

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 57/2014

In the matter between:

EVA JANSEN

APPLICANT

And

**KATHRIN SCHAEFER-STIEGE
OKAKAMBE RIDING CENTRE CC
(IN LIQUIDATION)**

1ST RESPONDENT

**DAVID JOHN BRUNI N.O.
(IN HIS OFFICIAL CAPACITY AS CO-LIQUIDATOR)**

2ND RESPONDENT

**IAN ROBERT MCLAREN N.O.
(IN HIS OFFICIAL CAPACITY AS CO-LIQUIDATOR)**

3RD RESPONDENT

THE MASTER OF THE HIGH COURT OF NAMIBIA

4TH RESPONDENT

5TH RESPONDENT

Neutral citation: *Jansen v Schaefer-Stiege* (A 57/2014) [2014] NAHCMD 162 (20 MAY 2014)

Coram: MILLER AJ

Heard: 20 May 2014
Delivered: 20 May 2014 [Ex tempore]

ORDER

The first respondent is ordered to pay the cost of the applicant on a party and party scale which will conclude the cost of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] This matter commenced before me as a as an urgent application in which the applicant sought certain relief against the respondent.

[2] The application was heard by me on the 20th of March 2014 and on the 2nd of April 2014 I issued the following order and I quote:

‘1. That the applicant’s none compliance of the forms of service has provided for by the Rules of this Honourable Court and service of the fax copy of this Application on the first Respondents and hearing of the Application on an urgent basis as is envisaged in Rule 6 (12) of the High Court Rules is condoned.

2. That the third and fourth respondents are ordered and directed to forthwith appoint a suitable and competent person either than the first respondent as manager of the third respondent pending the finalization of the proceedings.

3. That the parties are to attend a case management conference on 10 April 2014 at 15h30 in order to determine a return date.'

[3] I also ordered the time that the question of costs will stand over for determination on the return date.

[4] The matter was eventually set down before me and was heard on the return date which was yesterday.

[5] By then I was informed that the third and fourth respondents had appointed somebody else other than the first respondent to manage the affairs of the second respondent pending the finalization of the liquidation.

[6] To the extent that it was necessary I confirmed that *rule nisi*.

[7] The only question that remains for consideration is the issue of costs.

[8] It is generally understood in our law that the question of cost is a matter for the discretion of the Court which discretion of course must be exercised judicially taking into account the facts and circumstances surrounding the case.

[9] During the course argument before me yesterday, Mr. Schickerling who appeared for the applicant together with Mr. Jacobs submitted that the Court should order that the first applicant pay the costs of the application which costs will include of the cost of one instructing and one instructed counsel.

[10] He no longer persisted in seeking a punitive order on the basis that the first applicant should pay the cost on the scale as between attorney and own client.

[11] He was content to argue that an order, that the cost to be paid on a party and party scale should meet the demands of the case. Ms. Bassingwaighte who appeared on behalf of the first respondent submitted that I should order instead that the costs should be costs in the litigation in the liquidation.

[12] As it is apparent from the written judgment which I had handed down on the 2nd of April 2014, that is the date upon which the *rule nisi* was issued, the main issue was the fact that the first respondent although she had been appointed to manage the business of the second respondent pending the finalization of the liquidation had in the interim set up a business in competition and in opposition to the business of the second respondent.

[13] She thus found herself in a situation of a conflict of interest. As I had found, this was based on the concessions made by the first respondent.

[15] She had also written a letter to the clients of the second respondent to the effect that the business she had conducted was that of the second respondent except that the name had been changed. That letter patently was wrong and intended to convey the wrong impression to the client's and former clients of the second respondent.

[16] It was mainly for that reason that I made the orders I did to the effect that she should be replaced as the manager of affairs of the second respondent.

[17] As a general rule, and unless the circumstances indicate otherwise the costs would follow the result.

[18] The result in this case was premised upon the actions of the first respondent which I have set out about. Ms. Bassingwaighte indicated in support of the submissions

that the liquidators themselves had failed to act timeously when they were appraised of the situation and for that reason costs should be costs in the liquidation.

[19] It may well be submitted in the submission as far as the action or in action of the liquidators being the third and fourth respondent are concerned has merit. However, neither party sought any relief against the third and fourth respondents in as far as costs are concerned and it would not be just in the circumstances of the case to order they pay the costs and that was really conceded by Ms .Bassingwaighte.

[20] An order that cost be cost in the liquidation would be to the detriment of the creditors of the second respondent which includes the applicant.

[21] In my view and in my discretion there is no reason given the facts of this case why the creditors including the applicant should be disadvantaged by an order that costs be costs in the liquidation.

[22] It is mainly the actions of the first respondent which precipitated this application and resulted in the order that was made.

[23] In my view it is the first respondent in the first place who is to blame for the fact that this litigation arose.

[24] Keeping those circumstances I have concluded that the first respondent should be ordered to pay the cost of the application.

[25] In result I make the following order:

(a) The first respondent is ordered to pay the cost of the applicant on a party and party scale which will conclude the cost of one instructing and one instructed counsel.

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[15] P J Miller
[16] Acting Judge

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APPEARANCES

APPLICANT : J SCHICKERLING (with him SJ Jacobs)
Instructed by Nederlof Incorporated, Windhoek.

FIRST RESPONDENT: N BASSINGTHWAIGHTE
Instructed by Lorentz-Angula, Windhoek