

ALLOCATION OF COSTS AND FEES OF CIVIL LITIGATION IN FEDERAL SUPREME COURT CASSATION DIVISION: ‘DOES ONE APPROACH REALLY FIT ALL’?

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ABSTRACT

In civil litigation resolving disputes through the regular courts has its own costs and fees, either compulsory or voluntary, but inevitable. Allocation of these costs and fees is one of the most contentious post-judgment issues in all courts. Litigant parties have competitive interest and claim, while justice and public interest may support either. To adopt the most efficient and equitable allocation system, jurisdictions tend to adopt indemnity, non-indemnity, or judge-based principles with their respective exceptions.

In Ethiopia, the civil procedure law left allocation of costs and fees of civil litigation to the full discretion of courts. Nevertheless, there are no guiding principles on how courts can exercise this discretion. Unlike other jurisdictions that adopted similar approach, the Ethiopian legislature and courts fail to develop uniform guiding rules and principles for allocation of costs and fees. In its decisions, the Ethiopian Federal Supreme Court Cassation Division has adopted the non-indemnity principle rigidly, though it has quashed decision of lower courts for lack of adopting ‘loser pays’ (indemnity) principle.

The main theme of this article is, therefore, to investigate if one approach really fits to all cases irrespective of the outcome of the case, litigation behavior of the parties and costs incurred in light of these theories and principles in a comparative perspective. The article argues that by any standard this approach cannot pragmatically fit to all cases, parties, and litigation. It further argues that lack of research based workable allocation regime is exacerbating the backlog and delay of cases of the Cassation Division.

Key Words: *Fee and Costs Allocation, Loser Pays Principle, Non-indemnity Principle, Judge-based System*

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1. INTRODUCTION

One, if not the main, mechanism of resolving disputes is through the formal proceeding. States have been responsible to open the door of access to justices, essentially in the formal justice machinery. There have been efforts to create conducive environment of access to justice.¹ As an operative element of a state, there have been clear pressures up on governments to make justice accessible to all. In the wording of Genn, “*Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights... which every citizen has a constitutional right of access.*”² To this end, governments have incorporated access to justice in their constitution as a fundamental right.³ It is not in subordinate laws but in the constitution, which is the supreme law of the land. At the heart of access to justice is access to courts.

In accessing and resolving disputes by using courts, litigant parties incur costs and fees. Once litigant parties incur these costs, they often times, than not, require courts to allocate the costs fairly and equitably. The winner requires them to shift the costs and fees to the loser while the later needs them to do the opposite. Furthermore, courts are required to take into consideration factors beyond the interests and claims of the parties such as equity and public policy.

There are various theories and different practices across jurisdictions with their respective justifications and underlying exceptions. This article deals with the allocation of costs and fees according to Ethiopian Civil Procedure and the existing practice only in the Ethiopian Supreme Court Cassation Division in light of international principles and practices. This article is not a full-fledge discussion of allocation in Ethiopian courts. Suffice it to mention that as an apex court (worth of independent study), which checks appropriate application and interpretation of laws in lower courts, it plays an indispensable role, at least theoretically, in leading the move towards the effective and efficient allocation of costs and fees of civil litigation.

¹Neil Andrews, *Fundamentals of Costs Law: Loser Responsibility, Access to Justice, and Procedural Discipline*, Uniform Law Review (2014), Volume 19, Issue 2, P296 seq.

² Hazel Genn, *Judging the Civil Justice*, 2010, P1.

³ For instance, see the FDRE Constitution, Art.37.

To this end, section two deals with costs and fees of civil litigation briefly, and section three deals with the theoretical underpinnings of allocation of costs and fees. The fourth section discusses about the Ethiopian version of costs and fees allocation regime while the fifth dwells on whether the ‘one approach fits all’ stand of the Cassation Division is workable. The last section is devoted to conclusion and the way forward drawn from the whole discussion.

2. COSTS OF CIVIL LITIGATION: A BRIEF INSIGHT

Civil justice system⁴, as a wing of the entire justice system, has been urged to offer redress to those whose civil right were violated and sanction those who infringed those rights.⁵ Likewise, parties are expected to protect their rights through the formal system by fulfilling the technical and legal requirements if they opted to litigate. As a side effect of litigation, during any proceeding, there are an inevitable costs incurred by the parties to litigation.⁶ Often times, these are costs and fees to access the courts’ process. There are also costs incurred by the parties to hire a lawyer and to access or use evidences.

