HCJ 891/05 – f
CA 2617/00

Petitioner in HCJ 891/05: Tnuva Co-op for Marketing of Agricultural Produce in Israel Ltd.

Appellant in CA 2617/00: Kinneret Quarries (limited partnership)

v.

Respondents in HCJ 891/05:
1. The Agency Authorized to Grant Importation Licenses – The Ministry of Industry, Trade and Employment
2. The Minister of Industry, Trade and Employment
3. The Minister of Finance
4. The Minister of Agriculture and Rural Development
5. The Israel Dairy Board (formal respondent)

Respondents in CA 2617/00:
1. The Nazareth Illit Local Planning and Building Committee
2. The District Appeals Committee – Northern District

3. The Galilee Society – The Arab National Society for Health Research & Services
4. Israel Lands Administration – Northern District

The Supreme Court

Before Registrar Y. Mersel

Application for costs

For petitioner in HCJ 891/05: Yossi Levi

For appellant in CA 2617/00: Yehuda Tunic

For Respondents in HCJ 891/05: Avi Licht

For Respondents in CA 2617/00 Isaiah Etgar, Itamar Shai

DECISION

1. A party initiates legal proceedings. The proceedings are concluded. The question of costs, including attorneys' fees, arises. It is determined that one party shall be charged with the other party's costs. What rate of costs and attorneys' fees shall be

awarded? Is a party entitled to full reimbursement for all his expenses, and the entire amount of attorneys' fees that he paid his attorney ("real costs")? These are the questions that arise in the proceeding before me.

The Facts and Proceedings
CA 2617/00

2. In this case, appellant submitted a contempt of court application. The basis for the application was appellant's claim that respondents are running a quarry on the "Arab el Hayib" site (hereinafter - "the site"), despite the judgment, which determined that the permit for non-conforming use at this site is to be revoked, and that, in any event, no quarry should be run on it. Respondents filed a response, requesting the rejection of the application. Appellant then submitted an application to abate its application, as, according to its argument, it became aware that the facts basing its application had changed, and that the activity at the site is no longer operation of a quarry, rather construction of a military base. Respondents consented to abatement of the application, but respondents no. 1-3 demanded their costs and even requested exemplary costs. In my decision of February 6 2005 I decided to abate the application regarding contempt of court. I further decided that petitioner was to be charged with the costs of respondents no. 1-3, as what it discovered in retrospect regarding the use of the site, it could have known in advance, and in any event, it did not explain otherwise, and in any case it should be charged with the costs of respondents no. 1-3 for that application. Due to the charge for

costs, the parties were given an opportunity to make their arguments regarding the rate of costs which should be awarded in this case (my decision of February 6 2005). Respondents no. 1-3 accordingly submitted a bill including charges for attorneys' fees totaling 32,250 NIS (plus VAT). They further argued that the circumstances of the case were fitting for an award of "exemplary costs". Appellant, in its response, argued that its conduct does not justify awarding "exemplary costs". Regarding the requested amount of costs, it argued that the document submitted is only a bill, not a receipt or an attorneys' fees agreement, and that the date of the bill is after the date of the abatement application, and even after my decision of February 6 2005, and in any case the amount appearing on it should not be awarded.

HCJ 891/05

3. In this petition, petitioner attacked respondents' decision not to grant it a license to import milk powder from the US in 2005, which was necessary for petitioner's commercial activity. It was argued, *inter alia*, that respondents' decision on the subject was not legal, as it had been determined in previous proceedings (HCJ 8258/03) that petitioner was to be granted sufficient time to initiate legal proceedings if the government should decide upon a policy that would prevent granting a license for importing milk powder, yet such time was not granted, and a new decision on the subject was not made by the government, and in any case – so it was argued – the decision not to grant a license for importing milk powder at that time was not legal, and should be annulled. In a

decision of January 26 2005, respondents' response to the application was requested. In their response, respondents argued that petitioner had been given a hearing, and that in accordance with it, the intention is to recommend to the government that petitioner – as a monopoly in the milk market – not be allowed to import milk powder. However, it was clarified in the response, that due to the date that the decision was made on the subject, the policy that had been employed vis-à-vis petitioner would not be changed, and it could import milk powder in 2005 as it always had. In response to that declaration, petitioner filed an application for abatement of the petition and charging respondents with costs. The petition was abated (February 23 2005). Regarding costs, respondents left the decision of that request to the discretion of the Court. In my decision of March 31 2005, I ordered that the respondents be charged with petitioner's costs, as it had been proven that the change in respondents' policy regarding granting a license to import milk powder had come about as a result of the filing of the petition. Having no details regarding petitioner's costs, I requested the parties' stances regarding the amount of costs. In an affidavit by the deputy director of the financial department of petitioner (of April 18 2005), it was argued that the filing of the petition involved direct costs of 103,739 NIS, including attorneys' fees (97,914 NIS); court fees (825 NIS), and auxiliary costs (5000 NIS). In response, respondents again left the decision regarding the amount of costs to the discretion of the court, while emphasizing that there had been no hearing of the petition on the merits, and that the petition had been satisfied within a short time.

4. Due to the amounts of costs requested in both cases, and the scope of the disputes between the parties, the hearing of the two cases was unified on June 6 2005. In the decision it was noted that "in both proceedings before me, a similar question arises: the question of the costs which should be awarded… the question before me is whether it is legal to award amounts of costs totaling the 'real costs' which were actually spent, or the standard for awarding costs – including attorneys' fees – should be different". The parties supplemented their arguments before me on this matter.

