

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1635/22

In the matter between:

THE LEGAL PRACTICE COUNCIL

Applicant

and

ANNA MJILA (IN HER CAPACITY AS THE
EXECUTRIX OF THE LATE ESTATE OF
ABEL VUMILE MJILA)
ESTATE No: 2501/2022

1st Respondent

MASTER OF THE HIGH COURT,
KIMBERLEY

2nd Respondent

Coram: Tlaetsi JP, Williams J et Lever J

JUDGMENT

Lever J

1. After the passing of the late ABEL VUMILE MJILA (the deceased) the applicant being the Legal Practice Council of the Northern Cape (the

LPC) resolved to bring an application that its director in the Northern Cape be appointed as *curator bonis* to the legal practice of the deceased, who was an attorney of this court.

2. Pursuant to the said resolution of the LPC an urgent application was filed on the 17 August 2022 and a *Rule Nisi* was issued by Williams J on the 19 August 2022. In terms of the said *Rule Nisi*, the director of the Northern Cape LPC was appointed as *curator bonis* to the legal practice of the deceased with the usual powers and obligations as are appropriate in such circumstances.
3. There were no less than four postponements where the *Rule Nisi* was extended.
4. A full bench of this division was constituted because it appeared that the rights of the deceased's estate, controlled by the first respondent, to the practice of the deceased, was in issue, where it was alleged by the first respondent that the deceased ran his practice as an incorporated professional entity without limited liability, in the current terminology referred to as a 'personal liability company', in accordance with the company laws of the Republic of South Africa. Section 19(1)(a) of the Companies Act¹ (the Act) provides that once a company is incorporated and registered, it exists continuously until its name is

¹ Act 71 of 2008.

removed from the companies register in the manner provided for in the Act. The rights of the deceased's estate in relation to a 'personal liability company' such as an attorney's incorporated practice is an area of our law that is not yet settled. Hence the full bench set up to hear this matter.

5. There was indeed an incorporated professional entity registered in the name of the deceased. It emerged that the deceased was the sole director and shareholder of this entity at the time of his passing. However, no Legal Practitioners Fidelity Fund Certificate was ever issued to the said incorporated professional entity. The relevant Fidelity Fund Certificate was issued in the name of the deceased as a sole practitioner, which certificate was valid at the date of his passing.
6. As an attorney whether practicing under a partnership, a 'personal liability company' or a sole practitioner may not lawfully practice without a Fidelity Fund Certificate issued to cover the appropriate entity, it follows that the deceased never practiced through the vehicle of the personal liability company that bore his name.
7. The first respondent opposed the confirmation of the *Rule Nisi* on several technical grounds. However, the main ground of opposition was that the deceased practiced under the personal liability company that bore his name and that in her position as *executrix* of the deceased's

estate she could nominate a new director who had his own fidelity fund certificate and transfer the share in the company to that person.

8. In the end the contention that the deceased practiced in an incorporated personal liability company could not be sustained and ultimately the first respondent consented to the confirmation of the relevant *Rule Nisi*, but the question of who should bear the costs of this application was still in issue.
9. Consequently, on the 13 April 2023 the *Rule Nisi* was confirmed and the judgment on the question of costs was reserved.
10. The question of who is awarded the costs of litigation is governed by two rules. The first rule is sometimes referred to as the 'basic rule', 'the first rule' or 'the primary rule'. This 'primary rule' states that the award of costs in litigation is within the discretion of the trial Judge. The second rule is sometimes referred to as 'the general rule' or 'the secondary rule'. This 'general rule' states that costs are awarded to the successful party.
11. Innes CJ in the case of *KRUGER BROS. & WASSERMAN v RUSKIN* set out the 'primary rule' in the following terms:

"As already pointed out, the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His

discretion must be judicially exercised; but it cannot be challenged taken alone and apart from the main order, without his permission.”²

12. The two rules relating to costs do not exist in isolation to each other, there is an interplay between these two rules relating to the award of costs. This interplay is illustrated by Boshoff J in the matter of LETSITELE STORES (PTY) LTD v ROETS, where he states:

“In an appeal of this nature two general principles should be observed. The first is that the Court of first instance has a judicial discretion in regard to costs and this Court cannot interfere unless it is satisfied that the discretion is not exercised judicially. The second is that the successful party should as a general rule, have his costs. This is a rule that should not be departed from without the existence of good grounds for doing so. Where a successful party has been deprived of his costs, an appeal Court will enquire whether there were any grounds for this departure from the general rule, and if there are no such grounds, then ordinarily it will interfere. Any grounds here mean any grounds upon which a reasonable person could come to the conclusion arrived at.”³ (references omitted)

13. From this it emerges that it is possible to depart from the general rule. However, there must be a substantial reasonable basis for doing so, which must emerge from the facts of the case before the court. The grounds for departing from the general rule can thus never be a closed list. In these circumstances, it will also be extremely difficult to systematise when a court will depart from the general rule. At best we will be able to point to examples of when and in what circumstances a court departed from the general rule, that costs follow the event.

² 1918 AD 63 at 69.

³ 1959 (4) SA 579 (T) at 579H to 580B.