There are various definition of costs and fees of litigation. The notion of costs and fees in civil litigation, for the purpose of this article, covers litigation preparation costs, filing costs, lawyer’s cost, accommodation expenses, evidence costs like: compensation for forgone incomes of witness, experts and interpreters-the list is endless.⁷

Paying these costs, litigants need the court to make justice in allocating these costs and fees of litigation. Correspondingly, courts are bound to, among

⁴There are two major components of justice. Namely, Criminal and Civil. Throughout this paper, civil justice comprises all areas of the justice system but not the criminal justice system. It can be taken as a ‘system that enables individuals to assert civil claims against others, and have those rights adjudicated and enforced’.

⁵Alon Klement et al., *Civil Justice Reform: A Mechanism Design Framework*, 2008, P53.

⁶The word litigation is chosen deliberately to single out the ADR mechanism in all its forms, which are beyond the scope of this paper.

⁷The Ethiopian Civil Procedure Law fails to define what cost is while other many civil procedure laws try to list some elements. For more detail discussion, see The American Law Institute, *Principles and Rules of Transnational Civil procedures*: American Law Institute/UNIDROIT, (Cambridge University Press, 2006), P45; Stephen M. Gerlis and Paula Loughlin, *Civil Procedure*, (Great Britain (2001), P370 seq. For UK; Mathias Reimann, *infra* note-11, P69 seq. for Austria; P513 seq.; Jack S. Emery et al., *West Legal Studies: Thomson Learning, Civil Procedure and Litigation*, (USA,2000), P177 seq.

other things, deal fairly; ensure litigant parties are getting equal treatment; the amount of time and money spent on case is proportionate to the amount of the claim and the complexity of the issues, etc.⁸

However, the parameter of their respective version of ‘fair and equitable allocation’ is divergent. Evidently, the winner party demands the court to shift all the costs and fees of the whole litigation to the loser. Conversely, the loser party demands mostly, either each party should pay their respective costs and fees; or, if the court has to order, it should be ‘reasonable’ amount and only those costs and fees of litigation. In fact, situations realistically may demand courts to take into account factors beyond the sheer interest and perspectives of parties in the litigation. The decision on, ‘who should pay what’, is wide-ranging enough to engulf issues beyond parties.⁹ For a while, it is safe to conclude that there is no consensus on manner and ways of determining the ‘reasonable amount’ of the litigation costs and its allocation between, if not within, jurisdictions.

From the litigants’ perspective, cost and fee considerations will not only determine the price of access to justice but also will often have an important impact on the strategy, conduct and outcome of litigation.¹⁰ That is to say, decision of courts manifestly affects, *inter alia*, parties’ decisions whether to file or not; the kind of litigation strategy to adopt; how and how much to invest and even whether to use formal mechanisms or not. Improper allocation of the costs and fees may limit access to justice by increasing costs and providing hurdle that prevents and discourages people from accessing the court.¹¹

Likewise, there is also a concern that people may reach a compromise if there is a practice of unfair allocation which seriously limits the

⁸For details see overriding principles of justice <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/> <accessed last on 12/07/2017>

⁹For instance, to protect poor and vulnerable members of the society laws prohibit the judges.

¹⁰ Colin B. Picker and Guy I. Seidman, *the Dynamism of Civil Procedure: Global Trends and Developments*, (Netherlands, Springer International, 2016), P26; Peter Cashman (PhD), *The Costs of Access to Courts* (Paper for presentation at Bar Association of Queens land Annual Conference, 2007),P3.

¹¹ Mathias Reimann (ed.), *Costs and Fees Allocating in Civil Procedure*, (USA, Springer, 2012), P23 seq.

constitutional right to appeal. It may also serve as a shield for strategic litigants. If a litigant thinks she/he will lose a great deal of money in case the litigation turned out to be successful or unsuccessful, it will have huge repercussion on the decision to litigate or not. Comparative study of more than 30 jurisdictions indicates, “...in civil ...matters where money is usually the primary object, the financial burden of litigation may well be the single most important consideration in deciding whether to fight in court. Even if a matter is deemed important enough, and even if the chances of success are considered high, a party may not be able or willing to bear the costs of litigation.”¹²

On the contrary, appropriate allocation is believed to increase access to justice and decrease frivolous and unreasonable litigation. Allocation of costs and fees “even provide a basis on which countries compete for legal business.”¹³ To address the problems, jurisdictions have adopted various principles of allocation, which are discussed in the following section briefly.