The Arguments of the Parties

5. According to the argument of petitioner in HCJ 891/05, as well as respondents no. 1-3 in CA 2617/00, they should be awarded the amount of costs which were actually spent ("real costs"). The basic principle should be that once it has been determined that a party has won the proceedings and the relief he petitioned to receive, the other party must reimburse him for the expenses he bore in order to attain the relief. According to precedent – so it was claimed – a party who has won a case shall not come out of the litigation against his rival with a loss, and thus there is a duty to reimburse for the entire amount of attorneys' fees that was paid. That is the point of departure. However, the court of course also has discretion and may consider various factors regarding the amount of costs, including the date on which the proceedings came to a close, and the reasonableness of the costs and the attorneys' fees, considering the character of the case.

6. Appellant in CA 2617/00 argued, in its response, that the amount of costs requested is absolutely unreasonable. Costs should be based upon the actual investment of the party. In any case, its own *bona fide* conduct should be considered in deciding upon the amount of costs to be awarded. Respondents in HCJ 891/05 added that attorneys' fees and costs actually spent are a relevant consideration which can be taken into account, but that they are not a central component. The entirety of the circumstances of the case should be considered, including the character of the suit and its level of complexity; the relief requested and the relation between it and the relief that was granted; the extent of work invested by the party in the proceeding, and the attorneys' fees that the party paid or promised to pay. It was further argued that the amount of costs that is actually awarded in this Court in similar cases is approximately 10,000 – 15,000 NIS, and that should be seen as a guiding standard, from which there is no justification to deviate in the circumstances of this case. It was further noted in the response that the State is the trustee of the public, and should not be obligated to pay high costs, especially when it is not customary to charge petitioners who filed baseless petitions with costs. Last, it was argued that it is difficult to appraise the State's costs if it wins a case, and thus real costs should not be awarded, as that will lead to a lack of balance between the State and other parties.

The Disputed Question

7. Indeed, the factual and procedural circumstances in each of the two cases before me are different, but they share one common

legal question, which is: when it has been decided to charge a party with legal costs, including attorneys' fees (hereinafter – "costs"), what is the standard according to which the amount of those costs will be decided? The main dispute centers around the question whether costs should be "real", that is, the costs which were actually paid by the party (or those he promised to pay), or another standard, *e.g.* reasonable costs, or minimal costs.

The Normative Framework

8. In civil proceedings, the awarding of costs – which the registrar of the court, *inter alia*, has jurisdiction to do (section 99 of the Courts Law [consolidated version], 5744-1984) – is arranged in a number of provisions in the Civil Procedure Regulations, 5744-1984 (hereinafter – "the regulations"). These provisions apply, in principle, to proceedings in the High Court of Justice as well (*see* the High Court of Justice Procedure Regulations, 5744-1984, regulation 20(b)). The general provision on the issue is determined in regulation 511(a) of the regulations, according to which "at the end of the hearing of every proceeding, the Court or the registrar shall decide, regarding the case at hand, whether or not to charge a party for the other party's attorneys' fees and legal costs". Pursuant to the regulations, an award of costs can be made in two main ways: one is by an express determination of the amount of costs, and the other is by a determination that the party must pay costs, without determining their amount. Where the amount of costs is expressly determined, regulation 511(b) adds that "if the Court (or registrar) decides to charge a party with costs, the Court (or registrar) may

determine the amount of costs according to its (or his) discretion, subject to regulation 512". Regulation 512, whose title is "Determining the Amount of Costs", determines that:

> "(a) if the Court (or registrar) determined the amount of costs, it (or he) may award it, both regarding attorneys' fees and regarding legal costs, with one total amount for attorneys' fees and one total amount for legal costs, provided that subject to subsection (b), the amount of attorneys' fees shall not be lower than the minimum rate determined for attorneys' fees in the Israel Bar Rules (Minimum Rates), 5737-1977 (hereinafter – the minimum rate), unless the Court orders payment of a lower rate, for special written reasons.
>
> (b) In giving an order for costs and in determining their amount, the Court or registrar shall consider, *inter alia*, the value of the relief disputed between the parties, and the value of the relief granted at the end of the trial, and may also consider the way that the parties conducted the hearing.
>
> (c)….".

9. As mentioned above, the Court can decide to charge a party for costs without determining their amount. Such a situation is dealt with by regulation 513, which states that:

> "If the Court or the registrar awards costs without determining their amount, the amount of costs will be the aggregate of the following, unless the Court or the registrar rules otherwise:
> (1) Court fees, expenses for recording the Court protocol, copying it or photocopying it, expenses for serving Court documents pursuant to regulation 475a, stamp tax, witness pay, doctors' and other experts' fees, lodging and travel expenses for those who are in Israel, and any other expense legally listed in the suit file – as determined by the Chief Clerk of the Court according to the material in the file, with no need to file an application and *ex partes*;
> (2) The rest of the costs of the trial as assessed by the registrar, according to a written or oral application, after the parties have been given a chance to make their arguments, if he is of the opinion that said costs were reasonable and necessary in order to conduct the trial".

