REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: I 958/2013

In the matter between:

FULBERTUS KWEDHI **PLAINTIFF**

and

AMUPOLO BUILDING CONSTRUCTION CC **1ST DEFENDANT**
GABRIEL ERASMUS **2ND DEFENDANT**

Neutral citation: *Kwedhi v Amupolo Building Construction CC* (I 958/2013) [2013] NAHCMD 290 (17 October 2013)

Coram: CHEDA J
Heard: **24 September 2013**
Delivered: **17 October 2013**

Flynote: Interlocutory application – Respondent failing to comply with the Consolidated Practice Directives – Legal practitioner not being truthful about his failure to file Heads of Argument – Urges court to adjourn for three hours to peruse his Heads of Argument - Court disapproves of respondent's legal practitioner's conduct – matter removed from the roll – Respondent ordered to pay wasted costs at a higher scale.

Flynote: Punitive costs should be awarded where there has been some conduct which is unbecoming of either the Legal Practitioner or his client and causes an expense to the other party. Attorney and client costs should only be granted where they have been asked for.

Summary: Applicant set the matter down for the application for summary judgment and filed Heads of Argument within the stipulated period in terms of Consolidated Practice Directives. Respondent filed and/or served his heads of argument 1½ hours before the hearing.

When asked by the court why he did not file his Heads of Argument timeously, his explanation was unconvincing. Applicant, through his legal practitioner asked for wasted costs at a higher scale. A litigant/legal practitioner who disregards the rules of court runs the risk of being penalized with costs at a higher scale. The matter was accordingly removed from the roll with respondents bearing the wasted costs at a higher scale.

ORDER

---

(1) The matter is removed from the roll.
(2) The respondents to pay today's wasted costs on an attorney and client scale.

RULING

CHEDA J [1] This matter was set down for hearing on the 24th of September 2013 for an application for a summary judgment. Applicant/Plaintiff filed his Heads of Arguments on 20 September 2013 at 10H00 as per the requirements of the Consolidated Practice Directives (as amended).

[2] Respondents served their Heads of Arguments on the applicant and the court on the 24th of September 2013 at 08h27 and 09h00 respectively, which was the hearing day. This was 1½hrs and 1hr respectively before the hearing at 10H00. Applicant through his legal practitioner submitted that respondents' legal practitioner failed to comply with the Rules of this court in that he failed to file his Heads of Arguments on or before 12noon on Monday preceding the Tuesday being the set down day. She further argued that this non-compliance has resulted in a lot of inconvenience to both herself and the court. In an attempt to accommodate his (respondents') failures, she suggested that the matter should be stood down for 3 hours in order to allow her and the court time to peruse respondents' Heads of Argument. She also submitted that as a result of respondents' failure to comply with the rules they should bear todays' wasted costs at a higher scale.

[3] Mr Ntinda for respondents on the other hand submitted two reasons for his failure, firstly that he failed to comply with the rules as required, because, he was busy with his other office work and that he did not have enough time to take further instructions from his client. Secondly, that he could not have filed his heads of arguments without seeing those of applicant. He was however, sorry for his failure. As a remedy to this he conceded to the suggestion by applicant's legal practitioner that the matter be stood down for at least 3 hours to allow for perusal.

[4] Respondent was served with a notice of set down for today's hearing as far back as the 5th of June 2013. This was over 3 months ago but, he did not bother to file his heads of arguments and only chose to do so an hour or so before the hearing. This matter was due to be heard on the set down date. The Registrar's office is at pains to see to it that matters are heard on the appointed date. Legal practitioners should bear in mind that once a date has been allocated to them, they should ensure that they adhere to it, as failure to do so will no doubt result in unnecessary disruptions of the otherwise smooth running of the judiciary system. In my opinion, the courts should take a dim view of such errant behaviour by legal practitioners.

[5] Applicant through his legal practitioner was understandably not impressed by respondent's stance towards this matter. This is clear as evidenced by her

application for wasted costs at a higher scale as a condition of removing the matter from the roll. Section 26 (2) (b) of the Consolidated Practice Directives provides for the removal of an interlocutory matter from the roll in the event of a failure of it being heard. That being so, the matter should be removed from the roll.