14. Mr Mthombeni who appeared on behalf of the first respondent submitted that the first respondent acted reasonably in opposing the confirmation of the *Rule Nisi* and that at least to some extent the applicant was responsible for the confusion that the first respondent laboured under in relation to the legal vehicle in which the deceased practiced as an attorney. If the facts as they emerge from the papers support these submissions, this would probably constitute a sufficient basis to depart from the general rule that costs follow the event.
15. Mr Groenewaldt, who appeared for the applicant, contended that: the first respondent was not reasonable in her opposition to confirmation of the *Rule Nisi*; it had always been the applicant's case that the deceased had been a sole practitioner; there was no confusion on this issue and certainly not on the part of the applicant; and first respondent had clung to the contention that the deceased practised through the vehicle of an incorporated professional entity long after it was established even by her own attorney that the deceased practiced as a sole practitioner.
16. The applicant made the positive assertion that the deceased practiced as a sole practitioner within the jurisdiction of this court in its founding affidavit.

17. In her answering affidavit the first respondent denies the contention that the deceased practiced as a sole practitioner and asserts that he practiced as an attorney through the vehicle of an incorporated professional entity, being a personal liability company. The first respondent further asserts that on the 14 July 2022 she sent one Sanele Mjila to the office of the applicant to enquire as to the status of Mjila and Partners Inc and that the Director of the Northern Cape LPC told him that it was a special case. The confirmatory affidavit of the said Sanele Mjila was attached to the first respondent's answering affidavit.
18. In responding to this contention, the deponent to the applicant's replying affidavit states that she told Sanele Mjila that "...the practice is a special case because the Applicant was under the impression that the firm of the deceased was a sole proprietor and not an incorporated company."
19. Given the fact that the applicant was always in possession of a copy of the fidelity fund certificate issued to the deceased, that a copy of the said certificate was annexed to the replying affidavit, that it is self-evident from the said Fidelity Fund certificate that the deceased was a sole practitioner, the facts overwhelmingly support her version of this exchange between herself and Sanele Mjila. In these circumstances the contention that the applicant was at least partially responsible for any

confusion relating to the legal vehicle the deceased used in his practice as an attorney cannot be sustained.

20. It subsequently came to light that a letter was written by a Mr B.A. Mahlabeni on the letterhead of Mjila & Partners Inc dated 13 September 2022 to the Northern Cape LPC. This letter revealed that Mr Mahlabeni who was to take over the company Mjila & Partners Inc knew from the trust account the deceased ran for his practice that the deceased practiced as a sole proprietor and not as an incorporated professional entity.

21. The applicant sought to place this letter before this court in a supplementary affidavit. The first respondent fought the admission of this letter quite vehemently. Be that as it may, the important consideration here is that she had direct knowledge of this letter and its import. That is quite clear from her affidavit opposing the admission of the supplementary affidavit.

22. These facts indicate that at least from 13 September 2022 the first respondent had direct knowledge of the true facts relating to her late husband's legal practice as an attorney. She continued to oppose the confirmation of the *Rule Nisi* until April 2023. Such continued opposition, cannot, in those circumstances be considered reasonable.

23. In all of these circumstances I cannot find that the first respondent acted reasonably in opposing the confirmation of the *Rule Nisi*. Nor can I find in these circumstances that the applicant is partially responsible for causing confusion relating to the vehicle used by the deceased in his legal practice as an attorney.

24. Further, in considering the exercise of this court's discretion, it is necessary to look to the nature and function of the LPC. The LPC is a body created by statute⁴. It has a number of objectives and functions set out in the relevant statute. Amongst those functions the LPC is to protect the public interest and regulate the profession⁵. Although certain allegations were made and aspersions cast against both the Director and Mr Groenewaldt, there was no evidence to substantiate these. On the contrary, the evidence shows that the application before us was brought in the public interest to protect the litigating public in the form of the clients of the deceased's firm, the profession and the deceased's firm.

25. There were times when the first respondent had legal representation but there were also times when she stood alone as a lay person. Allegations were made by the first respondent against Mr Groenewaldt that he was conflicted in this matter as he had acted for the deceased in at least two matters. It is clear from the first respondent who was not represented at that time that she regarded Mr Groenewaldt's taking of

⁴ Legal Practice Act 28 of 2014.

⁵ Section 5 of the above Act.

this case on behalf of the LPC as a personal betrayal by Mr Groenewaldt.

26. Mr Groenewaldt dealt with this contention comprehensively and showed that the two matters concerned were so far removed from the facts of the present case that there could be no question of confidences entrusted to him being used to the disadvantage of the first respondent. Therefore, there was no conflict of interest.

27. I can understand that a lay person in these circumstances would feel personally betrayed and injured. However, on the facts there is no basis for me to exercise my discretion to depart from the general rule on the question of costs.

28. There were four postponements in this matter for the most part costs relating to these postponements were reserved. Having regard to the order I intend making on the costs generally, the record of who requested these postponements and the reasons for such postponements, there would be no prejudice to either party if they were simply made costs in the cause.

29. In all of these circumstances, the applicant was substantially successful and there are no reasonable grounds to depart from the general rule that costs should follow the result.

Accordingly, the following order is made:

- 1) The applicant is awarded costs against the first respondent on the ordinary party and party scale.
- 2) The costs of the postponements are to be costs in the cause.

Lawrence Lever
Judge
Northern Cape Division, Kimberley

I agree,

P Tlaetsi
Judge President
Northern Cape Division, Kimberley

I agree,

C Williams
Judge
Northern Cape Division, Kimberley

Representation:

For The Applicant:

Mr Sj Groenewaldt

Instructed by:

Towell and Groenewaldt Attorneys

For The 1st Respondents:

Adv XP Mthombeni

Instructed by:

L-M Attorneys & Partners Inc.

Date of Hearing:

*15 September 2022; 16 November 2022;
08 February 2023; 01 March 2023; 13
April 2023.*

Date of Judgment:

01 March 2024