10. Thus, the regulations grant discretion to the Court on the question whether to award costs, as well as on the question of the amount of costs to be awarded. However, meticulous reading of the above quoted regulations reveals that, practically, the limits of that discretion are not sufficiently defined. When a court charges costs whilst determining their amount (regulation 512), although the regulation determines a minimum amount, from which it can also deviate (the minimum attorneys' fees set out in the Israel Bar Rules (Minimum Rate), 5737-1977 (hereinafter: the minimum fee; but see the Israel Bar Rules (Recommended Minimum Rate), 5760-

2000)), there is no determination in the language of the regulations of the regular standard according to which it is supposed to award costs. True, regulation 512(b) determines criteria, on the basis of which the Court can be guided in determining the amount of the costs, including the value of the relief and the conduct of the parties. However, other than said instruction, it is not clear what the point of departure is regarding the amount of costs to be awarded. That lack of clarity appears not only in the case that the Court determines the amount of costs expressly. Indeed, regulation 513(1) sets out a list of types of costs whose amounts appear to be the amount the party paid for them, *e.g.* court fees, experts' fees, *et cetera*. However, regarding the other types of costs – including attorneys' fees – the regulations do not determine their amounts; instead, they determine that a party will be charged with them if the Court is "of the opinion that said costs were reasonable and necessary for conducting the trial". However, the language of the regulation does not clarify what that reasonableness is, and in what circumstances it will be decided that a certain expense – including attorneys' fees paid by a party – is necessary for conducting the trial. In order to clarify what needs to be clarified, we must turn to, and examine well, the purposes and the principles at the basis of a decision to charge a party for costs of trial. We now turn to that examination.

Awarding Costs

11. Legal proceedings cost a lot of money. That cost naturally includes the cost of conducting the proceedings for the court

system. True, in most proceedings the party who initiates the suit pays a Court fee. But that fee, paid to the state treasury, is but a participation in the cost of the proceedings for the court system (*see and compare* HCJ 6490/05 *Nader Mohammed Ali Sabih v. The Commander of The Army Forces in the West Bank* (yet unpublished)). It does not represent the actual cost of the proceedings. In that state of affairs, there are countries in which the party who loses the legal proceedings is charged to pay considerable costs to the state, on principle (*compare* regulation 514 of the regulations). Thus it is, for example, in Swiss law (*see* WALTER J. HAPSCHEID, DROIT JUDICIARE PRIVÉ SUISSE (1981) 295) and in German Law (PETER L. MURRAY & ROLF STRUNER, GERMAN CIVIL JUSTICE (2004) 341). However, that is not the question before me, and we shall not examine it further. In the cases before me, the question is of the expenses of the parties, and not of the Court. Indeed, legal proceedings cost the parties a great deal of money, both in litigation expenses themselves and in the attorneys' fees that they have promised to pay and have paid. Who must pay for these costs of the parties?

12. Different legal systems have different solutions to that fundamental question. In most of the systems, the rule is that the party who lost in the legal proceedings is charged with the costs of the party who won. So it is in Israel (*see* YOEL SUSSMAN, SEDER HADIN HA'EZRACHI (7^{th} ed., Shlomo Levin ed. 1995) 540-541), and so it is in English law (NEIL ANDREWS, ENGLISH CIVIL PROCEDURE (2003) 825). Thus is the law in additional countries such as Italy (MAURO CAPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN

ITALY (1965) 247); in Germany (PETER L. MURRAY & ROLF STRUNER, *supra*, at 341); Sweden (RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965) 367-368, *and* Bengt Lindell, "Sweden", in INTERNATIONAL ENCYCLOPEDIA OF LAWS – CIVIL PROCEDURE (1996) 163); in Canada (BRIAN A. CRANE & HENRY S. BROWN, SUPREME COURT OF CANADA PRACTICE (1996), 83); and in Australia (B. C. CRAINS, AUSTRALIAN CIVIL PROCEDURE (3d ed. 1992) 486). However, even though that is the common approach, it is not the only one. In the United States, subject to a number of exceptions, a different system is common, according to which each party pays for his own expenses, whether he won or lost in the legal proceedings (GEOFFREY C. HAZARD & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE (1993) 96) It seems that this is also the fundamental approach of Jewish law (*see* Eliav Shohatmen, *haChiuv baHotsa'ot baPsikat Batei haDin haRabani'im* [*Court Expenses in Rabbinical Court Decisions*], DINEI YISRAEL 10-11 (5741-5743) 263; *see also* Eliezer Shenkolewski, *Hotsa'ot Mishpat*, 12 TECHUMIN (5751) 335. Indeed, every system has its advantages and disadvantages, and there is no arrangement of the subject that escapes criticism (N. Rickman, *The Economics of Cost-Shifting Rules*, in REFORM OF CIVIL PROCEDURE (A. A. S. ZUCKERMAN & ROSS CRANSTON eds. 1995) 327).

The Amount of Costs

13. As mentioned above, the law in Israel has long been that, in general, the loser is the party that bears the winner's legal costs (*see, e.g.* Goldstein *supra*, at p. 496). That is the well known rule of "if you lost – you pay the costs" (*see* CA 26/56 *Ta'am haChayim Ltd. v. Asri*, 11 PD (1) 550, 553). We shall take a close look at that rule – which is uncontroversial in the case before me – and analyze its character. That examination will reveal that in fact, the principle according to which the party who lost the proceedings must pay the winner's costs, in and of itself, is not necessarily a determination regarding the amount of those costs. It is therefore not clear whether the charge is of costs that were actually paid, of reasonable costs, of minimal costs, or maybe punitive costs. The question therefore presents itself again: when a party is charged with the other party's costs, what should the amount of the costs be?

