CASE NO.: A 204/98

INDIGO SKY GEMS (PROP) LTD versus CHRISTOPHER LYN JOHNSTON

HANNAH, J.

1998/09/10

CIVIL PROCEDURE

COSTS

Award of costs on attorney and client scale may be made when the proceedings are vexatious although there is no intent that they should be. Vexatious to give applicant the relief sought but then fail to tender costs therefore putting applicant to expense and trouble of coming to court to obtain a costs order.

CASE NO. A *204/9S* .

IN THE HIGH COURT OF NAMIBIA

In the matter between:

INDIGO SKY GEMS (PROP) LTD

versus

CHRISTOPHER LYN JOHNSTON

CORAM: HANNAH, J.

Heard on: 1998.09.10

Delivered on: 1998.09.10

JUDGMENT:

HANNAH, J.: In this application the applicant sought an order directing the respondent to return a certain vehicle to it and an order that the respondent pays the costs of the application on the scale as between attorney and client. The respondent filed a notice of intention

to oppose but then capitulated and returned the vehicle to the applicant without filing any answering affidavit. The sole issue which therefore remains to be determined is that of costs.

The brief facts as set out in the founding affidavit are as follows: The respondent was employed by the applicant and as an employee was provided with a vehicle. In July, 1997 the respondent tendered his resignation. On 29 August, 1997 and again on 8 September, 1997 written demands were made for the return of the vehicle but it was not returned. In response to these demands the respondent's attorney adopted the stance that the demands had been made by an unauthorized person and in any event the respondent was still a director of the applicant company and as such was entitled to retain company assets. A further point advanced was that the respondent had a lien over the company assets for monies owed to him. There then followed a letter from the applicant to the respondent advising him that he was disqualified from holding the position of director by virtue of certain criminal convictions and this was followed by the launch of the present application on 12 January, 1998. I would add that on 22 September, 1997 the respondent commenced proceedings in the District Labour Court for unfair constructive dismissal and one ground upon which the applicant to the present application opposed the complaint was that the respondent was not in fact employed by the applicant but by a company registered in the Channel Islands.

Mr Smuts, for the applicant, submits that given the foregoing facts the applicant is clearly entitled to the costs of the application. The applicant was obliged to bring the application in order to obtain the return of its property. And counsel further submits that not only is it clear that the respondent never had a defence to the applicant's claim but costs have never been tendered. In these circumstances the right order, he submits, would be for costs to be paid on an attorney and client scale. In making the

submission Mr Smuts relies on certain words of Gardner J P in *In re Alluvial Creek,* 1929 CPD 532 at 535 to the effect that an award of costs on an attorney and client scale may be made when the proceedings are vexatious although the intent may not have been that they should be vexatious. I will consider the submission in due course but'before ■doing so will refer to the argument of Mr Bioch on behalf'-of:the' respondent. ••••• ' ••

Mr Bloch's heads of argument contain a considerable amount of factual material over and above that as set out in the application papers. Mr Bloch has sensibly accepted that I should not have regard to that extraneous material. Mr Bloch first contrasts the allegation made in the founding affidavit that the respondent was employed by the applicant with the allegation made in the reply in the proceedings before the District Labour Court that he was employed by a Channel Island company. Mr Bloch submits that this contradiction shows *mala fides* on the part of the applicant and its deponent. That, of course, is a possibility but there may be a simple explanation. In any event the point sought be taken does not touch on any defence the respondent may have had to the application but which he has not chosen to disclose.

Next, Mr Bloch takes exception to the allegation made in the founding affidavit and in correspondence that the respondent has criminal convictions. He contends that it has no relevance to the application and is scandalous and vexations. But the allegation does have a purpose and, if true, a good one. It is included to show that the

respondent was no longer director of the applicant company and to meet the claim made by his attorney in correspondence that as a director he was entitled to retain company assets. It was, of course, open to the respondent to deal with the allegations in an answering affidavit but this he did not do nor did he apply to have the allegations struck out as being based on hearsay. And then Mr Bloch complains that the applicant could have instructed counsel less senior than Mr Smuts.

The answer ι..is that, the applicant can instruct any legal practitioner'of its choosing-although if-counsel's .fesrris. Kursasoaablc that, of course, can. be dealt with at taxations Emallyp Mr Bloch refers the Court to various extracts from'Cilliers, Law of Costs arid invites the Court to order each party to pays its own costs.

I now return to Mr Smuts' submissions. With regard to his submission that costs should follow the event, the event being the return of the vehicle, Mr Bloch correctly points out that although the general rule is that costs follow the event there are circumstances where that general rule is departed from. Examples are given in the extracts from Cilliers, Law of Costs annexed to Mr Bloch's heads of argument and these include improper conduct in or in connection with the litigation, the reasonable conduct of the unsuccessful litigant and moral considerations. However, I am not persuaded that any such matters arise in the present application so as to justify a departure from the general rule. And accordingly I find that the applicant is entitled to its costs. As for the question of the scale of those costs I see no reason to make a special order up to the point in time when the notice of set down was served. I do not regard the respondent's conduct as vexatious up to that point in time even giving that word the wide meaning attributed to it by Gardner, J.P. in *In re Alluvial Creek*

Ltd. supra. The respondent may well have genuinely thought that as a director or creditor of the applicant he had some kind of right to possession of the vehicle or a lien over it and it would seem that this was the advise given to -him by his attorney. In the *Allivial Creek* case on the other hand the litigant persisted in litigation after a settlement have been reached and the Court found that this was something which he must have known he could not do.

However, once the vehicle had been returned the conduct of the respondent in failing to tender costs on a party and party basis and putting.the applicant to the unnecessary expense and trouble of coming to court to obtain a costs order was, in my view, vexatious in the wider sense of that word.

Accordingly, I order that the respondent pays the costs of the application. The costs incurred after service of the notice of set down are to be paid on the scale as between client and attorney.

ON BEHALF OF APPLICANT	ADV D SMUTS
Instructed by:	Lorentz & Bone
• ON'"BEHALF OF RESPONDENT	ADV B BLOCH
Instructed by:	Bloch & Company