



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. 1340/2022

In the matter between:

MZINGAYE GQOMO

Applicant

and

LEGAL PRACTICE COUNCIL

Respondent

REASONS FOR JUDGMENT

LAING J

[1] This was an application for the review and setting aside of a decision taken by the respondent. The applicant also sought an order remitting the decision back to the respondent for reconsideration by an investigating committee. In the alternative, the applicant sought an order declaring the decision invalid and replacing it with the court's own decision.

[2] The parties settled the merits of the application prior to argument. The court subsequently directed each party to pay its own costs. The applicant has requested written reasons for the order.

Applicant's case

[3] On 19 May 2021, the applicant lodged a complaint with the respondent's Eastern Cape provincial office about the conduct of an East London legal practitioner, Mr Bernardus Niehaus. It is unnecessary to set out the details thereof, save to mention that it pertained to the authenticity of an affidavit deposed to by a Mr Siyabulela Mananga, who had instructed Mr Niehaus to institute action proceedings against the applicant in relation to a claim previously brought against the Road Accident Fund.

[4] The provincial office referred the matter to an investigating committee, which dismissed the complaint. On 7 July 2022, the provincial office informed the applicant of the decision and advised him that he was entitled to appeal the findings of the investigating committee. An internal appeal was not available to the applicant, however, because the appeal tribunal established by the respondent was not yet operational.

[5] The applicant then launched the present application, challenging the investigating committee's decision. The basis of the challenge was that available evidence demonstrated that Mr Mananga had no capacity to sign the affidavit by reason of the injuries that he had sustained in a motor vehicle accident.

Respondent's case

[6] The respondent filed its answering papers. It pointed out that the director of its provincial office, a Mr Alfred Hona, had contacted the applicant and indicated that the respondent was amenable to settlement of the matter as follows:

‘...The decision of the investigation committee dated 9 June 2022 is set aside, and the Applicant’s complaint shall be referred to a new Investigation Committee appointed by the Director of the Respondent’s Eastern Cape Provincial Office for investigation in accordance with Rule 40 of the Rules promulgated under the Legal Practice Act, with the investigation committee to consist of at least two suitably qualified legal practitioners; and

...each party shall pay its own costs.’¹

[7] The applicant accepted the proposal but insisted that the respondent pay the costs of the application on an attorney-and-client scale. The parties reached a deadlock on the issue.

[8] The respondent averred that it had made the proposal for pragmatic purposes, to avoid the costs of litigation. In any event, no internal appeal was available because the appeal tribunal was not yet operational.

In reply

[9] The applicant asserted that the respondent had failed to comply with rule 53 of the Uniform Rules of Court (‘URC’) since it had failed to deliver the record of the investigating committee’s decision. This had created prejudice.

[10] He admitted that he had accepted the respondent’s proposal, save for the question of costs. The real reason why the respondent made the proposal, said the applicant, was because it had not properly investigated his complaint before reaching its decision.

¹ Sic.

Issues to have been decided

[11] The parties were *ad idem*, at the commencement of argument, that the only issue before the court was that of costs. The merits had already been settled.

[12] It is necessary to discuss, briefly, the principles that were relevant to the decision.

Legal framework

[13] A court enjoys a wide discretion when making a costs order. Van Loggerenberg has this to say about the subject:²

'It has frequently been emphasized that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides. In leaving the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.'³

[14] The standard rule is that the successful party is entitled to his or her costs. However, in deciding who is the successful party, a court must consider the substance of the judgment and not merely its form.⁴

[15] In a situation where the merits of the dispute have been disposed of, such as here, the principle is that the question of costs must be decided along broad, general

² DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 20, 2022), at D5-6.

³ The principles were set out in *Fripp v Gibbon & Co* 1913 AD 354 and have been followed consistently. See, more recently, *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), at 298E; and *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* 2022 (5) SA 56 (SCA), at paragraph [78].

⁴ DE van Loggerenberg, *op cit*, at D5-7.

lines. The court must not decide the question along lines that would necessitate a full hearing of the merits.⁵

[16] The application of the above legal framework to the facts of the matter is addressed in the paragraphs that follow.

Application to the facts

[17] The applicant refuted, at the outset, the respondent's assertion that the settlement proposal had been made for pragmatic purposes. He contended, rather, that the respondent's settlement proposal was a concession that it had not properly investigated his complaint. He provided no substantiation for this.