3. APPROACHES OF ALLOCATION OF COSTS AND FEES IN CIVIL LITIGATION: A BRIEF OF LITERATURE REVIEW

Different jurisdictions adopt various methods of allocating the entire costs and fees of litigation. Some adopt the ‘loser pays’ principle, while others adopt parties cover their respective costs. And, yet others leave it to the discretion of the judge. In other terms, the first principle is known as indemnity rule, the second non-indemnity rule while the last is known as judge-based system.¹⁴ Before we jump to discussion of each, it has to be underlined that all systems have principles and exceptions that allow courts to derogate from that principle.¹⁵ For instance, in systems that adopted the loser pays principle courts are allowed to deviate from the principle if law

¹² *Id.* P4.

¹³ Theodore Eisenberg et al, *When courts Determine fees in a system with a Loser pays Norm: Fees Award Denials to Winning Plaintiffs and Defendants* (Corner Law Faculty Publications, 2013), P1454.

¹⁴ For more discussion on the classification of the rules see James Maxeiner, *Costs and fees allocation in civil procedure*, the American Journal of Comparative Law (2010), Vol. 58, Pp198-99.

¹⁵ Reimann, *Supra* note 11, at p3 seq.

clearly dictates not to shift the costs, bad faith of the winner, if the winner is an indigent etc.¹⁶

3.1 . LOSER PAYS PRINCIPLE

In non-indemnity principle, parties are ordered to bear their respective costs and fees of the litigation. The loser pays principle is, by far, the most widely adopted principle.¹⁷ In this principle, the loser party should prima facie indemnify, or contribute substantially towards, the costs and fees incurred by the winner party.¹⁸ Those who adopted the ‘loser pays’ (indemnity) principle pursue the full compensation of winning party and deterrence of frivolous claims. The successful litigant can collect his/her legal costs and fees from the loser.

In fact, even within jurisdictions that have adopted the loser pays principle variations are inescapable on how much should be shifted to the loser.¹⁹ After studying more than 30 jurisdictions comparatively, Mathias made the following eloquent conclusion:

The reality is much more complex: no system makes the winner completely whole (although some come very close), and even in the United States, some costs are shifted to the loser (although usually only a very small part); most jurisdictions operate somewhere in between. ...what basic principle a legal system proclaims says little about which costs (and which amounts) are actually shifted to the loser: some jurisdictions announcing the “loser pays” rule arguably charge the loser for no more than in the United States... The world of cost and fee allocation in civil procedure is much better described as a broad spectrum. On one end are the systems that shift nearly all of the winner’s litigation expenses to the loser; in the middle, we find many jurisdictions shifting

¹⁶For instance, See James Maxier, *Cost and Fee Allocation in Civil Procedure*, the American Journal of Comparative Law (2010), Vol.58, Pp 200-2003.

¹⁷ Avery W. Katz, *Indemnity of Legal Fees-7300* (Georgetown University,1999), P63.

¹⁸Andrews, *Supra* note 1, P295.

¹⁹Jennifer Corrin Care, *Civil Procedure and Courts in the South Pacific*, (Australia, Cavendish Publishing Pty Ltd, 2004), P257.

substantial parts, but not nearly the whole; and at the other end, only a fraction of the winner's costs are recoverable
(Emphasis Added)

As can be understood from this conclusion, it is in rare circumstance that 'the loser pays all' the costs of the winner incurred during the litigation. Furthermore, the prime purpose of indemnity "is not intended to be compensation for a risk to which a litigant has been exposed, [but] to refund of expenses actually incurred."²⁰ This rule reflects basic justice. Responsibility for the winner's costs rests with the party who brought or defended a losing cause.²¹

In exceptional circumstances provided by law, the court may withhold or limit costs to the winning party when there is clear justification for doing so.²² For instance, if the case is based on family law, courts can or sometimes even to exempt the loser party from covering the costs and fees of litigation, provided the conditions are fulfilled. To this end, in systems that adopted the loser pays principle, courts are allowed to deviate from the principle if the law clearly dictates not to shift the costs, if the winner is in bad faith, if the winner is an indigent. There are other exceptions like small claim cases, family law disputes, labour cases, social security cases, consumer litigation, tort cases, etc.²³

3.2 . NON-INDEMNITY PRINCIPLE

Regarding the systems who have adopted the non-indemnity principle, the justification is, *inter alia*, "to provide access to the courts for the poor and other risk-averse persons".²⁴ There is a public need for open access to all. Costs and fees of litigation should not preclude parties from bringing their

²⁰*Cost and Fee Allocation in Civil Procedure Republic South Africa*, P2. available at www.personal.umich.edu < last accessed 24/11/2016>.