14. One possible way of solving this question is on the basis of characterization of the legal basis of awarding costs, and as a derivative of it, the question of the amount (*compare* AAA 10219/01 *Mis'viv l'Agam Ltd. v. The Municipality of Ramat Gan*, 57 PD (2) 97, 100). Thus, for example, the charge for legal costs can be viewed as a tort obligation (*ex delicto*), or a "quasi-tort" obligation. *Barak, P.* discussed this idea, stating that "the right to costs is granted to the winner by force of tort law. When a person carries out a legal proceeding against another person, and it ultimately turns out that a reasonable person would not have carried out such a proceeding, he commits a tort against him. At times the elements of the tort of oppression will be fulfilled

(section 60 of the Torts Ordinance [new version]); at times the elements of the tort of negligence will be fulfilled (sections 35 & 36 of the Torts Ordinance [new version])" (*see* BAA 663/90 *A. v. The District Committee of the Israel Bar*, 47 PD (3) 397, 403; CA 243/83 *The Municipality of Jerusalem v. Gordon*, 39 PD (1) 113). The awarding of legal costs by courts is understood as a "procedural 'shortcut', intended to make possible efficient realization of the substantive right to compensation" (*see* BAA 663/90 *supra*, at p. 403). If the charge for costs is essentially a tort obligation, its amount should make the entitled party whole (*see* DINEI HANEZIKIN – TORAT HANEZIKIN HAKLALIT (GAD TADESCHI, ed. 1976) 25). The amount of costs that a court should award, then, subject to the duty to mitigate damage, is that of the real costs; in other words, expenses that were actually paid by the winning party. However, this approach is not devoid of problems. The main difficulty in it is the fact that in most cases, it cannot be determined that the proceeding was a baseless proceeding pursued maliciously that constitutes the tort of oppression, or that there was fault in pursuing it, to the point of negligence. The loss of the legal suit does not, in and of itself, mean that the suit was misguided and unjustified from the very beginning (*see* Zvi Zylbertal, *Hotsa'ot leTovat haMedina* [*Costs Awarded to the State*], 15 MISHPATIM (5746), 389, 393). Assigning liability *ex post* whilst assigning blame *ex ante* is problematic (Robert E. Keeton, *Conditional Fault in the Law of Torts,* 72 HARV. L. REV. (1959) 401). In most cases it cannot be determined that by the very litigation of the proceeding the party acted unreasonably or unfairly (Shalev Ginossar, *Abuse of Process*, 17 ISR. L. REV. (1982) 401, 424); Shalev Genosar, *Mitrad*

la'Yariv [*Nuisance between Litigants*], 2 MISHPATIM (1970) 221), and charging him to pay the costs of the other party on that basis raises difficulty (*see* Stephen Goldstein, *The Influence of Constitutional Principles on Civil Procedure in Israel,* 17 ISR. L. REV. (1982) 467, 497). As has been shown, considerable difficulty arises from the attempt to deduce the amount of costs from the tort character of that obligation.

15. The attempt to base awarding of costs on a punitive basis also runs into difficulty. Awarding costs is not punishment of a party who has lost for dragging his adversary to court. The amount of costs awarded in any case is not punitive, and should not be higher than the expenses that were actually paid out. It was for good reason that the Supreme Court accordingly ruled that "awarding of costs is not intended to punish the party who lost his suit" (*see* CA 161/77 *Haifa Assessing Officer v. Paz Oil Company Ltd.*, 31 PD (3) 505, 513) and that the Court has no jurisdiction to award punitive costs (CA(L) 551/83 *Berger v. Ventura*, 36 PD (1) 266, 270-271). Indeed, the obligation to pay costs is a unique obligation. It was rightly said that the jurisdiction to obligate a party to pay costs – an obligation *ex lege* in the regulations – is a "hybrid" obligation (*see* Ginossar *supra,* at p. 425; Zylbertal *supra,* at p. 394). It is not a tort obligation *par excellence*, and it is not a punitive obligation. It is an obligation by force of the law, which leaves discretion to the Court. In any case, the amount to be awarded cannot be deduced from the very fact of the obligation to pay costs.

The Purpose of a Party's Obligation to Pay his Adversary's Legal Costs

16. Indeed, the answer to the question what, in principle, is the amount of costs which the loser of the proceeding must pay, is to be derived from the purpose of the obligation to pay costs. The principled decision regarding the obligation to pay legal costs is based upon a number of trends and basic principles which are to be balanced: one principle is ensuring the right to access to justice. It is no longer controversial that said access is a basic right of the individual (CA 733/95 *Arpal Aluminium Ltd. v. Klil Industries Ltd.*, 51 PD (3) 557; Yoram Rabin, *Zchuyot Chevratiyot me'haSphera haDiunit*, ZCHUYOT KALKALIOT, CHEVRATIOT U'TARBUTIOT BAYISRAEL [ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ISRAEL] (YORAM RABIN & YUVAL SHANY eds. 2004) 765. It also entails the entire public's interest in the rule of law and the enforcement of the law. The question whether a party can afford the price of the proceedings, as well as the question whether he must pay the costs of the adversary party, thus has implications upon the right of access to the courts, and the ability to realize that right. Over-deterrence of parties should be avoided (*compare* ANDREWS *supra*, at p. 827). The second principle is the protection of the individual's property rights. Obliging a party to pay for legal costs, whether his own, if he won the proceeding, or the expenses of the adversary party, if he lost the proceeding, can be considered an impingement upon the property of an individual. Every rule regarding awarding of costs inherently includes objectives regarding protection of property rights. The third principle is equality between the parties. In light

