IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

CASE No A 260/2007

HELD AT WINDHOEK

In the matter between

ERF SIXTY-SIX, VOGELSTRAND (PTY) LTD	**RESPONDENT/APPLICANT**

and

THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND	**1ST APPLICANT/RESPONDENT**
BEACH LODGE CC	**2ND APPLICANT/RESPONDENT**
THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT	**3RD APPLICANT/RESPONDENT**

Coram: DAMASEB, JUDGE-PRESIDENT

HEARD: 27 February 2012
DELIVERED: 13 March 2012

JUDGMENT

DAMASEB, JP: [1] This is an application for costs in terms of rule 42(1)(c) of the High Court Rules, following the withdrawal of a rule 53 review application. Both the first and second respondents sought costs against the

applicant after it withdrew the review application without tendering costs. The first respondent did not pursue its application in terms of rule 42(1)(c) - apparently having come to an understanding with the applicant that each party bear its own costs. Only the second respondent moved its application before me on 27 February 2012. The first respondent did not appear. I will refer to the parties as cited in the main application: The first respondent is the municipality of Swakopmund whose decision-making was sought to be reviewed, while the second respondent is a body corporate in whose favour the first respondent had taken the decision which was the subject of the review application brought by the applicant.

[2] The applicant withdrew its review application on 3 July 2008 without tendering costs, in terms of Rule 42(1)(a). The second respondent seeks a punitive costs order, and to include two instructed Counsel. It maintains that the applicant acted vexatiously in bringing the review application when it did. The applicant opposes the application for costs and maintains that it was impelled by the unlawful conduct of the first respondent- which conduct the second respondent benefitted from - to come

to Court to seek review relief. It asserts in counsel's heads of argument that the unlawful conduct has since been conceded by the first respondent.

[3] The applicant initially sought urgent relief[1]. On 12 October 2007 Mainga J (as he then was) dismissed the urgent application for lack of urgency and struck the matter from the roll, with costs. Thereafter, the first respondent filed the record of the decision sought to be reviewed[2], and proceeded to file answering papers. The applicant never supplemented[3] or replied although it had sought, and was granted, extension of time to file a supplementary affidavit. The first respondent also filed answering papers, albeit out of time.

[4] The applicant then withdrew its application for review. Nothing appears on the record why it withdrew the review application, or why no costs were tendered in view of the withdrawal.

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[1]On 5 October 2007.

[2]In terms of Rule 53(11)(b).

[3]Sub-rule (4) of Rule 53 states: *"The applicant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit."*

[5] It bears mention at this stage that after Mainga J struck from the roll the urgent application, the applicant appealed that order to the Supreme Court but never prosecuted it with the result that it lapsed. Before it launched the appeal, applicant had apparently sought reasons for the dismissal of the urgent application. It appears that Mainga J was unimpressed by the request as he felt such reasons were not necessary as they were quite apparent from the record. The learned judge said the following (at p4 of the cyclostyled judgment)[4]:

> "The second term was congested and could not come by to furnish reasons in this matter as requested, after all I feel very strongly that the request for reasons in this matter is unnecessary as the reasons for the refusal to hear the application on an urgent basis are apparent from the application..." (My underlining for emphasis)

[6] Nevertheless, Mainga J proceeded to give the reasons sought. I mention this fact at this stage because it has a bearing on my reasons for the order that I make.

[4]Delivered on 22 August 2008. The urgent application was struck from the roll on 12 October 2008.

[7] In Paras [14]– [17] Mainga J explained why the urgent application was struck from the roll for lack of urgency. He said:

> *"[14] An applicant who desires to seek the indulgence of the court on an urgent basis should not wait until what he/she is seeking to prevent is eminent or has commenced and then rely on urgency to have his matter heard. In Bergmann v Commercial Bank of Namibia Limited, supra, at 50G – I Maritz J had this to say:-*
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> *"When an application is brought on a basis of urgency, institution of the proceedings should take place as soon as reasonable possible after the cause thereof as arisen."*
>
> *[15] Applicant objected to the rezoning of Erf 109 in January 2007. On 30 August 2007 it became aware of the decision of the Municipal Council of Swakopmund declining Second Respondent's application as requested but approved a zoning of "special" as a licenced hotel with certain conditions. It took applicant eleven days and twenty days before its legal representatives wrote letters to the Municipality Council and the Second Respondent respectively. It should have occurred to the applicant that with the approval of the Municipal Council of rezoning Erf 109, the second respondent who bona fides applied for rezoning of that erf would commence the building extensions to the erf any time after the approval. Even more so that the Council's decision was made in June and the Applicant came to know about it after two months.*

