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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Andrea Bolla
And
Alias Swart

BEFORE: Justice Harvison Young

COUNSEL: *Farah Hudani*, for the Applicant

James Marks, for the Respondent

DATE HEARD: written submissions

COSTS ENDORSEMENT

[1] The applicant, Ms. Bolla, fled Botswana in October, 2016 with the two children of the marriage, having forged a court order and her husband's consent to travel while there were custody proceedings underway there. She commenced a divorce application in Ontario and Mr. Swart brought a motion asking the court to decline to exercise jurisdiction. On March 17, 2017, I released my reasons for decision in this matter: (*Bolla v. Swart* 2017 ONSC 1488), ordering that the children be returned to Botswana.

[2] The parties have been unable to agree on costs. On behalf of the respondent father, Mr. Marks seeks costs in the amount of $177,329.89 inclusive of disbursements and HST on a full indemnity basis. On behalf of the applicant mother, Ms. Hudani asks that no costs be awarded or, in the alternative, payment be deferred until the determination of the custody, access, property and support issues in Botswana.

Legal Framework

[3] Rule 24 of *Family Law Rules*, O. Reg. 114/99 deals with costs. Rule 24(1) states that the successful party is presumed entitled to costs.

[4] Rule 24(11) of *Family Law Rules* states that in setting the amount of costs the court shall consider the following factors:

(11) A person setting the amount of costs shall consider:

(a) the importance, complexity or difficulty of the issues;

(b) the reasonableness or unreasonableness of each party's behaviour in the case;

(c) the lawyer's rates;

(d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;

(e) expenses properly paid or payable; and

(f) any other relevant matter.

[5] Rule 18 deals with offers to settle. In this case both parties served offers to settle. The relevant part of the rule states as follows:

> 18 (14) A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:
>
> 1. If the offer relates to a motion, it is made at least one day before the motion date.
>
> 2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
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> 3. The offer does not expire and is not withdrawn before the hearing starts.
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> 4. The offer is not accepted.
>
> 5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

[6] The burden of proving that the order is as favourable as or more favourable than the offer to settle is on the party who claims the benefit of subrule (14).

[7] When the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply.

[8] In addition to considering the factors set out in Rule 24(11), the court must take into account the principles articulated in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.). The overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful

litigant. In deciding what is fair and reasonable, "the expectation of the parties concerning the quantum of a costs award is a relevant factor." (at para. 38)

[9] Finally, as the court stated in *Serra v. Serra*, 2009 ONCA 395 (CanLII) at para. 8 "[m]odern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* (1999), 1999 CanLII 2052 (ON CA), 46 O.R. (3d) 330, at para. 22."

Analysis

[10] In this matter, the evidence in chief included both affidavit evidence and oral testimony. The hearing took 5 days. The evidence was voluminous. There were 25 affidavits, a number of expert reports prepared although not all the evidence was ultimately admitted. The fact that it was a 5 day trial does not capture, in my view, the amount of time that was required for it to take place in this compressed time frame, both in terms of the time since the application was commenced, and the fact that it was completed within 5 days. Had all the evidence been heard by oral evidence, the trial would have taken much longer.

[11] Mr. Marks' time includes the multiple steps in this proceedings which Ms. Hudani's does not. It required numerous court attendances and/or teleconferences to settle the order. In addition, there was a vast amount of correspondence between the parties which Mr. Marks notes is not reflected in the applicant's bill of costs. I agree with Mr. Marks that Ms. Bolla's insistence that the matter proceed to trial, and her choice to argue that this was a case in which the court should exercise jurisdiction on the basis of Mr. Swart's conduct, resulted in a very time intensive process. That was exacerbated by the fact that many of the witnesses were in South Africa which increased the logistical time complications. This does not in itself constitute "unreasonableness" on Ms. Bolla' part. Neither, however, does it mean that Mr. Swart should bear the cost, given the presumption in the Rules that a successful party is entitled to its costs.

[12] Ms. Hudani submits that the time billed by Mr. Marks is unreasonable. I do not agree. Mr. Marks' time spent was 242.15 hours while Ms. Hudani's was 210. This is not a great difference and is accounted for largely by the fact that Mr. Marks includes costs for the whole proceeding. All witnesses submitted their evidence by affidavit but were available for cross-examination. The parties were permitted an additional 2 hours each of oral evidence at trial. I would not award costs to either party on the motion before Stevenson J. as, in my view, success was divided.

[13] Mr. Swart's breakdown of costs provides a detailed breakdown of the work completed by Mr. Marks and his law clerk at the rate of $375.00 per hour for 2016 and $400 per hour for 2017 for him, and $150 per hour for his law clerk for 2016 and $175 per hour for 2017. Mr. Marks was called to the bar in 1989 and has over seventeen years has litigation counsel. Ms. Hudani billed at the rate of $365 per hour and had some assistance from two junior lawyers at the rates of $300 and $245 respectively. Her bill of costs, filed with her submissions after the court's reasons were released, totals $98,000. As I have noted, this does not reflect much of the time that should be taken into account and which Mr. Marks has properly included in his.

[14] The respondent also served two offers to settle the entire proceeding in advance of trial with no costs payable on the basis that the children be returned to Botswana and that the ongoing litigation in the High Court of Botswana resume. These offers were not in effect at trial. Although Ms. Bolla did file offers before trial, none of these conceded the jurisdictional issues. The last one before the trial (January 23, 2017) would have required him to concede custody of the children and that they would remain in Toronto, which was at the core of the jurisdictional issue. While none of the respondents offers constitute a Rule 18(14), they may still be taken into account.

What is fair and reasonable?

[15] I am satisfied that the respondent is entitled to his reasonable costs. He was clearly successful and attempted to settle the matter. He has satisfied his burden of establishing that he was as successful as the offers, though they were not in force at the time trial and were therefore not Rule 18(4) offers.

[16] Given the divided success on the motion before Stevenson J., I would not award Mr. Marks costs of that motion. I agree with Ms. Hudani that what an unsuccessful party might reasonably anticipate as exposure to costs is a useful gauge. Here, however, Ms. Hudani has not included costs in relation to any of the pre-trial court appearances. These (including the trial management conferences before me) were integral parts of this process. The fact that they are not reflected in the actual "trial time" should not render them any less part of the process. Significant issues were addressed.

[17] Finally, I do not accept the applicant's argument that she cannot afford to pay costs. This was a risk she took on when she chose to oppose Mr. Swart's motion, and given the fact that he resides in South Africa and many of the witnesses were there, the fact that the costs have been considerable and higher than one might normally expect in a family matter in this court should not be surprising.

[18] Taking all of these considerations into account, I find that costs in the amount of $115,000 is fair and reasonable and an order will issue accordingly.

Harvison Young J.

DATE: June 5, 2017