



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 916/2022

In the matter between:

WILLEM FRANCOIS BOUWER NO

(In his capacity as the appointed co-curator *bonis* of

J H J van Dyk, Ref: MC751/2017)

FIRST APPELLANT

ANNALI CHRISTELLE BASSON NO

(In her capacity as the appointed co-curator *bonis* of

J H J van Dyk, Ref: MC751/2017)

SECOND

APPELLANT

and

MASTER OF THE HIGH COURT, PRETORIA

RESPONDENT

Neutral citation: *Bouwer and Another NNO v Master of the High Court, Pretoria*
(916/2022) [2023] ZASCA 135 (19 October 2023)

Coram: SALDULKER, MBATHA and CARELSE JJA and NHLANGULELA and
WINDELL AJJA

Heard: 12 September 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court

of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 19 October 2023.

Summary: Administration of estates – annual curator’s account in terms of ss 83 and 84 of the Administration of Estates Act 66 of 1965 – realised capital asset reflected as income, not capital asset in the patient’s estate – remuneration of curator – applicable tariff in terms of regulations 7 and 8 – curator entitled to 6% fee on all funds reflected in the income account of annual curators’ account as collected, regardless of origin.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Skosana AJ, sitting as a court of first instance):

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel, where so employed.
 - 2 The order of the high court is set aside and replaced with the following:
 - ‘1. It is declared that the proceeds of the Absa current account, the sale of the vehicle and the debt collected from Dr Rita Nel, as reflected in the First Annual Curator’s Account in respect of the patient J H J van Dyk (Ref: MC751/2017), are correctly reflected as income and that these assets are not capital assets in the patient’s estate.
 2. A curator *bonis* is entitled to a 6% fee on all funds reflected in the income account of an annual curators’ account as collected or actually collected, regardless of the origin thereof.
 3. The respondent is ordered to pay the costs of this application, which includes the costs of two counsel where so employed.’
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JUDGMENT

Carelse JA (Saldulker and Mbatha JJA and Nhlangulela and Windell AJJA concurring):

[1] This is an appeal against the judgment of the Gauteng Division of the High Court, Pretoria, per Skosana AJ (the high court). The high court dismissed an application for declaratory orders by the appellants, the curators *bonis* of Ms Johanna Helena Josina van Dyk (the patient), against the respondent, the Master of the High Court, Pretoria. The declaratory orders involved the consideration of ss 83 and 84 of the Administration of Estates Act 66 of 1965 (the Act), read with regulations

7 and 8, promulgated under s 103 of the Act.¹ The appeal is with leave of the high court.

[2] On 8 June 2018, a court order was granted declaring the patient of unsound mind and incapable of managing her affairs in terms of rule 57 of the Uniform Rules of Court.² On 13 June 2018, Mr W F Boucher, a male practising attorney and Annali Christelle Basson, a Judge of the Gauteng Division of the High Court, Pretoria, were appointed co-curators *bonis*, the first and second appellants respectively. The second appellant is the daughter of the patient. The respondent is the Master of the High Court, Pretoria.

[3] In terms of s 83 of the Act, a curator is obliged to lodge annually 'a complete account in the prescribed form of his administration'. Section 83 of the Act provides:

'(1) Every tutor or curator shall-

(a) on or before the date in every year which the Master may in each case determine, lodge with the Master a complete account in the prescribed form of his administration during the year ending upon a date three months prior to the date so determined, supported by vouchers, receipts and acquittances and including a statement of all property under his control at the end of such last-mentioned year, and if he carries on any business or undertaking in his capacity as tutor or curator, also a statement relating to such business or undertaking; and

(b) if required to do so by the Master by notice in writing, produce, within a period specified in the notice, for inspection by the Master or by any person nominated by him for the purpose, any securities held by him as tutor or curator.

(2) Any person who ceases to be tutor or curator shall, not later than thirty days thereafter, or within such further period as the Master may allow, lodge with the Master a complete account, in the prescribed form, of his administration between the date up to which his last account was rendered under subsection (1) and the date on which he ceased to be tutor or curator, supported by vouchers, receipts and acquittances, and including a statement of all property under his control immediately before he ceased to be tutor or curator.'

¹ Regulations promulgated under s 103 of Act 66 of 1965, GNR 473, GG 3425, 24 March 1972 (the Estates Regulations).