[16] From 30 August 2007 when applicant learnt of the Council's decision to the time when the application was instituted was over a month. There is no evidence when the Second Respondent commenced with its building extensions. It is possible that by 30 August when Applicant learnt of the Council's decision, the Second Respondent had already commenced its building constructions. From the photos (CCL 17.2) taken of the improvements on Erf 109 on 3 October, again after a month since applicant learnt of the Council's decision, the extensions were at an advanced stage.

[17] The prejudice complained of is that the flats to be built on erf 66 which property was acquired in 1998, yet up to the time of this application had not commenced with the development of the property, would be of the rear of the structures on erf 109, impeding the sea view of some of the rooms to be built on erf 66 and that if the rooms of the hotel on erf 66 are to be redesigned to an increased height, it will entail a severe extra cost not only in design but also in building costs"

[8] There is no explanation by the applicant why the appeal against this order was not prosecuted to its logical conclusion.

[9] The following facts are common cause as confirmed during argument before me:

i) Following the striking of the urgent application, the first respondent filed the record of the proceedings sought to be reviewed. Although the applicant sought an extension of the time period within which to file supplementary affidavits, it failed to supplement. It did not inform the respondents that the application will no longer be pursued and that they should not incur further costs; or why it had chosen not to supplement.

ii) The first respondent thereafter proceeded to file answering papers on 22 February 2008. The second respondent filed answering papers on 27 March 2008. The applicant never replied after both sets of papers were filed. Again the applicant did not advise the respondents that it was not going to reply and that it would no longer be pursuing the review application; and why not.

iii) On 3 July 2008 the applicant filed a notice of withdrawal of the review application[5] without disclosing any reason; and just a few days later filed another review application against the same respondents relative to the same building of the second respondent.

[10] The first issue I must determine is whether, in adjudicating the opposed Rule 42(1)(c) application, I must do so by considering the merits of the matter as a whole based on the papers as they stood after the first respondent answered; or whether I should determine the costs liability solely on the basis of the conduct of the parties in the litigation. The Court has a discretion in the matter. As this Court said in *Channel Life Namibia Ltd v Finance in Education (Pty) Ltd* 2004 NR 125 at 126F-G:

> *"There may very well be cases where the Court will have no other choice but to consider the merits of a matter in order to make an appropriate costs allocation, while there will, doubtless, be others where the Court may make an appropriate costs allocation based on the 'material' at its disposal, without regard to the merits of the case. Each case will be treated on its own facts."*

[5]About 4 months after the first respondent answered and about 3 months after the second respondent answered.

[11] I am guided by the quoted dicta in the following cases: In *Germishuys v Douglas Besproeiingsraad*[6] the court said:

> *"Where a litigant withdraws an action or in effect withdraws it, very sound reasons... must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings."*

In *Reuben Rosenblum Family Investments (Pty) Ltd and another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening*[7]*, the court said:*

> *"Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him."*

[12] The Court retains discretion as to the award of cots, even where an action or application has been

[6]1973 (3) SA 299 (NC) at 300E.
[7]2003(3) SA 547 (C) at 550C-D

withdrawn[8]. It is ultimately a question of fairness as between the parties. The Court may therefore in the exercise of its discretion in appropriate circumstances take into account that the party that has withdrawn the litigation was justified in bringing the litigation:

> *"It is clear from the above, in my view, that, even in cases where litigation has been withdrawn, the general rule is of application, namely that a successful litigant is entitled to his costs unless the Court is persuaded, in the exercise of its judicial discretion upon consideration of al facts, that it would be unfair to mulet the unsuccessful party in costs."*[9]

[13] If I understood Mr Totemeyer correctly, the first respondent has not made any concession of its liability to pay applicant's costs, or indeed the costs of the second respondent for that matter. Mr Totemeyer informed me from the bar that first respondent's legal practitioner of record is aware that at this proceeding, the applicant will in the alternative invite the court to order that in the event of the second respondent being

[8]See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773A at 786C; *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 797H.