of the considerable cost of legal proceedings, every arrangement of awarding costs has a different affect upon parties with different financial ability. Thus, for example, ordering a party to pay the costs of the other party is more meaningful for someone with little resources than for a person with money. However, a rule according to which each party pays his own costs also acts differently upon parties with different financial ability. The question arises, whether a given costs arrangement impinges upon the right to equality, or realizes it (*see, e.g.,* Chen Barir, *Bituach Hotsa'ot Mishpat* [*Legal Expense Insurance*], 15 MISHPATIM (1985) 105, 131; HAZARD & TARUFFO *supra*, at pp. 209-210). Last, arrangements for awarding legal costs are related to management of the resources of the judicative system, as it can be argued that the policy employed by the courts regarding awarding costs affects the number of proceedings heard in the courts, the essence of those proceedings, or the way they are litigated by the parties. It can prevent baseless suits and cumbersome litigation tactics (*compare* ANDREWS *supra*, at p. 826, and Dirter Leiopold, *Limiting Costs for Better Access to Justice –The German Experience*, REFORM OF CIVIL PROCEDURE (A. A. S. ZUCKERMAN & ROSS CRANSTON eds. 1995) 265).

Full ("Real") Costs or Partial Costs

17. Different balancing points between the various rights and interests I have discussed can lead to different approaches regarding the question what amount of costs should the losing party be obligated to pay. As a matter of principle, it seems that there are two main approaches on the issue: one approach is the "real"

costs approach. According to that approach, a party who litigated a legal proceeding and lost it, must pay the costs that the adversary party actually paid, regardless of their amount. He must pay the costs of litigating the entire proceeding, including the attorneys' fees of the winning party, be their amount as it may. That approach is, *prima facie*, based upon a sentiment of justice, according to which it is unjust if a person who won a legal proceeding loses money (*see* Zylbertal *supra*, at p. 394). That approach involves deterring parties in certain cases from litigating baseless proceedings and from wasting precious judicial time. It assumes a proper constitutional relationship between the property right of the party who won the proceeding (*see further* SHLOMO LEVIN, TORAT HAPROTSEDURA HAEZRACHIT – MEVO V'IKRONOT YESOD [THE THEORY OF CIVIL PROCEDURE – INTRODUCTION AND BASIC PRINCIPLES] (1999) 26-27). Its objective is preventing a situation in which enforcement of a right whilst preserving the rule of law is not worth the cost (*compare* Lindell *supra*, at p. 163). However, this approach has disadvantages of its own. There is concern that awarding full costs will create unjustified inequality toward parties who do not have sufficient financial capability, as well as of over-deterrence of such parties, who will fear being obliged to pay the full costs of their richer adversaries – costs which will, naturally, be even higher than theirs. Furthermore, there is concern that ultimately, awarding "real" costs will unnecessarily make the cost of legal proceedings more expensive, and in the words of *Landau J.*, "this crawling inflation intended, *prima facie*, to benefit the winning party, will ultimately take its revenge against the entire public, by great increase in the expense of proceedings in the courts

(*see* CA 621/68 *Guttman and Sons, Insurance Co. Ltd. v. Hillel*, 23 PD (1) 305, 308). Against this background, great criticism has even been made of the arrangement in English law, in which there is jurisdiction to award actual costs, which are actually indemnity costs, and a custom of doing so (*see* ANDREWS, *supra,* from p. 831). According to the criticism, the cost of legal proceedings, and the legal costs awarded in this way, are too high, and a reform in this field should be advanced, whilst placing a limit upon the amounts of costs awarded (*see* Lord Woolf's report, ACCESS TO JUSTICE – FINAL REPORT (1996) 78; *see also* A. A. S. Zuckerman, *Lord Woolf's Access to Justice: Plus ça change…"*, 59 MODERN L. REV (1996) 773).

18. The other approach regarding the amount of costs is that even though the party who lost the case must pay the costs of the party who won, that does not lead to awarding the full costs that were actually paid, rather, as a matter of principle, a lower amount should be awarded. Lying at the basis of this approach is the idea that over-deterrence of parties should be prevented, while preserving the equality between them (*compare* CA 647/79 *Iwon v. The Assessing Officer*, 35 PD (4) 645). It assigns great weight to the right of access to justice. That approach also prevents unnecessary enrichment of the winning party – or his attorney – on the basis of awarding of excessive costs which are unnecessary (*see* CA 541/63 *Reches v. Hertsberg*, 18 PD (1) 120, 128). It prevents seeing the judicial process as a "gamble". At the same time, this approach also raises significant difficulties, as there is a certain extent of injustice when a party wins the case but does not win all

of his costs. That is an impingement upon his property right. The rule of law, and law enforcement, are liable to suffer damage. Awarding partial costs constitutes an incentive to litigate, and can encourage baseless proceedings, or improper conduct of the litigation. It even involves a dimension of uncertainty, as the party cannot expect the amount of costs he will receive if he wins the case, and thus cannot plan his conduct in a sufficiently informed fashion.