²¹Neil Andrews, *Supra* note 1, P295; The American Law Institute, *Principles and Rules of Transnational Civil Procedures*: American Law Institute/UNIDROIT (Cambridge University Press, 2006), P45.

²²Neil Andrews, *Supra* note 1, P297.

²³For further detail discussion see *Supra* note-15, Pp16-19.

²⁴John F. Vargo, *the American Rule of Attorney Fee Allocation: the Uninjured Persons' Access to Justice*, 42 AM. U.L.Rev. 1567, 1594 (1967) cited by James Maxeiner, , *Costs and Fees Allocation in Civil Procedure*, the American Journal of Comparative Law (2010), Vol. 58, P198.

claims or defending suits brought against them. Accordingly, parties in litigation must generally bear their own expenses. The American Supreme Court has listed the following three illustrative justifications:

“...in many cases the result of litigation is uncertain and, as a result, it is unfair to penalize losing parties by assessing costs and fees for merely defending; if losing parties were forced to bear their opponents' costs and fees, "the poor might be unjustly discouraged from instituting actions to vindicate their rights...; claims for costs and fees would likely increase "the time, expense and difficulties of proof" in any given case and "would pose substantial burdens for the administration of justice.”²⁵(Emphasis added)

Pragmatically speaking, there is no pure dichotomy of ‘loser pays’, indemnity, and ‘each party covers his or her costs’, non-indemnity principles.²⁶ Even in the US that has adopted long tradition of adopting non-indemnity principle there are research based calls for costs and fees shifting for “indemnification would reduce frivolous litigation, improve case quality and lower litigation costs.²⁷ Still those who adopted the hybrid method have principles and exceptions.

3.3 JUDGE-BASED SYSTEM

As the name indicates, this approach holds that the allocation of costs and fee of litigation is decided not by legislation, but, left to the discretion of judges. There are jurisdictions that adopt this approach including South Africa²⁸, Israel²⁹, and Ethiopia. Advocates of this system list many advantages, which are summarized as follows:

²⁵John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, P2, available at <https://www.cisg.law.pace.edu/cisg/biblio/gotanda.html#21> <last accessed on 27/08/2017>

²⁶ Even in the US non-indemnity rule, there are states within the federation who adopted the loser pays principle. For detail discussion see Marie Gryphon, *Assessing the Effects of a “Loser Pays” Rule on the American Legal System: An Economic Analysis and Proposal for Reform*, Rutgers Journal of Law & Public Policy (2011), Vol.8: 3, Pp595-97.

²⁷ see Marie Gryphon, Id; Eric Helland and Jungmo Yoon, *Estimating Effects of English Rule on Litigation Outcomes*(Working Paper, Rand Justice, Infrastructure, and Environment, 2015), P1.

²⁸ *Cost and Fee Allocation*, *Supra* note 20.

²⁹ Theodore Eisenberg, *Supra* note 13, P1453.

“A plausible additional approach to allocating litigation costs is to vest full responsibility for assessing them in the institutional actor with case-specific expertise, with no affiliation with the litigating sides, and with a presumed interest in promoting justice as each individual case requires the judge. Such a judge-centered system could, in theory, effectively address the problems associated with the litigation cost allocation methods already described. It might, for example, avoid the systematic underpayment of litigation costs in countries with fixed-amount or percentage-based reimbursement schedules since the judge can adjust the amount awarded as each case warrants. A judge-centered system might also avoid the harshness of litigating parties with reasonable but losing claims having to bear the full litigation costs of their opponents.”³⁰(Emphasis added)

This system gives a judge to decide allocation of costs and fees of litigation on case-by-case basis. It is the most flexible system. However, it lacks predictability; and is uncertain. None of the parties can be able to guess in what circumstances can the court shift or not shift to the other. Judges may also easily abuse it in case the law or Supreme Court fails to come up with practicable guidelines.