[9]*Wildlife and Environmental Society of South Africa* supra at 131B-D.

entitled to its costs flowing from the withdrawn review application[10], such be borne by the first respondent - not the applicant - the first respondent had misled the applicant in its decision-making and thus necessitated the review since withdrawn. According to Mr Totemeyer, the first respondent conceded in the answering papers that it had acted in error in its decision-making and that it was going to put right the error made, thus making it unnecessary for the applicant to proceed with the review.

[14] Ms Schimming-Chase for the second respondent countered that the applicant:

1) failed to disclose any basis on which the inference can be drawn that the reason for the withdrawal of the review application was its acceptance that in view of the alleged concession it was no longer necessary to proceed with the review;
2) that in any event the papers show that the applicant came to court prematurely when the urgent relief was sought;

[10]The applicant's main case in this application in terms of rule 42(1)(c) is that the proper order should be that each party pay their own costs.

3) that the papers show that in respect of the first part of the relief, there clearly was no basis for seeking relief;

4) that in respect of the second part of the relief it ought to have been apparent to the applicant that the approval on the strength of which the second respondent acted was by an unauthorised official and not by the Council.

[15] In first respondent's answering papers filed on 28 February 2008, it persists with its denial that it acted *ultra vires* and that the applicant was entitled to any relief; and persisted that the applicant be held liable for its costs arising from the review. It is common cause that the applicant never replied to first respondent's answering papers and proceeded instead to withdraw its application. The first respondent's denial and positive averments in answer therefore remain undisputed.

[16] In argument I asked Mr Totemeyer if it was possible for the applicant, after the first respondent filed its answering papers, to file a short reply in which to record what it perceived as the concessions by the first

respondent that made continuation of the review unnecessary, and to put both first and second respondents on notice that it will withdraw its application because of that and set out the factual basis on which it will seek departure from the general rule that costs follow the event. I got the impression Mr Totemeyer's reply was that it was possible but not necessary. I must disagree. Not only did the applicant not supplement when the circumstances called for it, but it also did not reply in order to place all these matters before Court in circumstances where it must have been reasonable to assume that costs will become *the* issue. Additionally, at no stage did applicant, even by way of correspondence warn the second respondent that it did not intend to pursue the review application. I do not think that in the face of the applicant's failure to object to the late filing of second respondent's answer as an irregular step, it denies it the costs incurred in filing its answering papers.

[17] In the present case, the application was dismissed for lack of urgency. The Court never heard the merits of the matter because the applicant did not wish to proceed with the matter to finality. Although, in an appropriate

case, the Court will have regard to the merits of the case, I am mindful of the following cautionary dictum by Goldstone J in that regard in *Oranje Vrystaatse Vereniging vir Staatsonderstenende Skole and Another v Premier, Province of the Free State, and Others*[11]:

> *"The merits of their case have not been argued before or considered by this Court. And it would obviously not be in the interests of justice for argument to be heard on issues which have now become moot and are no longer of any consequence to the parties or indeed anyone else. The costs of such a proceeding would greatly exceed those which the parties have incurred pursuant to the application for leave to appeal."*

[18] The difficulty facing the applicant is that, apparently knowing that it did not intend to seriously pursue its application for review, it made no effort to tell the second respondent of that fact and to warn it not to incur further legal costs. The applicant has not provided the evidential basis for the inference it seeks to be drawn that the reason the application was withdrawn was because of a concession by the first respondent. In the circumstances of this case they should have. It is a reasonable inference from its omission to do so that it

[11]1998 (3) SA 692 (CC) at 696, para [5].

intended all along not to pursue the application but failed to warn the respondents. To in such circumstances ignore their conduct and instead consider the merits and relative strengthens of the parties' cases in the review, 'is not a path that leads to justice' as far as the second respondent's claim to costs is concerned.