² Rule 57(1) of the Uniform Rules of Court provides:

'Any person desirous of making an application to the court for an order declaring another person (hereinafter referred to as "the patient") to be of unsound mind and consequently incapable of managing his or her own affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator *ad litem* to such patient.'

[4] On 1 July 2019, the first appellant (with the consent of the second appellant) lodged the first curator's account for the period 2018/2019 with the respondent in the prescribed format set out in regulation 7. Regulation 7 of the Estates Regulations provides:

'The account referred to in section 83(1) and (2) of the Act shall-

(1) contain a heading which shall-

...

(d) specify the period in respect of which the account is rendered and state whether it is an account in terms of section 83(1) or (2) of the Act; and

...

(2) contain a money column;

(3) specify under a subheading "Income and expenditure account"-

...

(b) all income actually collected reflecting the source from which it is derived;

(c) any money transferred from the "Capital Account" referred to in subregulation (4) to meet debts and charges;

...

(4) specify under a subheading "Capital Account"-

...

(e) the amount of any capital asset or part thereof realised, with a description of such asset, and the amount of any money transferred to the "Income and Expenditure Account" as provided in subregulation (3)(c), with reasons for such transfer.'

[5] According to the first curator's account, the income reflected in the 'income and expenditure' section comprised of the following amounts: interest earned on a Standard Bank account; pension received from the Department of Justice; Government Employees Pension Income; an Absa cheque deposit from an Absa current account; a vehicle that was sold; and a debt collected from a Dr Rita Nel. The Absa current account, the vehicle and the outstanding debt were assets of the patient that were realised by the appellants for the purpose of using the proceeds to cover the patient's monthly expenses. The total amount realised was R423 084.60. The first curator's account reflected the total income collected, being R1 311 392.94, wherein provision was made for remuneration for the curators at the prescribed tariff provided for in regulation 8(3)(a), being 6% of the total income collected for the period 2018/2019, which was an amount of R78 683.58.

[6] The respondent disputed that the realised assets were correctly reflected as income collected, and alleged that the curators *bonis* were not entitled to claim 6% remuneration in respect of the three realised assets. On 2 October 2019, the respondent sent a letter to the first appellant instructing him to amend the first curator's account to exclude the amount of R423 084.60 (the realised capital assets), reflected in the 'income and expenditure' section of the first curator's account. This was on the basis that it was not income collected but capital assets which remained same, even if the assets were realised. For these reasons, the respondent directed the appellants to calculate its fees on the amount of R885 503.41 and not R1 311 392.94 as reflected in the first curator's account. Simply put, the respondent contended that the appellants were not entitled to receive a 6% fee on the realised capital assets, as the 6% curator fees would only accrue once the proceeds thereof, when invested, started earning interest. This was disputed by the appellants, who as a result of the impasse, sought declaratory relief.

[7] In determining the issues, the high court sought to interpret the relevant legislation. It was not necessary to do so, because on a close scrutiny of regulations 7 and 8 of the Estates Regulations read with ss 83 and 84 of the Act, it is apparent that these provisions are clear and express. That being so, the issues in this appeal are narrow and crisp. The first is whether the proceeds of capital assets that have been realised should be reflected in the income and expenditure section in the first curator's account, or reflected as a capital asset instead. Pertinently, the crux of the matter is, whether the moment an investment is collected and deposited into the patient's estate's bank account, the assets change in nature and identity from a capital asset to income received. The second, which is inter-related to the first issue, is whether the proceeds of the realised assets will attract the 6% tariff, or whether the curator is only entitled to 6% remuneration on the interest collected from the realised capital assets, when invested.

[8] The heads of argument raised several points *in limine*. The respondent, correctly in our view, did not persist with the points *in limine*.

The first issue

[9] It is the appellants case that regulation 7(3)(b) of the Estates Regulations³ expressly provides that once capital assets are realised, they lose their identity as capital assets and the proceeds thereon become income actually collected and must be reflected under the heading 'income and expenditure' in the curators' account. Although the respondent agrees with this proposition, she simultaneously advocates for a 'third category' to reflect the origin of the income. The appellants accept that the capital asset will be reflected in the capital account, but contend that once realised, it should be reflected in the income account.

[10] The regulations do not provide for a third category of account, as the respondent contended. In our view, the wording in regulation 7 is mandatory and expressly provides for two accounts. Regulation 7(3)(b) requires all income actually collected to be entered in the money column under the sub-heading 'income and expenditure account'. And regulations 7(3)(c) and 7(4)(e) provide that any capital assets realised, should be transferred from the 'capital account' into the 'income and expenditure account' with reasons for such transfer.