To rectify, or at least to reduce, the pitfalls of the unpredictability, jurisdictions have developed clear guiding rules on how courts should exercise the discretion in light of fairness and justice.³¹ The discretion is expected to be “exercised judicially in accordance with established principles in relation to the facts of the case.”³² The guidelines are developed through practice by the courts themselves.

³⁰ *Ibid.*

³¹ *Ibid* and *Marie Gryphon*, *Supra* note 26.

³² *Corrin Care*, *Supra* note 19.

4. ALLOCATION OF COST AND FEES IN ETHIOPIAN CIVIL PROCEDURE LAW

This section provides indispensable background information about the Ethiopian legal rules governing the civil litigation costs and fees vis-à-vis its practice in the Federal Supreme Court Cassation Division.

4.1 ALLOCATION IN THE CIVIL PROCEDURE LAW

As discussed in section 3 of this research, there are various theories and practices adopted by jurisdictions with their respective justifications. The Civil Procedure Code of Ethiopia, which is designed to regulate the process of civil litigations, has plainly left allocation of costs and fees of civil litigation to the discretion of courts as follows:

*Unless otherwise provided, the costs of an incident to all suits shall be in the discretion of the court and the court shall have a full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect.*³³ (Italics added)

According to this provision, courts in Ethiopia have a full power to make a decision regarding not only the amount but also who should pay. The only limitation is ‘if provided otherwise’. As it is discernible from the provision, the law gives unlimited power to the courts to decide who should pay, from what property and to what extent the party should pay.

There is slight difference in the wording of the Amharic and English versions of the provision. First, the Amharic version states that ‘unless it is provided by other laws’ whereas the English version states, “Unless otherwise provided” with no indication as to how and by whom it is provided.

In the wording of the English version, it leaves a room for parties to agree or law can dictate otherwise; but, in the Amharic version no indication as to the first. There are many unanswered questions. Of these, firstly, can this be interpreted, as courts have no discretion to decide if the parties, especially

³³Civil Procedure Code of the Empire of Ethiopia Decree No. 52/1965, Art. 462.

the loser, are able to show special circumstances? Secondly, the English version makes it mandatory for the court to have full power by using “shall” while the wording of the Amharic version connotes the possibility. The Ethiopian Civil Procedure provides courts to decide allocation of costs and fees on case-by-case basis.

This gives them maximum flexibility to accommodate changing circumstances taken into consideration the nature of the litigation, behavior of the parties, time taken etc. to make equitable and fair allocation of costs decisions. Nonetheless, the pitfall of this unlimited power lies at creating legal uncertainty due to the unlimited power and lack of guidelines on how the courts should apply their conscience, evidences, and the facts to make fair and equitable decisions.

Nevertheless, if the judge decides that the “unsuccessful party should pay” then the party for whose advantage the allocation of costs and fees has been decided “shall prepare an itemized bill of costs showing the expenses he has incurred in the suit.”³⁴ Likewise, the law requires the party to file the bill in the court of judgment and a copy of that bill be served to the other party. This in turn, indicates that the laws are in favor of litigation, oral or otherwise, on the issues of allocation of costs and fees in civil matters. This can further be substantiated by the rule that follows and demands the court to adjourn the case for “considering the bill and shall summon the parties to appear on such day.” Furthermore, the court is authorized to reduce the amount “which in its opinion is excessive and ...were not necessary or proper for the attainment of justice or for the defending of the rights of any party” provided that it considers the bill and hear the parties.³⁵

High emphasis is given to the allocation of costs and fees of litigation though the law fails to expound on what grounds the court can ‘shift or not shift’ the costs and fees. Especially, after the court makes a decision as to the allocation of cost and fee, the law provides serious consequences if any party deviates from the order of the court.³⁶ In a similar manner, the law clearly demands that court once it renders its judgment concerning the allocation of costs and fees, it has to include in its decree, operational part of the

³⁴ Civil Procedure Code of the Empire of Ethiopia Decree No. 52/1965, Art.463(1)

³⁵ Civil Procedure Code of the Empire of Ethiopia Decree No. 52/1965, Art.464(1).