The Proper Amount of Legal Costs

19. What, therefore, is the proper approach on this issue? My answer to the question is: in principle, and as a point of departure, real costs are to be awarded to the party who won the case; in other words, the expenses that he actually paid or obligated himself to pay. However, that is but a point of departure. It is not the endpoint, as the Court must examine the amount of costs alleged, and verify that they are reasonable, proportionate and necessary costs for litigating the case, considering the entirety of the circumstances of the case. The attorneys' fees and costs which were actually paid are thus relevant data in the framework of awarding costs, however, they are not exclusive data (*compare* CA 9535/04 *The "Bialik 10" Faction v. The "Yesh Atid LaBialik" Faction* (yet unpublished). Costs are not a prize or bonus for the winning side, rather, a reimbursement of necessary and appropriate costs of the proceeding (*compare* CRAINS *supra,* at p. 488). Thus, not necessarily every expense actually paid must be reimbursed, if it was not necessary for conducting the litigation and it is based

completely upon the party's overcautious conduct (*compare* Rechberger *supra*, at p. 71). The costs must be proportionate to the proceeding itself and its essence, as that prevents putting excessive cost upon the loser, and encourages appropriate conducting of litigation on the part of winners (*compare* Lownds v. Home Office, [2002] 1 W. L. R. 2450, *Woolf, J.*). Awarding costs and attorneys' fees is thus based upon employment of objective discretion in every case, each according to its circumstances.

20. This approach, according to which real costs are to be awarded, subject to their being reasonable, necessary and proportionate, is based upon a number of reasons: first, in my opinion, such a rule reflects an appropriate synthesis of both aforementioned approaches, and it can realize the advantages of both of them, whilst minimizing their disadvantages. The point of departure, according to which the costs that will be awarded will be real costs, advances justice toward the party who won the proceeding, and protects his property, as well as advancing, to a certain extent, efficient conduct of worthy cases in the courts. On the other hand, subjecting that point of departure to the requirements of reasonableness, necessity and proportionality, considering the entirety of circumstances of the case, is intended to prevent a situation in which the costs awarded are too high, causing over-deterrence of parties, creating inequality, needlessly making legal proceedings more expensive, and impinging upon access to justice. Second, although the language of the regulations does not determine the amount of damages to be awarded, in both regulation 512 and regulation 513 there are elements of the idea that it is not

necessary for the amount of costs awarded to always be the full amount. Thus, regulation 512(a) refers the adjudicator to the minimum rate for attorneys' fees in the Israel Bar Rules; regulation 513(2) determines that the amount of costs to be awarded shall be the amount that was actually paid if the registrar "is of the opinion that said costs were reasonable and necessary in order to conduct the trial".

21. Third, it appears that, practically, the caselaw of this Court for years supports such a rule. In the aforementioned CA 541/63, *Berenson J.* stated that "lacking a special reason to justify not awarding costs or awarding reduced costs for a party that won the case, it is appropriate to award payment of his full costs, so that he does not suffer a loss" (*ibid*, at p. 127). This approach was repeated in additional judgments (*see* CA 208/66 *Bank HaPoalim Ltd. v. Estate of Kali*, 20 PD (4) 169, 170; CA 600/67 *Haifa Assessing Officer v. Berger,* 22 PD (2) 490, 491; CA 300/77 *Rosner v. Binyanei T. L. M. Construction Company Ltd.*, 32 PD (3) 682, 689; CA 3769/97 *Dahan (incapacitated) v. Dani*, 53 PD (5) 581, 598). At the same time, this basic principle was subjected to the standard of reasonableness: first, on the basis of the assumption that the minimum rate of the Israel Bar constitutes a standard for the reasonableness of costs (*see* CA 309/59 *Chevrat Mifalei Mayim Ltd. v. Fishov*, 14 PD (2) 1121, 1140-1142; CA 600/67 *supra*, at p. 491; CA 403/78 *Chevrat Mivnei Ta'asiya Ltd. v. Orenstein*, 33 PD (1) 105, 108), but doubts were later expressed regarding the minimum fee as an appropriate standard for examining the reasonableness of the costs (CA 309/59 *supra*, at p. 1138; *compare*

CA 77/85 *The Electric Company – Jerusalem District Ltd. v. The Electric Company of Israel*, 39 PD (2) 592; Yehuda Savir, *Schar Tirchat Orech Din va'Yitsiot baBeit haMishpat – Gisha Chadasha*, 28 HAPRAKLIT (1972) 477). It has been said that "it is a minimum limit, and it seems that years ago it became meaningless in practical life" (*see* CA 9535/04, *supra*). Note, finally, that the minimum rate's status today is but a recommendation, and the force of the reference in regulation 512(a) regarding this matter has in any case been weakened (*see* section 81 of the Israel Bar Law, 5721-1961 as amended in 5753; the Israel Bar Rules (Recommended Minimum Rate), 5760-2000). The conclusion stemming from this caselaw, and from the weakening of the minimum fee, is that the point of departure in costs caselaw should be the expenses that were actually paid by the party – so that he does not suffer a loss (*compare* The Supreme Court President's Instruction of February 6, 1998, 51 PD (1) 1). *S. Levin J.* discussed that, stating:

> "There is no doubt that in the past, in certain cases, it became customary to award parties only a small part of the fees they paid their attorneys, and thus the party who won his case suffered a loss. It is my opinion that the time has come to break free from that custom, and to award parties who have won their cases the appropriate amount, considering all the circumstances, even if in certain cases it is higher than the minimum rate (*see* CA 611/89 *Drucker Zacharia Contracting Company v. Nachmias*, 46 PD (2) 60, 68; CA 27/81 *Module*

Mechanical Engineering Company Ltd. v. Imco Industries Ltd., 37 PD (1) 211, 213)."