[18] The court could not decide whether there was a basis for the applicant's contention without a full and proper hearing of the merits. The merits were, however, not before the court. In the circumstances, the applicant was constrained to rely primarily on the standard rule that he was entitled to his costs because he had been substantially successful, overall, in his application. The proposal made by the respondent was the main relief that the applicant had sought originally.

[19] To have asserted that the standard rule should have been applied was incorrect. It ignored the obvious, viz. that the respondent had not made any concession regarding the merits of the applicant's claim. Moreover, no court had made any findings thereon.

[20] The applicant was confronted, too, by the issue of non-joinder. The test for joinder was clearly stated in *Henri Viljoen (Pty) Ltd v Awerbuch Bros.*⁶ The court in that regard affirmed earlier authority to hold that a person is a necessary party and should be joined if such person has a direct and substantial interest in any order that the court

⁵ DE van Loggerenberg, *op cit*, at D5-36D. See, too, *Jenkins v SA Boilermakers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15, at 17-18; and, more recently, *Eloff v Road Accident Fund* 2009 (3) SA 27 (C), at 35D-I.

⁶ 1953 (2) SA 151 (O).

might make; alternatively, if such an order cannot be sustained or carried into effect without prejudicing such person, unless he or she has waived the right to be joined.⁷

[21] In the present matter, the respondent pointed out that the Eastern Cape Provincial Council was a statutory body that had been established in terms of section 23(1) of the Legal Practice Act 28 of 2014 ('the LPA'). It was distinct from the respondent and had the power to establish investigating and disciplinary committees. The applicant had failed to join it as a party to the proceedings. Furthermore, the investigating committee whose decision formed the subject of the application was also a distinct legal entity, established under section 37(1) of the LPA. This, too, had not been joined. Both the Eastern Cape Provincial Council and the investigating committee had a direct and substantial interest in any order that reviewed and set aside a decision taken regarding a complaint lodged against a legal practitioner.

[22] Possibly of most concern to the court, however, was the applicant's failure to have joined the legal practitioner himself, Mr Niehaus. He was the object of the applicant's complaint. The investigating committee had previously invited him to submit a response to the complaint, which he had done. At the least, it can hardly be said that Mr Niehaus would have suffered no prejudice if an order had been made that reviewed and set aside the decision and remitted it back to the investigating committee for reconsideration, alternatively, replaced it with the court's own decision. He would have been entitled to participate in the proceedings and to defend the matter. The applicant never afforded such an opportunity to Mr Niehaus.

[23] The applicant referred, in argument, to *Legal Practice Council v Craddock*.⁸ That matter is distinguishable from the present, however, since it pertained to an application for an order striking the respondent from the roll of attorneys.

Relief and order

⁷ *Kethel v Kethel's Estate* 1949 (3) SA 598 (A), at 610; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) 637 (A), at 659. The principle continues to be followed as apparent from, more recently, *Watson NO v Ngonyama* 2021 (5) SA 559 (SCA), at paragraph [52]. See, too, the discussion in DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat, RS 16, 2021), at D1-124.

⁸ 2022 JDR 2317 (ECMA).

[24] Having considered the circumstances of the matter, the court was not persuaded that the applicant was entitled to his costs. It was clear that the respondent had merely made the proposal in view of the practical requirements and likely consequences of proceeding further with litigation. It was a matter-of-fact approach to a situation where, in the absence of an internal appeal process, the delays and expenses of litigation were best avoided by both parties. The respondent made no concessions whatsoever in relation to the merits.

[25] The failure of the applicant, moreover, to have joined the Eastern Cape Provincial Council, the investigating committee, and (most importantly) Mr Niehaus, would have created difficulties for him at any hearing of the merits. Such difficulties could have proved fatal for the applicant. As with the merits of the matter, however, the issue of non-joinder was not before the court.

[26] The court, overall, was satisfied that it would have been fair and just to both parties simply to have directed them to pay their own costs. This was, in the end, the order that was made.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant: Adv Kilani, instructed by F. Myaiza Attorneys, East London.

For the respondent: Adv Watt, instructed by Wheeldon Rushmere & Cole Inc,
Makhanda c/o Lionel Trichardt & Associates, East London.

Date of hearing: 16 February 2023.

Date of delivery of reasons for judgment: 04 May 2023.