³⁶ Civil Procedure Code of the Empire of Ethiopia Decree No. 52/1965.

judgment, “the amount of costs incurred in the suit or appeal, and by whom, or out of what property such costs are to be paid”³⁷ It has to be noted that parties can appeal on the allocation of costs and fees but such appeal is final.³⁸

4.2 ALLOCATION OF COSTS AND FEES IN FDRE FEDERAL SUPREME COURT CASSATION DIVISION

The Federal Supreme Court is the highest judicial organ in the Ethiopian federal judicial system.³⁹ Its counterpart in the regions has similar position on regional matters.⁴⁰ Currently, the decisions of the Federal Supreme Court Cassation Division are binding on all levels of courts. In the wording of the Federal Courts Re-amendment Proclamation “ interpretation of a law by the Federal Supreme Court Cassation Division in its judgments made with not less than five judges shall be binding on federal and regional courts at all levels.”⁴¹ It is there, to correct fundamental error of law for the purpose of uniform applications and interpretations of law.⁴²

In exercising this power, the apex court has made many binding interpretations concerning ‘error of laws’. So far, the Division has published 20 volumes of its binding decisions. One of these is regarding allocation of costs and fees of civil litigation. In reversing and elaborating lower courts’ decisions, the Cassation Division has made it clear that the principle adopted

³⁷ Civil Procedure Code of the Empire of Ethiopia Decree No. 52/1965, Art.183 (1) (e).

³⁸ Civil Procedure Code of the Empire of Ethiopia Decree No. 52/1965, Art. 466.

³⁹ FDRE Constitution, Art.80.

⁴⁰ It is worth mentioning that the Federal Supreme Court Cassation Division is currently exercising Cassation over Cassation on any matters decided by Federal and State courts; though Scholars are raising critical questions. For detail discussions Muradu Abdo, Review of Decisions of State Courts over Sate Matters by the Federal Supreme Court, Mizan Law Review (2007),Vol.1, No.1, Pp60-74; Mehari Redae, *Cassation over Cassation and its Challenges in Ethiopia*, Mizan Law Review (2015), Vol.9, No.1, Pp175-200

⁴¹See Federal Courts Re-amendment Proclamation No.454/2005, Art. 2 (4).

⁴²The Decision of FSCCD should not be equated with enacting laws. Its power is limited only to rectify the fundamental error of law, “guarding the legislature’s purpose and intent”, committed in interpretation. If the Cassation division acts in the other way, it is another act that amounts to interference of powers of the legislature. For critical analysis of the flaws in the decisions of the cassation, see Bisrat Teklu and Markos Debebe, *Change for Aptness: Fighting Flaws in the Federal Supreme Court Cassation Division* available at <https://www.ju.edu.et/jl> last accessed 21/09/2017.

in Ethiopian procedure law is principally the ‘loser pays’ principle.⁴³ The Division confirms that whether the loser should pay or not, is left for the discretion of the courts, utterly of which the loser pays, is an option. In these same cases, the Division also adopted some guiding exceptions to the basic rule.⁴⁴

Of the 20 volumes of binding decisions of the Division, there are four⁴⁵ pertinent cases worth of special discussion. The writer opted to discuss in ascending order of the published volume as follows.

4.2.1 Case One

In *Abebaye Abi Deraweq V. Ato Yigerem Feye* case, the court that had first instance jurisdiction rejected both the claim and costs of the petitioner (Wro. *Abebaye Abi*).⁴⁶ The petitioner had appealed to appellate court which confirmed the decision of the lower court regarding the recovery of the court fees, though dismissed the claim. Then, she petitioned to the Cassation Division to reverse the decision of the appellate court arguing, “If the claim of the plaintiff is rejected by the court, it is error of law to order the defendant to pay the costs of the litigation who has won.” Then, the Cassation Division has reversed the decision of the Supreme Court stating “according Art. 251(1) of the Civil Procedure Code of Ethiopia, court fees are covered by person who is suing unless allocated by the court otherwise.” It further held that if the respondent made unfounded claims which were dismissed both by the appellate and lower courts; there is no legal ground that the defendant had to cover the costs and fees. Ordering the petitioner to

⁴³See *W/ro. Abebaye Abi Deraweq V. Ato Yigerem Feye, Federal Supreme Court Cassation Division Binding Decision, File No. 4628, Vol.12, Pp320-321.*; *Ethiopian Revenue and Customs Authority Dire Dawa Branch V. W/ro Hindeya Endris, Federal Supreme Court Cassation Division Binding Decision, Cassation File No. 83701, Vol.14, p129-130*; *Youtek Construction Plc V. Ato Fuad et al, Federal Supreme Court Cassation Division, Cassation File No. 91103, Vol.15 and Vol.16, Pp188-190*; *Ato Kinfe W/senbet V. Ato Sileshi Bekele et al., Federal Supreme Court Cassation Division, Cassation File No. 9859, Vol.18, Pp96-99.*