The costs to be awarded are thus usually "real" costs. However, these costs must be reasonable. That reasonableness is no longer necessarily the same as the minimum rate in the Israel Bar Rules.

22. The fourth reason for the conclusion I have reached is the fact that this standard is the common one regarding the amount of costs in many legal systems in which the rule is that the loser pays the winners' costs. In them as well it has been determined that the point of departure is that the amount of costs to be awarded is the total of expenses actually paid, subject to their being reasonable, necessary and proportionate in the circumstances of the case (*see* PETER HURST, CIVIL COSTS (2d ed. 1995) 51-52). So it is in Sweden (*see* GINSBURG & BRUZELIUS, *supra*, at p. 369); in Denmark (*see* Peter Fogh & Frants Dalgaard-Knudsen, "Denmark", INTERNATIONAL CIVIL PROCEDURE (CAMPBELL & CAMPBELL eds. 1995) 75, 115); in Australia (*see* CRAINS *supra*, at p. 488); in Austria (Walter Rechberger, "Austria", INTERNATIONAL ENCYCLOPEDIA OF LAWS – CIVIL PROCEDURE (1996) 70); and in South Africa (Roshana Kelbrick, "South Africa", INTERNATIONAL ENCYCLOPEDIA OF LAWS – CIVIL PROCEDURE (1996) 98). Even English law, which is strict in its approach toward real costs, acknowledges a type of costs that, although they are real in character, must at the same time be reasonable and proportional ("standard costs" – *see* ANDREWS, supra, at p. 830). Indeed, comparative law as well supports this conclusion. Indeed, the appropriate rule is that the legal costs

awarded be those that were actually spent, conditional upon their being reasonable, necessary and proportional, according to the circumstances of the case.

What are Reasonable, Necessary and Proportional Costs?

23. There are different approaches regarding the determination whether an amount of costs in a given case is reasonable, necessary and proportional. One way is to expressly determine in statute what reasonable amounts of attorneys' fees and expenses are, whereas if a party chooses to spend beyond that determined amount, he is responsible for it, and will not be awarded reimbursement for the extra amounts, even if he wins the case. That, for example, is the approach in Germany, in which maximum amounts of costs are determined in law (MURRAY & STURNER, *supra*, at pp. 346-347). However, that is not the way chosen by the Israeli regulations. Israeli law takes a second approach, according to which the adjudicator has discretion to examine when the real costs are not reasonable, necessary or proportional in the proceedings, and to lower them accordingly. What are the principles that guide this discretion?

24. Attempts to lay out hard and fast rules will not succeed, due to the great scope of imaginable cases and circumstances, as well as those which, as reality teaches us, the future yet holds. Nonetheless, in the language of the regulations, in the caselaw of the courts, and in comparative law (*see, e.g.* 10 HALSBURY'S LAWS OF ENGLAND (4th ed.) pp. 21-22), one can find guidelines and

considerations that may be taken into account, among the other considerations, in the framework of the objective examination of reasonableness of the real costs of a winning party: first, the minimum rate is not usually used as a standard for determining costs. It is the bottom limit. It is however clear that when the costs actually spent are within the amounts determined in the minimum rates, there is usually no difficulty determining that such costs are reasonable. Second, the conduct of the parties to the proceedings, including the way they conduct the proceedings (*see* regulation 512(b) of the regulations; SUSSMAN *supra,* at p. 541; Zylbertal *supra,* at p. 392). "The way a party acts is an important component in determining attorneys' fees and costs" (CA 9535/04 *supra*). In principle, the losing party does not therefore have to bear extra costs which the winning party spent due to negligence in conducting the proceedings, or overcautious conduct which is not needed in order to attain justice or protection of his rights (*compare* Kelbrick, *supra,* at p. 98). Third, the requested relief or the size of the disputed amount (*see* regulation 512(b) of the regulations; SUSSMAN *supra*, at p. 541); there must be a proportional relationship between the requested relief – and the relief granted – and the attorneys' fees and costs (*see* CA 77/85 *supra*; CA 9535/04 *supra*; *and* HURST *supra,* at p. 52). Fourth, the complexity of the case and the time invested in preparing it can be considered (*see* CA 762/76 *Katz v. The Menachem Amir Co. Ltd.*, 32 PD (2) 500, 502). It was justly said that attorneys' fees are for the effort expended, and are not compensation (*see* CA 309/59 *supra*, at p. 1140). It follows naturally that the question whether the handling of the case required special skill and expertise can be important.

Last is the importance of the case for the parties. To the extent that the case's objective importance to the party is supreme, or even critical, it is natural that he will wish to expend more resources in the litigation, and such expenditure will be more reasonable. The examination is therefore one of the "retrospective interest" of the parties to the proceedings (*see* Habscheid *supra*, at p. 296). Furthermore, in the framework of the importance of the case, additional aspects related to the importance of the issue raised in the case and the public interest in it can be examined (*compare* CA 9535/04 *supra*). Indeed, the list of considerations is not a *numerus clausus*. Each case must be examined according to its circumstances.

