

REPUBLIC OF NAMIBIA

NOT REPORTABLE



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 450/2005

In the matter between:

WILLEM DU TOIT

APPLICANT

and

ALETTA CATHERINA DREYER

1ST RESPONDENT

WILLEM DREYER

2ND RESPONDENT

ZARIS FARMING CC

3RD RESPONDENT

Neutral citation: *Du Toit v Dreyer* (I 450/2005) [2013] NAHCMD 239 (8 August 2013)

Coram: DAMASEB, JP

Heard: 30 May 2013

Delivered: 08 August 2013

Flynote: Application for leave to appeal – Appeal against cost order – An award for costs in the discretion of the court – Court holding that a court may mark its disapproval

of reprehensible and discreditable conduct which may have occurred in the course of the transaction upon which the litigation is based or conduct which may have risen during the course of or in connection with the litigation itself by means of a special cost order – Parties having right to appeal to the Supreme Court as of right – Fairness and justice demands that where both parties have appealed to the Supreme Court as of right and all issues, factual and legal, ventilated at trial are being revisited afresh on appeal, leave to appeal be granted in respect of the costs order made by the trial court – Leave to appeal therefore granted.

APPLICATION FOR LEAVE TO APPEAL

REASONS

DAMASEB, JP:

Introduction and grounds of the Application

[1] On 5 August 2013, I made an order granting the applicant (plaintiff in the trial) leave to appeal to the Supreme Court against the costs order denying him costs. What follows are my reasons for that order.

[2] The application for leave to appeal is premised on the argument that I failed to distinguish between the issue of interest arising from the repayment of the principal debt, and the plaintiff's entitlement to costs in seeking the repayment of the purchase price and his resistance to what I have now found were unmeritorious counterclaims by the defendants.

Judgment on Application for Leave to appeal

[3] I addressed the issue of costs separately from the merits of the matter, although, as I was entitled to in my discretion, I had regard to the conduct of the parties during the course of the litigation and, in addition, in respect of the applicant, his disregard for the laws of the land.

[4] I came to the conclusion that the parties conducted themselves reprehensibly in the course of the litigation. I clearly set out the incidents on that score in my judgment. I do not find it necessary to repeat them. I decided, in the exercise of my discretion, to mark my disapproval of their conduct with an order denying them costs. I also decided that the applicant's disregard of Namibia's laws was of such gravity that the courts of this land must disapprove his disrespect for the laws of Namibia by denying him his costs for seeking justice in the courts of the land. There is nothing untoward about that. My approach is supported by authorities such as the decision in *Rally for Democracy and progress and others v Electoral Commission of Namibia and others*,¹ wherein the court pointed out (at para 327) that 'If the court is satisfied that a party has been guilty of reprehensible or discreditable conduct, it may mark its disapproval by means of a special costs order. Such reprehensible conduct may relate to or may have occurred in the course of the transaction upon which the litigation is based, or it may have arisen during the course of or in connection with the litigation itself.'² If there are special circumstances justifying departure from the general rule, the Court is entitled to do so and to make a special costs award such as denying a successful party the costs it is otherwise entitled to.'³

[5] Both parties have appealed to the Supreme Court against the order I made on 8 March 2013 holding that the plaintiff, because of his *fraus legis*, was not entitled to interest on a capital sum paid by him on behalf of the defendants. I also found that the defendants were complicit in the illegality perpetrated by the plaintiff and for that reason applied the *par delictum* rule and found that doing justice between person and person required that the defendants repay to plaintiff the moneys paid by him on their behalf. I dismissed the defendants' counterclaim for restitution.

[6] I only became aware that there was an appeal on the merits lodged in the Supreme Court when I had sight of the applicant's Application for leave to appeal. That application was filed of record on 25 March 2013. From it, I became aware that the applicant (plaintiff in the trial) takes issue with the order I made allowing him repayment of the principal amount but denying him interest thereon. In his notice of appeal the

¹ 2009 (2) NR 793(HC)

² Herbstein & van Winsen. 2009. *The Civil practice of the High Courts of South Africa* (5th Ed) Vol. 2, p 970.

³ See further *Hailulu v Anti-Corruption Commission and Another* 2011 (1) NR 363 (HC) at p 377, para 41.

applicant appeals against the portion of the judgment refusing the applicant any interest a *tempore morae* on the capital amount of N\$ 672 000 and also against the resultant order refusing the appellant the costs of his action.

[7] The applicant was entitled to appeal as of right on that issue. But given that he also takes issue with the costs order I made denying him costs on the successful claim and his successful resistance of the counter-claim, he requires my leave on the latter. Applicant's application for leave to appeal my costs order lists 13 grounds, arguing that the effect of it in conjunction with the disallowance on the capital amount successfully claimed renders it disquietingly inappropriate.

[8] The respondents in the application for leave (defendants in the trial) oppose the application for leave to appeal. It never occurred to me that they had also appealed to the Supreme Court, as of right, against my order finding that their being complicit in the plaintiff's *fraus legis* invoked the *par delictum* rule. They also appealed against my finding in respect of their counterclaim. Not only that, they propose to seek my leave to appeal my cost order denying them costs in their successful resistance to the plaintiff's claim for interest and costs. That they indeed filed such an application for leave or that they appealed as of right to the Supreme Court only became apparent to me at the hearing of the application for leave when Mr Frank for the applicant brought it to my attention. Much to the obvious embarrassment of Mr Jacobs, who appeared in opposition to the applicant's leave to appeal, he was not made aware of the defendants' appeal on the merits and their application for leave to appeal the costs only order in so far as they were partially successful on the merits. Mr Jacobs' instructing counsel did not make him aware of the fact.

[9] It is inexplicable why the respondents did not set down their application for leave to appeal my cost order adversely affecting them at the same time as the plaintiff's application. The court is therefore being placed in the position of having to undertake a piecemeal adjudication of the matter. I am faced with a situation where the party who seeks to oppose the applicant's leave to appeal is itself seeking leave to appeal my cost order adverse to them. Not only that, all of the factual and legal disputes – and they are many as is evident from the respondent's notice of appeal to the Supreme Court – are

alive and being revisited in the Supreme Court. A finding by that court varying my findings on any of those issues will in all probability necessitate it considering afresh the cost orders that I made.

[10] I am mindful of the test I must apply in adjudicating an application for leave to appeal a costs order only and need not restate it. Regardless of the applicable test, I am satisfied that there may well be situations in which justice and fairness demands that leave to appeal is granted. This is such a case: Both parties have, as of right, chosen to revisit on appeal all the issues that were ventilated in the trial court, including costs liability. Fairness and justice demands that they be allowed to fully ventilate all those issues, including the costs order in respect of matters they were partially successful in at trial but were mulcted in costs.

[11] In the premises therefore, applicant is granted leave to appeal the costs order I made against him and the costs of this application shall be costs in the appeal.

P T Damaseb

Judge President

APPEARANCE

APPLICANT

T Frank

Instructed By

Du Toit Associates, Windhoek

RESPONDENT

J Jacobs

Instructed By

Francois Erasmus & Partners, Windhoek