⁴⁴ See *W/ro. Abebaye Abi, Federal Supreme Court Cassation Division, File No. 46281, Vol.12 Pp320-321*; *Youtek Construction Plc V. Ato Fuad et al, Federal Supreme Court Cassation Division, Cassation File No. 91103, Vol.15 and Vol.16, Pp 188-190*; *Ato Kinfe W/senbet V. Ato Sileshi Bekele et al., Federal Supreme Court Cassation Division, File No. 98593, Vol.18, Pp96-99.*

⁴⁵The decisions of these cases are rendered in Amharic and the writer provides translation.

⁴⁶For detail facts of the case, see *W/ro. Abebaye Abi Deraweq V. Ato Yigerem Feye, Federal Supreme Court Cassation Division, File No. 46281, Vol.12, Pp320-321.*

indemnify the respondent is, therefore, is wrong interpreting of the law which has to be corrected. Here the Cassation Division is right if the loser pays principle is to be followed; the reverse would be true. That is to say, the defendant has won the case, and then plaintiff may be ordered to indemnify the reasonable costs and fees of the litigation.

Unfortunately, the Cassation Division reversed the decisions of the lower courts though it ordered the parties to cover their respective costs in the Cassation. As can be discerned from facts of the case the petitioner has come from Gambela region, hired a lawyer to defend the case, court fees incurred in the Cassation Division, appeal including court fees, evidence and other costs. The Cassation Division ignored the principle of the loser pays principle, which has been claimed to be adopted by lower courts.

4.2.2. Case Two

The petitioner, Ethiopian Revenue and Customs Authority Dire Dawa Branch, has argued that the issue of allocation of costs and fees has to be entertained in the execution file not on the judgment file, which has already become dead file.⁴⁷ The Cassation Division has dismissed the argument of the petitioner and affirmed the decision of lower courts by stating litigation of allocation of costs and fees should be presented at the court where the judgment was rendered in a file of a judgment pursuant to Art.183 of the Ethiopian Civil Procedure Code, for it is part of the judgment. Likewise, execution is possible on a matter up on which judgment is rendered by virtue of Art.378 of the same Code. It further states that courts should exercise their discretion by allowing parties to litigate on the issue of allocation, amount and even whether the costs and fees claimed by the party are really incurred or not.

4.2.3. Case Three

In another case, the Division holds that the main objective of the rules of costs and fee is to prevent frivolous litigation.⁴⁸ Then, if [lower] courts affirm that the litigation has no legal basis, the party who causes those costs

⁴⁷ For detail facts of the case, see *Ethiopian Revenue and Customs Authority Dire Dawa Branch V. W/ro Hindeya Endris, Federal Supreme Court Cassation Division, File No. 83701, Vol.14, Pp129-130.*

⁴⁸ For detail facts of the case, see *Youtek Construction Plc V. Ato Fuad et al, Federal Supreme Court Cassation Division, File No. 91103, Vol.15 and Vol.16, Pp 188-190.*

and fees should indemnify the party who sustained unnecessary costs. Likewise, the Division added, that it can be discerned from the contents of the Civil Procedure provisions that the ‘loser pays’ does not mean that the loser pays all the costs and fees incurred by the winner. Conversely, the Cassation Division stressed that it is also against the objective of the civil procedure to reject the question of costs and fees indemnification if the party who is causing them is in bad-faith. After giving this reasoning, the Division has reversed the decisions of the lower courts who have denied the winning party while the loser is in bad faith.⁴⁹The Cassation Court criticized lower courts for failing to give decision on the issue of shifting or not shifting of the costs and fees of the litigation.⁵⁰

Regrettably, the Division left uncertainty whether courts should only adopt the loser pays principle in case of bad faith. That is to say, is bad faith the precondition to decide the costs and fees to follow the judgment? Can the indemnity cost be justified by the mere fact that loser has been found to be wrong, in fact or law? Alternatively, is any misconduct a requirement? Are there circumstances where parties are ordered to cover the costs of each side? These and other similar questions are left unanswered by the Cassation’s decision.

