



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 282/2014

In the matter between:

MARITIMA CONSULTING SERVICES CC**APPLICANT**

And

NORTHGATE DISTRIBUTION SERVICES LTD**RESPONDENT**

Neutral citation: *Maritima Consulting Services CC v Northgate Distribution Services Ltd* (A 282-2014) [2015] NAHCMD 121 (29 May 2015)

Coram: PARKER AJ**Heard:** 22 April 2015**Delivered:** 22 April 2015**Reasons:** 29 May 2015

Flynote: Practice – Applications and motions – Further affidavits – Court has discretion to allow filing of further affidavits – In instant case respondent choosing not to apply to strike out alleged new matter in applicant's replying affidavit but rather choosing to apply for leave to file supplementary answering affidavit – Court considered such course not advisable as it did not conduce to structured litigation in application proceedings and tended to offend the overriding objectives of the rules of court – Court concluded that respondent has failed to establish that special circumstances exist for court to exercise its discretion in favour of permitting the filing

of a supplementary answering affidavit – Consequently, court dismissed application with costs.

Summary: Practice – Applications and motions – Further affidavits – Court has discretion to allow filing of further affidavits – Respondent averred that applicant's replying affidavit contained new matter – Respondent chose not to apply to strike out the alleged new matter but rather chose to apply for leave to file supplementary answering affidavit in order to answer the new matter – Court considered such course unadvisable because it does not conduce to structured litigation in application proceedings and it tendered to offend the overriding objectives of the rules set out in rule 1(2) of the rules of court – Court concluded that respondent has failed to establish that special circumstances exist to persuade the court to exercise its discretion in favour of the respondent's application – Consequently, court dismissed application with costs.

Flynote: Appeal – Leave to appeal against costs order – General rule is that costs should follow the event and court entitled to depart from general rule only where special circumstances exist – Court did not find special circumstances to be present when it applied the general rule and awarded costs to successful party, and counsel for unsuccessful party has not in the instant proceeding pointed to any special circumstances that were present – Consequently, court concluded that applicant has failed to clearly indicate reasonable prospects of success on appeal to the Supreme Court – Principles in *S v Nowaseb* 2007 (2) NR 640 (H) applied – Consequently, application dismissed with costs.

Summary: Appeal – Leave to appeal against costs order – General rule is that costs should follow the event and court entitled to depart from general rule only where special circumstances exist – In instant case court had awarded costs against applicant when its application was struck from the roll which decision has not been set aside – Court awarded costs to the party which successfully moved to reject the application in the absence of special circumstances – Court reasoned that since it did not find that special circumstances existed it was not entitled to deny the successful respondent its costs – Court found that in instant proceedings counsel did

not point to special circumstances that existed when the costs order was made – Court concluded therefore that applicant has not indicated clearly prospects of success on appeal – Consequently, court dismissed with costs the application for leave to appeal.

JUDGMENT

PARKER AJ:

[1] On 22 April 2015 I heard three applications under the same case no. A 282/2014: (a) an application in which Maritima Consulting Services CC is the applicant and Northgate Distribution Services Ltd is the respondent, and wherein the applicant made application to sell the manganese (the subject matter in the main application), filed on 24 February 2015 (application 1), (b) an application in which Northgate Distribution Services Ltd is the applicant and Maritima Consulting Services CC is respondent, and wherein the applicant made application for leave to appeal a costs order, filed on 9 February 2015 (application 2), and (c) an application in which Northgate Distribution Services Ltd is the applicant and Maritima Consulting Services CC is the respondent, and wherein the applicant seeks leave to file a supplementary answering affidavit, filed on 14 January 2015 (application 3).

[2] On the same day, I granted the relief sought in application 1 in respect of paras 1, 2 and 3 of the notice of motion for reasons contained in the chapeu of the order. On the same day I also dismissed with costs application 2 and application 3, and stated then that reasons for the order would be delivered to counsel on or before 4 June 2015. These are the reasons. I should state that Mr Töttemeyer SC (with him Ms Van der Westhuizen), counsel for Maritima Consulting Services CC, and Mr Ram, counsel for Northgate Distribution Services Ltd, referred the court to certain authorities in their submissions. I am grateful for their industry. I have distilled relevant principles from those authorities that are of assistance on the points under consideration.

Application 2

[3] In application 2, the applicant seeks leave to appeal to the Supreme Court against the costs order that was granted on 20 January 2015. The starting point of the determination of this application is indubitably this. The general rule is that costs follow the event, that is, the successful party should be awarded his or her costs; and in the absence of special circumstances, a successful party is entitled to his or her costs. And the general principle is well entrenched that the award of costs is entirely a matter for the discretion of the court which, of course, is to be exercised judicially upon a consideration of the facts of each case; and, in essence, it is a matter of fairness to both parties. See AC Cilliers, *Law of Costs*, para 2.08; and the case there cited.

