which sets out what costs can be recovered when costs are awarded on the party and party scale, and the amount ultimately recovered will normally be considerably less than the bill that the attorney presents his client with.
2. The second scale is the 'attorney and client scale'. This is a higher scale than the party and party scale and is normally only awarded by a court as a punitive measure when the conduct of the unsuccessful litigant has been unbecoming during the court proceedings. There is no tariff published for this scale to guide a taxing master as to how much should be awarded per attendance or how far he should deviate from the applicable party and party tariff. The taxing master will commonly award more attendances and/or allow a higher claim in respect of each attendance, than he would on the party and party tariff (applying his discretion in the matter). The idea behind the attorney and client tariff is to penalise a litigant acting inappropriately during the proceedings with a legal bill not only for his own attorneys, but for the attorneys on the other side, that will cover not only their opponent's legal costs on the party and party scale, but on a higher punitive scale.
3. The third scale is the 'attorney and own client scale' but case laws tells us that this is not a real scale, as there is no such thing and any reference to 'the attorney and client scale' will be understood as a reference to the 'attorney and

client scale'. The judge added, however, that there can be substantial and compelling circumstances that would justify a substantial deviation by the taxing master from the prescribed tariffs when considering a bill.

Freedom of contract

The Constitution and common law endorse and protect the legal principle of 'freedom of contract', which prescribes that parties to a contract can agree on anything in a contract to the extent that it is legal. Our law recognises the legality of contracting to contribute towards your opponent's litigation costs in the event that the institution of legal action is necessary. However, other laws can limit all rights and principles in law. The sections that follow describe limitations prescribed by certain laws on the ability of a litigant to recover a contribution towards legal costs.

Consumer Protection Act

The Consumer Protection Act 68 of 2008 (CPA) limits the legal entitlement of a party to claim a contribution towards legal costs on the (higher) punitive scale in certain circumstances. The CPA provides that this entitlement is only open to a supplier (that has entered into a contract governed by the CPA) where the same right (ie to a contribution towards legal costs on the punitive scale) is given to the consumer in that same contract. The CPA expressly includes landlords providing residential accommodation within its ambit, but generally excludes landlords providing commercial accommodation (because normally juristic persons rent commercial accommodation and the CPA excludes consumers that are juristic persons with an annual turnover of more than R2 million from its protection).

The CPA further excludes bodies corporate (as far as they interact with its members) from its ambit, but would generally include managing agents providing services to a body corporate for a fee (unless the body corporate is excluded from the protection of the CPA by virtue of its annual turnover exceeding R2 million).

Discretion of the Court/taxing master

Various court judgments handed down over the years have created a set of rules that apply to a situation where a landlord / body corporate / or any other litigant is attempting to recover a contribution towards legal fees. Certain of these rules are described by Albert Reinecke in an [article published in the De Rebus](#) in December 2014 and are repeated below. The balance of the points below are 'rules of practice':

1. No matter what it says in an agreement entered into between the parties in question, a court always has the discretion to award costs (or not to award costs) to a successful litigant, on any scale that the court deems appropriate.
2. Once the court has set the scale on which costs are to be recovered, the taxing master cannot derogate from the scale.
3. Where a contract provides that a successful litigant is entitled to recover legal fees on a punitive scale, and where the court awards costs on a punitive scale, the taxing master still retains the discretion as to how much to award to the successful litigant. If the facts of the case are such that the behavior of the unsuccessful litigant was so abhorrent, or that the work involved in bringing the matter to finalisation was incredibly onerous, the taxing master may very well award taxed costs equal to or very close to the bill presented by the attorney concerned to his or her client in this situation (the successful litigant). However, the taxing master will generally allow costs that are less than the total amount of the bill presented by the attorney to his client (the successful litigant).

The result of the application of the above rules is that any party to litigation would normally expect to receive less as a contribution towards legal costs from an opponent than the charges raised by its attorney. In exceptional circumstances, however, a litigant may recover an amount roughly equal to its attorney's bill. Any shortfall in the recovery is borne by the client and is payable to the attorney, in the ordinary course. An attorney cannot accept (and should not be held liable for) any responsibility for any shortfall in the recovery because of the application of any discretion applied by the court or taxing master.

Passing charges on to defaulting tenants/owners

The above is very important to recognise in the context where a landlord or body corporate intends to hold a defaulting tenant or owner liable for legal charges incurred by it in recovering amounts owed. When all of the above laws are read together, the legal situation is as follows:

1. A landlord, body corporate or any other person is free to enter into any contract that provides that they will be liable for a contribution towards the legal costs of the party with whom they contract on either the party and party scale or on the attorney and client scale. However, this agreement as to legal costs contributions will only be enforced by the courts where the court is of the view that it is appropriate to do so, meaning that this agreement needs to be brought to the attention of the court when applying to the court for legal costs to be awarded on the punitive scale.
2. If the court exercises its discretion and as a result does not award the successful litigant punitive costs then (even though the agreement entered into between the parties may have provided for this) the successful litigant will not be entitled to claim anything more than the taxed costs on the party and party scale.
3. If the court awards a successful litigant attorney and client costs, or even attorney and own client costs, the taxing master still retains the discretion as to how much to award to the successful litigant. Commonly the taxing master will award less than 100% of the amount claimed from the successful litigant by his attorney.
4. It is not open to a landlord, body corporate, managing agent of a body corporate, or any other successful litigant, to claim any amount as a contribution towards legal fees over and above the amount awarded to it by the court and taxing master in terms of the laws and procedures discussed above. This is notwithstanding that there may be an agreement to the contrary entered into between the parties, as any agreement entered into in relation to legal costs contributions is subject to the principles discussed herein relating to the discretion of the court and taxing master.
5. A body corporate or landlord that has not obtained a taxed costs order against a tenant or owner, may not compel such person to pay any amounts for legal fees. This applies even if the reason that the legal fees were incurred, is because the tenant/owner was defaulting and the assistance of an attorney was utilised in order to compel the tenant/owner to pay. This is because the ability to agree to be liable for a costs contribution is limited by the other laws, which prescribe that any contribution towards legal costs must be taxed.

Differing views

There are some attorneys that disagree that the law goes this far. They are of the view that if the matter does not make it to litigation (and therefore there would be a bill to tax in court) the defaulting tenant/owner is still liable to pay the legal fees, that but it is open to the tenant/owner to approach the Law Society to tax or dispute the bill received.

The authors are of the view that although this interpretation of the law would be more commercially sensible for bodies corporates and landlords (and the attorneys that they employ), unfortunately this clashes with the principle that a litigant should only be called upon to pay the taxed legal costs, on the prescribed court tariff and once a taxing master has exercised his discretion in determining the amount to be paid, and thus that this interpretation is not the correct one.

Whether a court will find differently in future, remains to be seen.

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