[19] It is apparent from the record that the applicant deployed delay as a litigation strategy unrelated to the suggested reason of wanting to avoid unnecessary litigation: It starts with its appeal against the order of Mainga J. Not only did the presiding judge feel that the reasons for the order were apparent from the record, but in view of such orders being non-appealable[12], appealing against the order but not pursuing it to its logical conclusion shows that reliance was placed on the common law principle that an appeal suspends an order of the court[13], to achieve some delay in the order taking effect. How else does one explain the failure to prosecute the appeal? The applicant thereafter failed to

[12]Shivute CJ stated the common law position as follows in *Namib Plains Farming & Tourism v Valencia Uranium* 2011 (2) NR 469 at 484C-D para [41]: *"Urgency is not an appealable issue in any circumstance. Whether urgency exists in a particular case is a factual question which is determined on a case by case and discretionary basis. There are no public interests to be served for this Court to be seized with the determination of issues of urgency which are dealt with by the High Court on a regular basis…"*

[13]*South Cape Corporation (Pty) Ltd v The Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 542D-E.

supplement after the record of the proceedings was filed. It sought an extension of time but failed to supplement. By seeking an extension of time it created the impression it was serious in pursuing the review. The extension had the effect of delaying the progression of the matter to finality. It then chose not to supplement and offered no reason why. Very significantly, it did not give any indication that it was considering not to proceed, or that its decision whether or not to would depend on what is said in the answering papers of the first respondent. After the respondents filed answering affidavits there was no reply forthcoming – at the very least to explain that the review will not proceed for the reason now advanced only in argument. It took the applicant over 3 months to then withdraw the review application, only to file another review application which, although based on certain measures taken by the first respondent in the intervening period, related to the same building activity being carried out by the second respondent on the strength of first respondent's decision-making. The proximity of the new review application to the withdrawal strengthens the inference that the silence about the intended withdrawal was to obtain some advantage, to the

respondent’s prejudice, for the intended future course of action.

[20] Taken together, all these facts and circumstances lead me to the conclusion that the applicant’s conduct in the litigation was intended to cause delay; and not, as suggested, that the litigation was terminated because of a concession made by the first respondent that rendered the review application unnecessary. In any event, the first respondent vehemently denied in its answering papers that the applicant had any justification for going to court and persisted that the application was premature and should be dismissed with costs. The second respondent similarly maintained throughout that the application was premature and that the applicant was not justified in coming to court.

[21] Considering that the applicant neither supplemented nor replied to the allegations of the respondents in their answering papers, those allegations remain unchallenged and no basis has been put forward why I must find them to be far-fetched or inherently improbable. Therefore, in the exercise of my discretion, I decline to

consider the merits of the matter and do find that no good reason has been demonstrated why I should not hold the applicant liable for the second respondent's costs. As I have decided not to have regard to the merits of the matter, it becomes unnecessary to consider if the first respondent should be held responsible for the second respondent's costs.

[22] The second respondent asked for costs on attorney and client scale. In order to grant such an order, I must (i) be satisfied that the conduct of the applicant justifies such an order, and (ii) that a party-and-party costs order will not be sufficient to meet the expenses incurred by the innocent party.[14] Although I am satisfied as to the first requirement, the second respondent has not placed evidence before me to satisfy me that a costs order on the normal scale will not be sufficient to meet its costs in opposing the review. I will accordingly not grant a punitive costs order against the applicant.

[23] I make the following order:

[14] *Hailulu v Anti-Corruption Commission* 2011(1) NR 363 at 277H.

The applicant is directed to pay the second respondent's costs occasioned by the withdrawal of the review application in case NO.A260/2007; to include the costs of one instructing and one instructed counsel. The second respondent is also awarded the costs of the rule 42(1)(c) application, on party and party scale, to include the costs of one instructing and one instructed counsel.

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DAMASEB, JP

ON BEHALF OF THE APPLICANT: Mr R Totemeyer, SC

Instructed by: **MB DE KLERK & ASSOCIATES**

ON BEHALF OF THE 2ND RESPONDENT: Ms E Schimming-Chase

Instructed By: **DR WEDER, KAUTA & HOVEKA INC.**