Unfortunately, the principle adopted by the Division was not even applied to the costs and fees incurred in the Division’s litigation of the same case. In fact, the winner who has been denied appropriate cost recovery by lower courts is also denied in the Division. What the Division did was, it remanded the case to the lower courts to decide on ‘allocation of costs and fees’ while the parties are ‘ordered to bear their respective’ costs and fees of litigation incurred in the Division.

4.2.4. Case Four

In this case, after ordering the winner party to provide bill of costs, lower courts have rendered a decision, *inter alia*, on allocation of costs and fees of the litigation.⁵¹ The loser has presented his petition to the Cassation Division, among others, to reverse the decision by arguing that lower courts have

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹See *Ato Kinfe W/senbet Vs. Ato Sileshi Bekele et al., Federal Supreme Court Cassation Division, File No. 98593, Vol.18, Pp96-99.*

committed fundamental error of law to render the decision and if the decision is reversed then there is no issue to indemnify. The Cassation Division has affirmed the decisions of lower courts by stating that allocation of costs and fees by ordering the loser to indemnify the winner as far as the courts can render their decision based on litigation stand, contracting parties' identity and other similar circumstances. Here, the Cassation Division seems impliedly, to list some guiding principles that lower courts should take into consideration.

However, the Cassation Division ordered the parties to bear their respective costs and fees incurred at the Cassation Division, irrespective of the outcome of the case, costs incurred, stand of the parties and their litigation behavior. The winner of the litigation has incurred visible costs like advocate fees, court fees, forgone opportunity costs and other costs to defend the case.

In all its published binding decisions, including the cases under-discussion, the Division rigidly follows one approach; each side of the litigation should cover the costs of litigation irrespective of the nature of the case, behavior of the parties before or during litigation, costs covered, time taken to complete the case etc.⁵²

4.3 . DOES THE ONE ALLOCATION APPROACH FIT ALL?

One may argue that the prime purpose of Cassation Division is not to entertain cases as regular courts but to check of if the laws are correctly applied and interpretation by all courts in their respective jurisdiction. It reverses if courts of any level have committed fundamental error of law, not to entertain the facts of the case. Consequently, allocation of costs and fees of civil litigation is not a fundamental issue at the Cassation Division.

However, this argument does not make sense for a number of reasons. First, every-litigation has its own costs and the right person should pay that cost. Parties pay huge cost to proof their claim or defend claims brought against them. Court fees, advocate fee, transport and accommodation costs are only some of these costs incurred. Second, if lower courts erred in interpreting or applying laws and have awarded costs mistakenly, it would be unjust for the

⁵²See all Federal Supreme Court Cassation Division Vol.1-20.

party who has won in reversing the judgment. For this person winning may be turned to be losing in reality given the huge costs and delay of decisions in the Federal Cassation. Third, even though the loser party committed no fault at all, this does not mean that the winner party should shoulder the costs and fees alone. Fourth, if the Division is desired to provide justice then, it should render justice fully, from all perspectives. Fifth, if the Division is to correct 'fundamental error of law' it should incorporate laws of allocation of costs and fees. Sixth, if lower courts are required to adopt the 'loser pays' principle why not the Cassation Division. In one system, how can one expect different approaches, at least, theoretically? Is the spirit and letter of the law demands courts to shift the costs and fees towards the loser in bad-faith; is the Division above the law?

Adopting the non-indemnity principle inflexibly all times, for all parties, in all cases irrespective of the outcome of the case would keep on, the existing public outcry, backlog and delay of cases. It would be absurd to treat all individuals, petitioners and respondents, identical while justice demands otherwise. What if the losing party petitioned with a full knowledge of the outcome of the case? What, if that party or his advocate clearly contributed to the wrong interpretation of laws at lower courts?

Even the loser who acted in bad faith showing illegitimate behavior in the courtroom to win the baseless or vexatious claims will pay no costs and fees of the litigation initiated inappropriately to merely harass the winner party. It would be unjust and incomprehensible for it is a matter of inherent justice that the person who causes damage intentionally to others should make it good.⁵³

To decrease unfounded harassment and frivolous litigation, losers with bad faith should pay the costs and fees of civil litigation at the Division. The party who lost the case due to his/her frivolous claims must bear the costs thereof to deter similar acts and conducts if it is proportional and the winner acted in good faith.

However, caution must be taken that the practice of the Cassation Division must not deter reasonable and meritorious claims for fear of incongruous

⁵³ Andrews, *Supra* note 1, P297.