25. Before returning to the circumstances of the cases before me, and the applications for costs in them, two comments should be added: the first regards the burdens of proof when dealing with costs. Indeed, the caselaw recognition of "real" costs as a point of departure means that the party claiming the costs is the one who must prove their actual amounts. Thus, for example, by submitting the attorneys' fees agreement (*see* Supreme Court President's Instruction of February 6 1998, *supra*); detailing the work invested in the case; the basis for charging attorneys' fees, and evidence of actual payment or charging of such a payment. If the actual expenses have been proven and detailed, the burden is transferred to the other party – who lost the case – to show why the requested amount should not be awarded, considering the reasonableness of the expenses, their necessity and their proportionality. However, parties and their attorneys routinely apply for award of costs

without detailing the requested expenses (and attorneys' fees). In such a situation, the applicant for costs should be seen as leaving the decision regarding costs to the discretion of the court, which will determine the reasonable, necessary and proportional amount of costs in light of the circumstances of the case before it. The other comment regards the status of the State as a party in the framework of applications to award costs and attorneys' fees. Indeed, as a matter of principle, and if there is no other justification to decide otherwise, the State should be seen as no different than any other party regarding charging the State with costs. True, charging the State with costs is like charging the entire public with them, but when the charge is justified on the merits and reasonable in its amount, the amount of costs should not be lowered simply since the State is the party bearing them, as otherwise, the winning party bears the cost of conducting the proceeding for the entire public. Furthermore, there is indeed difficulty in proving actual expenses paid by the State, if it wins the proceedings and requests assessment of its costs. However, in this context, there is no *prima facie* reason not to use the standard used in those cases in which a party does not prove its actual expenses, which is a standard of the reasonableness of the expenses considering the circumstances at hand. When the State wins – as a party – in a proceeding, there is no justification for it not being awarded its reasonable costs, considering the entirety of the circumstances of the case.

Implementation in the Cases Before the Court

HCJ 891/05

26. Petitioner in this proceeding argues that the expenses it actually paid total 103,739 NIS. Evidence to prove these costs was submitted, including detail of the billed hours and attorneys' fees, and receipts for expenses paid. Respondents in this petition do not dispute the amount of expenses actually paid. That is, therefore, the point of departure. Examination of the rest of the circumstances of the case reveals that although the attorneys' fees are higher than those determined in the minimum rate, that does not, as aforementioned, indicate unreasonableness. The value of the relief petitioner petitioned for was considerable, and it regarded a necessary component of petitioner's business activity, as well as the import quota for the entire 2005 year. According to the petition, "importation of milk powder is an integrative part of the regular production scheme of the milk business in Israel . . . every delay in allocating import quotas is liable to cause severe breakdowns in supply of milk products to the local market, especially in the summer months, in which milk production decreases". It was argued before me that the value of the import license totals "tens of millions of NIS". Against this background, it is clear that petitioner chose to conduct a legal proceeding on the issue, and needed appropriate legal counsel. It is also clear that there is a reasonable proportion between the value of the disputed issue and the attorneys' fees paid. The petition itself is 25 pages long, and includes extensive description of the prior proceedings and the relevant legal framework. There is no claim, or basis to claim, that petitioner was negligent in its conduct, or took legal steps and paid large unnecessary expenses. However, the fact that

the entire proceeding ended without a hearing on the merits, a short time after its filing in this Court, is to be granted weight. It is further noted that petitioner did not attach its attorneys' fees contract, and it is thus impossible to know the basis of the hourly fees of the attorney and the legal clerk who worked on the case. Those figures are important in assessing the reasonable attorneys' fees in the circumstances of the case. Last, despite the importance of the issue, it seems that the case itself is not particularly complex – factually or legally – and revolves around the legality of the public agency's conduct in light of prior proceedings. In that state of affairs, my conclusion is that respondents should be charged with costs the amount of which is reasonable in the circumstances of the case (5,825 NIS) and attorneys' fees paid by petitioner totaling 60,000 NIS. Indeed, the amount of costs may be higher than the amount of costs awarded at times in various proceedings before this Court. However, the test for that is not arithmetical, rather substantive. As awarding of costs is based, in light of the aforementioned, upon examination of actual expenses in each specific case and their reasonableness, the amount of expenses, in and of itself, cannot be compared to anything but the amount in cases that are similar. As in this case actual expenses were claimed and proven at the amount stated above, the award of costs should be based upon that proven amount.

27. Respondents no. 1-3 in this proceeding submitted, as evidence, a "bill". There is no detail before me of the work done in its framework. No attorneys' fees agreement was attached. The basis for the charge is not clear. Furthermore, there is no evidence of actual payment of the requested amount. In such a situation, it is difficult to adopt the amount argued by respondents no. 1-3 as actual expenses. Against that background, it appears that reasonable and proportional attorneys' fees for filing the response to the proceeding initiated by appellant totals 10,000 NIS, and that is the amount appellant shall be obliged to pay respondents no. 1-3 in this proceeding. I further add that despite the arguments of respondents no. 1-3 regarding appellant's conduct, I do not award an amount higher than that stated above. Even though appellant is charged with costs, that does not lead, in and of itself, to an award of high costs – "exemplary costs".

28. The result is that respondents no. 1-4 in HCJ 891/05 shall pay petitioner's costs totaling 5,825 NIS and attorneys' fees totaling 60,000 NIS. Appellant in CA 2617/00 shall pay the attorneys' fees of respondents no. 1-3 totalling 10,000 NIS.

Given today, 23 Sivan 5765 (June 30 2005).

Yigal Mersel, Judge

Registrar