[11] Once capital assets are realised, it changes in nature and identity. The capital asset no longer exists, and to reflect the asset in the capital account will result in a distorted financial statement. That being so, the curator has no choice but to enter the realised asset in the 'income and expenditure account'.

The second issue

[12] The second issue deals with the remuneration of the curators *bonis* and the applicable tariff that should be applied. Section 84 of the Act provides:

'(1) Every tutor and curator shall, subject to the provisions of subsection (2), be entitled to receive out of the income derived from the property concerned or out of the property itself-

(a) such remuneration as may have been fixed by any will or written instrument by which he has been nominated; or

(b) if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master.

(2) The Master may-

³ See para 4 above.

- (a) if there are in any particular case special reasons for doing so, reduce or increase any such remuneration; or
- (b) if the tutor or curator has failed to discharge his duties or has discharged them in an unsatisfactory manner, disallow any such remuneration, either wholly or in part.'

[13] The applicable tariff that the curator is entitled to is set out in regulation 8(3), which provides as follows:

'(3) The remuneration of tutors and curators referred to in section 84(1)(b) of the Act shall be assessed according to the following tariff:

- (a) *On income collected* during the existence of the tutorship or curatorship: 6 per cent;
- (b) on the value of capital assets on distribution, delivery or payment thereof *on termination of the tutorship or curatorship*: 2 per cent.' (My emphasis.)

[14] The appellants contend that because capital assets were realised, the applicable tariff is 6% of the income received and should be entered under the sub-heading 'income and expenditure account'. The respondent, on the other hand, contends that realised capital assets should not attract a tariff of 6% because the origin of the income collected is from capital assets. Instead, so it is argued, the applicable tariff is 6% of the interest collected from when the proceeds of the realised asset are invested.

[15] The legislative scheme (the Act and the Estates Regulations) clearly envisages two sets of tariffs, namely 6% on the income collected annually and a 2% tariff at the end of the curatorship when the patient's capital is distributed. Regulation 8(3)(b) is only triggered when the curatorship is terminated and not during the curatorship.

[16] The effect of the respondent's contention would be to leave the curator bereft of recompense. If the curator must be paid, *'in terms of section 84(1) of the Act, a curator is to receive some of his remuneration out of the "income collected" from the estate concerned, and the rest of the capital assets of such estate when these are realised and the proceeds paid or the assets are delivered or distributed at the end of the curatorship'*.⁴

⁴ *Burne and Another NNO v Master of the High Court, Natal Provincial Division* (2937/97) (an unreported judgment from the Natal Provincial Division delivered on 14 September 1998) at 9.

[17] The 2% tariff is not applicable for the reasons set out above. If the respondent has concerns that the 6% tariff is out of proportion, its remedy lies in s 84(2)(a) or (b) of the Act, in that the respondent can reduce, increase, or disallow a curator's remuneration, where there are 'special reasons' for doing so. In this matter, the curatorship has not been terminated, therefore, regulation 8(3)(b) finds no application. Accordingly, the appellants are entitled to 6% of the income received from the realised capital assets.

Costs

[18] The court *a quo* made no order as to costs because the matter raised fairly complex issues of law. However, in this Court, the appellants seek costs of two counsel, where so employed. The respondent contends that the usual costs order, that costs follow the result, should not apply. It must be borne in mind that the appellants instituted proceedings in their official capacities as curators, relating to their fees for the period 2018/2019. Because of the deadlock between the appellants and the respondent, the appellants launched an application for declaratory relief on 25 January 2021, which was served on the respondent on 2 February 2021.

[19] On 23 February 2021, the respondent filed a notice of its intention to oppose the relief sought. The answering affidavit had to be filed on or before 12 March 2021, but was served in August 2021, some 100 court days later. The explanation for the delay appears to have been caused by the tender process involving the appointment of senior counsel and the unavailability of senior counsel. In this Court, the heads of argument were only filed on 7 September 2023, five days before the hearing of the appeal. The reason proffered for the delay was that the state attorney was unaware that an email was sent by this Court in April 2023. The email was discovered only on 21 August 2023. There is no explanation for the delay from 21 August 2023 until 7 September 2023. The explanation for the delays is unconvincing.