[6] Applicant has asked the court to grant him costs at a higher scale in light of respondents' attitude in these proceedings. It is trite law that in matters of this nature, courts normally order costs to be in the cause. This, however, is not a rigid rule. The question of costs has always been the discretion of the court, which discretion should be exercised judicially. These courts have always followed the time-honoured principle laid down in *Kruger Bros and Wasserman v Ruskin*[1], where, Innes, CJ stated '*The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but, it cannot be challenged, taken alone and apart from the main order, without his permission*.' This discretion must be exercised upon a consideration of the facts of each case and what that means is that it is a question of fairness to both parties. (see also *Cape underwear manufacturers (Pty) Ltd v Consolidated Fashion Industries Ltd*[2]).

[7] Respondents approached this matter with lack of seriousness. Their legal practitioner, Mr Ntinda admitted to the court that his client Mr Gabriel Erasmus was not available to give him further instructions in light of applicant's heads of arguments. This argument is with greatest respect not satisfactory because there is no provision for him to file heads of argument subsequent to those of applicant. It therefore exposes him to lack of genuiness in his failure to comply with the rules. He exhibited a cavalier attitude towards his preparation of this matter. In filing Heads of Arguments an hour before the hearing when those of applicant's were filed 3 months ago, is demonstration enough of the dilatory manner with which he handled this matter. He seems to find favour in the suggestion that the court should adjourn for 3 hours in order to peruse his heads which are quite voluminous and contain various case authorities. If the court accedes to this request, it means that the court will continue to hear arguments without perusal of the cited authorities as if it is an

[1] Kruger Bros and Wasserman v Ruskin 1918 AD63 at 69.
[2] Cape underwear manufacturers (Pty) Ltd v Consolidated Fashion Industries Ltd 1948 (1) SA 175 and Fuchs & Co v Cohn 1903, %1903, TS208.

urgent matter. This is very inconvenient to the court. To him, this should be done irrespective of the inconvenience caused. I find that this conduct on his part is a brazen disregard of the rules of court. Such conduct in my view deserves the courts disapproval. The courts normally would not order a party to pay costs during an interlocutory application as such costs are normally costs in the cause, but this is a case where justice demands otherwise. Rules of the court should be respected by all those who are bound by them; a party who seeks to deviate from those rules cannot avoid the court's indignation by being ordered to pay punitive costs. The courts' disapproval should, in my view be marked by an award of costs against respondents at this stage, see, *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House*[3] and *Reid v Royal Insurance Company Ltd*[4].

[8] The courts are generally loathe to order a litigant to pay costs at a higher scale and often only do so under exceptional circumstances. This position was ably stated by Tindal, J.A in *Nel v Waterberg Landbouwers Ko-operative Vereeninging*[5] where the learned Judge stated '*The true explanation of awards of attorney and client costs not expressly authorized by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation*.'

[9] As stated above, these courts have a duty to enforce their own rules. Therefore, any litigants who without just cause choses to breach them should no doubt be prepared to incur the wrath of the courts. Respondents' legal practitioner's attitude towards this matter can best be described as uncaring. He did not start by seeking condonation for his non-compliance of the rules, but only did so at the suggestion and/or remark by applicant's legal practitioner.

[10] I totally agree with applicant's legal practitioner that respondents should be saddled with wasted costs. It is my view that an award of costs at a higher scale is

[3] Associated Musical Distributors (Pty) Ltd v Big Time Cycle House 1982 (1) SA 616 (O).
[4] Reid v Royal Insurance Company Ltd 1951 (1) SA 713 (T)
[5] Nel v Waterberg Landbouwers Ko-operative Vereeninging 1946 AD 597 at 607.

no doubt, harsh and should be reserved for errant and/or wayward conduct of a litigant. Such costs should be ordered as a mark of disapproval towards the conduct of a litigant which results in an unnecessary expense to the innocent party. (see, *Epstein and Payne v Fraay and others*[6]). However, punitive costs should only cover the extent of the litigant's conduct which has been exposed. In *casu*, it should be today's wasted costs as all other costs should always be costs in the cause. (see *Hamza v Baifen*[7]).

[11] In addition thereto, costs, such as attorney and client costs cannot be granted unless they have been prayed for by the other party, which is the position in *casu*. The courts are also averse in ordering them unless there exist good reasons for doing so.

[12] Applicant has made a good case for costs at a higher scale and I am therefore persuaded to grant the order as prayed for.

[13] These are my reasons for the said order:

M Cheda

Judge

[6] Epstein and Payne v Fraay and others 1948 (1) SA 1272.
[7] Hamza v Baifem 1949 (1) SA 993.

APPEARANCES

PLAINTIFF :	De Jager Instructed by Du Pisani Legal Practitioners Windhoek
STATE:	M Ntinda Of Sisa Namandje & Co. Windhoek