[4] On 20 January 2015 the court granted the following order: 'The application is struck from the roll, with costs, including costs of one instructing counsel and two instructed counsel, and wasted costs of today'. It is indicated in the record of proceedings why the striking from the roll order was made. The costs order is but ancillary to that order. The striking from the roll order has not been set aside by a competent court to this day; and so, without a doubt, it remains irrefragably unassailed. The legal consequence of this is inevitably that Northgate Distribution Services Ltd has accepted that order striking its application from the roll (in para 1 of the 20 January 2015 order). And, as I have said previously, the award of costs followed, in the discretion of the court, that event; the event which up to this day remains unchanged, as aforesaid.

[5] Thus, costs were awarded, in the discretion of the court, to Maritima Consulting Services CC because Maritima Consulting Services CC was successful in rejecting Northgate Distribution Services Ltd's application, and the court did not then find the presence of special circumstances that would entitle it to depart from the rule that costs should follow the event, as mentioned previously. As I say, I did

not see any legal basis upon which to deny Maritima Consulting Services CC its costs, and none was pointed to me by Mr Ram in the instant proceeding.

[6] The foregoing analysis points inevitably to the conclusion that Northgate Distribution Services Ltd has failed to establish that the discretion to award costs to Maritima Consulting Services CC was exercised unjudicially, as Mr Töttemeyer submitted. In sum, with the greatest deference to Mr Ram, I fail to see the legal basis upon which Mr Ram can seriously argue that a reasonable possibility exists that the Supreme Court would reach a different conclusion when, as I have said previously, costs followed the event, 'the event' which remains unassailed to this day, and when the court, in granting the costs order, did not find the presence of special circumstances that would have entitled the court to depart from the general rule, and none has been pointed out to the court by Mr Ram. All in all, I find that the Northgate Distribution Services Ltd has not clearly indicated reasonable prospects of success on appeal to the Supreme Court. See *S v Nowaseb* 2007 (2) NR 640 (HC) which concerned criminal proceedings. I do not see any good reason why the principles there should not apply to civil proceedings.

[7] I have carefully considered the application; and disabusing my mind – as far as humanly possible – of the fact that I had no doubt that the award of costs was made on the facts of the case and on the well settled principles adverted to above, I am not in the least satisfied that there is reasonable prospect that the Supreme Court would take a different view about the court's interpretation and application of the rule and its qualification respecting award of costs. In my judgement, the applicant has not indicated clearly reasonable prospects of success on appeal. (See *S v Nowaseb*.)

Application 3

[8] Northgate Distribution Services Ltd applies also for leave to file a supplementary affidavit solely on the basis that in its replying affidavit to Northgate Distribution Services Ltd's answering affidavit, Maritima Consulting Services CC included new matter. Maritima Consulting Services CC has moved to reject

application 3 on the basis that Northgate Distribution Services Ltd, through the backdoor, as it were, seeks to augment its answering affidavit.

[9] It has been held that leave to file further affidavits by a party will be granted only in special circumstances or if the court considers such a course advisable. (*Herbstein and van Winsen: The Civil Practice of the Supreme Court of South Africa*, 4 ed, p 359) Thus, the filing of further answering affidavits will be permitted where, for instance, 'there is a possibility of prejudice to the respondent if further information is not allowed'. In the instant case – and this is significant – Northgate Distribution Services Ltd (respondent) is not seeking the permission of the court to place before the court further information, which, for instance and probably, was not available to it when it filed its answering affidavit; rather, it desires to file a supplementary answering affidavit, which in its view, will answer what it considers to be new matter in the replying affidavit filed by Maritima Consulting Services CC (applicant).

[10] If there is, indeed, a new matter, why answer it, when, in the first place, Maritima Consulting Services CC is not permitted to introduce the new matter in its replying affidavit? The practice in this court which, in my view, is adviseable and efficacious and which makes a whole lot of sense is for such respondent to apply to have the new matter struck. In that event, if the respondent is successful, the new matter is simply expunged and there will logically be no longer any matter existing for the respondent to answer and for the applicant to rely onto support its case. Such approach conduces to structured litigation in application proceedings; and it commends itself to me, apart from all else. On that score I accept Mr Töttemeyer's submission that allowing the respondent, Northgate Distribution Services Ltd to file a supplementary answering affidavit is a sure invitation to unstructured and chaotic litigation; something, which should not be encouraged, not least because it tends to offend the overriding objectives of the rules of court as set out in rule 1(2) of the rules of court.

[11] All said, I conclude that Northgate Distribution Services Ltd has failed to establish that special circumstances exist that should persuade the court to exercise its discretion in favour of permitting the filing of a supplementary answering affidavit.

Indeed, as I have demonstrated previously, I do not consider the course pursued by Northgate Distribution Services Ltd of applying for leave to file a supplementary answering affidavit in these proceedings to be adviseable.

C Parker
Acting Judge

APPEARANCES

APPLICANT: R Töttemeyer SC (assisted by C E van der Westhuizen)
Instructed by Engling, Stritter & Partners, Windhoek

RESPONDENT: R Ram
Instructed by Köpplinger-Boltman Legal Practitioners,
Windhoek