[20] The respondent raised several points *in limine* in the court *a quo*, all of which were dismissed. These points were repeated in the respondent's heads of argument. Regrettably, it was only on the morning of this hearing that counsel for the

respondent informed the appellants counsel that he was not persisting with the points *in limine*, and was only briefed to argue the matter on the merits.

[21] Another disturbing feature of this case is the statement of the respondent that the appellants are busy with some dubious 'scheme', a serious allegation which is without any foundation or substance. The first appellant is an attorney and the second appellant is a Judge of the High Court. One would expect that if scandalous allegations were made against officers of the court, there would be sound justification for it. It is the duty of this Court to protect the integrity of the legal system and to dissuade unwarranted attacks that undermine the administration of justice.

[22] It is trite that a court must exercise its discretion judicially when it awards costs. As a general rule the successful party should have his or her costs awarded. There are exceptions where a successful party is deprived of his or her costs. Depriving successful parties of their costs can depend on circumstances such as: the conduct of the parties; the conduct of the legal representative; whether a party has had only a technical success; and the nature of the litigation.⁵

[23] Because the State and the government are considered legal *personae*,⁶ they can be held liable for the costs of litigation.⁷ There are, however, special rules relating to an award of costs involving statutory, quasi-judicial bodies and public officers.⁸ Statutory, quasi-judicial bodies and public officials, even if mistaken but *bona fide*, generally should not have costs awarded against them.⁹ Nevertheless, this general rule is subject to qualification.¹⁰ Where a public official's conduct is

⁵ A C Cilliers *Law of Costs* (2019) SI 40 at 3-3-3-4.

⁶ *Ibid* at 10-4.

⁷ *Die Regering van die Republiek van Suid-Afrika v Santam Versekeringsmaatskappy Bpk* 1964 (1) SA 546 (W) at 549.

⁸ Cilliers at 10-6.

⁹ *Coetzeestroom Estate and GM Co v Registrar of Deeds* 1902 TS 216 at 223-224, where Innes CJ stated the following:

'With respect to the question of costs, the Court should lay down a general rule in regard to all applications against the Registrar arising on matters of practice. To mulct that official in costs where his action or attitude, though mistaken, was *bona fide* would in my opinion be inequitable. And it would be detrimental to that vigilance in the administration of the Deeds Office, which is so essential in the public interest to maintain. . . The rule will not apply to cases in which the Registrar may be sued for damages caused to a third party by a negligent or improper discharge of his duties. *In all such cases the question of costs will have to be decided simply on the facts before the Court.*' (My emphasis.)

¹⁰ *Deneysville Estates Ltd v Surveyor-General* [1951] 2 All SA 202 (C); 1951 (2) SA 68 (C).

anything but *mala fide* or grossly irregular, a court can exercise its discretion and award costs against a public official, where the circumstances justify such.¹¹

[24] In this case the long delay in filing the answering affidavit, the lateness of the heads of argument, for flimsy reasons, and the unfounded scandalous statement that was made against the appellants, an attorney and a Judge of the High Court, are relevant circumstances. Moreover, it would be unjust for the costs to be borne by the estate of the patient. The fact that the respondent was acting in its official capacity is not a sufficient reason to deprive the appellants of their costs. The conduct of the respondent during the proceedings to the extent that the respondent chose to raise points that were unhelpful, its opposition on the merits which was a bare denial, instead of assisting the court to reach a just decision, is worthy of this Court's rebuke. The respondent could have abided the decision of this Court. Accordingly, this is an extraordinary case where a costs order should be made against the respondent.

[25] In the result, the following order is made:

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel, where so employed.
- 2 The order of the high court is set aside and replaced with the following:
 - '1. It is declared that the proceeds of the Absa current account, the sale of the vehicle and the debt collected from Dr Rita Nel, as reflected in the First Annual Curator's Account in respect of the patient J H J van Dyk (Ref: MC751/2017), are correctly reflected as income and that these assets are not capital assets in the patient's estate.
 2. A curator *bonis* is entitled to a 6% fee on all funds reflected in the income account of an annual curators' account as collected or actually collected, regardless of the origin thereof.
 3. The respondent is ordered to pay the costs of this application, which includes the costs of two counsel where so employed.'

¹¹ See Cilliers para 10.07.

Z CARELSE
JUDGE OF APPEAL

Appearances

For the appellants: P G Cilliers SC and A P J Boucher
Instructed by: WF Boucher Attorneys Incorporated, Pretoria
Symington De Kok, Bloemfontein

For the respondent: M Malowa SC and P Dube
Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein