

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS IN RESPECT OF ORDER OF COSTS

Case no: POCA 5/2017

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

AFRICA AUTONET CC t/a PACIFIC MOTORS

RESPONDENT

Neutral citation: *The Prosecutor General v Africa Autonet CC t/a Pacific Motors*
(POCA 5/2017) [2017] NAHCMD 265 (13 September 2017)

Coram: ANGULA DJP
Heard: 21 July 2017
Order made: 14 August 2017
Reasons Furnished: 13 September 2017

REASONS FOR THE ORDER OF COSTS

ANGULA DJP:

Introduction

[1] On 14 August 2017, having heard and considered counsels' arguments as to why the PG should or should not pay the respondent's costs relating to the application to anticipate and to rescind the preservation order, the Court made an order in the following terms:

'The applicant pays the respondent's costs of the application to anticipate and to rescind the preservation order including the respondent's wasted costs of 21 July 2017, such costs to include the costs of one instructing counsel and two instructed counsel.'

[2] Thereafter, the Court received a letter from the Government Attorney, the applicant's legal practitioners dated 25 August 2017, requesting reasons for the above order '*to enable the PG to consider the way forward*'.

[3] Below are the reasons for the order the court made on 14 August 2017.

Factual background

[4] On 23 March 2017, the PG launched an *ex parte* urgent application in which she sought a preservation of property order in respect of certain positive balances of money ('the property') held in bank accounts at Nedbank and First National Bank, respectively, in the name of the respondent. The preservation of property order was granted on 24 March 2017 by Parker AJ.

[5] On 28 June 2017, the respondent delivered a notice on the PG in terms of section 52(3) of the Prevention of Organised Crime Act No. 29 of 2004 (the POCA Act'). The respondent gave the PG notice of its intention to oppose the making of a forfeiture order in respect of the property which was the subject of the preservation order. The notice further provided the PG with the chosen address at which the applicant would accept service of documents concerning further proceedings in respects of the property.

[6] On 5 July 2017, the respondent filed and delivered an application to anticipate and to rescind the preservation of property order. Alternatively an order authorizing the legal practitioners for the PG to make a payment to the respondent in the amount of N\$120 000 per month, from the money preserved under the preservation order; a

further amount of N\$400 000 in respect of reasonable legal expenses in connection with ongoing legal proceedings and an order that the PG pays the costs of the respondent's application to anticipate and to rescind the preservation order. Costs were to include the costs of one instructing counsel and two instructed counsel on the scale as between attorney-own-client. The application was set down for hearing on 21 July 2017.

[7] On 21 July 2017, when the matter was called, Ms Boonzaier (assisted by Mr Nanhapo) appeared on behalf of the PG and Mr Heathcote SC (assisted by Ms Campbell) appeared for the respondent.

[8] After a lengthy adjournment during the morning, the court reconvened and was informed that the parties had reached an agreement and requested the court to make the agreement an order of court. It was accordingly ordered that:

1. Payment of N\$1,000,000.00 is hereby authorised in terms of section 57 of the Prevention of Organised Crime Act, 2004 from the property covered by the preservation order given on 24 March 2017 by the Honourable Mr Justice Parker AJ, which amount is made up as follows:
 - 1.1 N\$600,000.00 in respect of past trading expenses of the respondent; and
 - 1.2 N\$400,000.00 in respect of the reasonable legal expenses of the respondent in connection with these proceedings.
2. The payment authorised in paragraph 1 above, is to be paid by Nedbank from Nedbank Account number 11990008096, upon presentation of this court order to Nedbank to the respondent's legal practitioners of record, Koep & Partners, FNB, FNB Business Account, Trust Account number: 55503559252, Branch Code: 281872.
3. Nedbank is authorised to open a new transactional and CFC banking account in order to permit respondent to continue trading.
4. The agreement contained in paragraphs 1, 2 and 3 above, is made without prejudice to any of the parties' rights.

5. The applicant is directed to deliver her replying affidavit on or before Monday, 31 July 2017.
6. The wasted costs of today's appearance stand over.
7. The hearing of this application is postponed to Monday, **14 August 2017** at **09h00**.
8. The Africa Autonet CC is to file its heads of argument on or before *9 August 2017* and the Prosecutor General on or before *11 August 2017*.'

[9] On 14 August 2017, when the application was called, Ms Boonzaier informed the court that the preservation of property order has in the meantime lapsed and no papers had been filed by the parties as per the above order of court. Mr Heathcote then moved for an order that the PG be ordered to pay respondent's costs of the application. Ms Boonzaier responded that in their view the respondent was not entitled to costs. The court thereupon requested counsel to address the court on the issue of costs.

[10] Falling for determination, is whether the PG should be ordered to pay the respondent's costs of the application to anticipate and to rescind the preservation of property order.

Arguments on behalf of the PG

[11] Ms Boonzaier argued that in view of the fact that the preservation of property order has lapsed there was no longer an application for rescission of that order. Counsel submitted that the respondent was not a 'successful party' so as to entitle it to costs and that the decision by the PG not to proceed with an application for the forfeiture of property order was discretionary in terms of section 59 of the POCA Act. Ms Boonzaier further submitted that the fact that the preservation of property order had lapsed had nothing to do with the application for the rescission of the preservation order and that the court could not assume that the bringing of the application for rescission was the effective cause for the PG's decision not to proceed with the application for the forfeiture order.

[12] Mr. Heathcote on his part stressed that the respondent was put to costs through the proceedings instituted against its property by the PG; and that in terms of the well-established legal principles, the respondent was entitled to be compensated for the costs it had incurred in opposing the PG's application which had effectively been abandoned.

Applicable legal principles

[13] It has been held that the purpose of an order of costs in favour of a successful litigant is to indemnify him or her for the expenses to which he or she has been put through having been unjustly compelled to defend or to initiate litigation¹. As a general rule the party who succeeds should be awarded costs. In determining who the successful party is, the court will endeavour to ascertain which of the parties has been 'substantially successful'.

[14] Justice Ackerman J in the matter of *Ferreira v Levin, Vryenhoek v Powell*² said the following with regard to court's discretion in awarding costs:

[3] The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs ... the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.'

¹ Herbstein & Van Winsen at The Civil Practice of the High Courts of South Africa Vol 2, 5th ed, page 951.

² 1996 (2) 621 CC at 624.

[15] Keeping these principles in mind, I now proceed to demonstrate why the Court exercised its discretion and awarded costs in favour of the respondent.

[16] It is trite that the proceedings under Chapter 6 of the POCA Act are civil proceedings.³ Section 90(1) of the POCA Act, provides that the rules of this court shall, amongst others, regulate proceedings in chapter 6 of the POCA. Section 51 of the POCA Act, which is part of Chapter 6 of the POCA Act, provides for applications for preservation of property orders. There is nothing in the POCA Act or the rules of this court that exempts the PG from the obligation to pay affected persons' costs. Accordingly, when the PG exercises her discretion to institute proceedings for the preservation of property order, she must bear in mind that she commits affected persons to incurring costs in resisting preservation of property orders by anticipating, varying or rescinding such orders. If the PG allows a lapsing or abandons or withdraws a preservation of property order proceedings, she will in appropriate instances be ordered to pay the costs incurred by the affected persons.

Costs occasioned by the postponement on 21 July 2017

[17] The general rule is that costs occasioned by a postponement are paid by the party that applied for a postponement⁴. It is common cause that on 21 July 2017, Mr Boonzaier, who on that day appeared on behalf of the PG, applied for a postponement in order for the PG to be afforded an opportunity to file her replying papers to the respondent's application for a rescission order. By agreement between the parties the agreement was made, an order of Court, the wasted costs occasioned by the postponement stood over for determination at a later stage.

[18] During arguments on 14 August 2017 regarding the question of costs, the court enquired from Ms Boonzaier whether the PG was prepared to pay the wasted costs occasioned by the postponement on 21 July 2017. Ms Boonzaier's response was that she did not have instructions to that effect.

³ Section 50(1) of the POCA Act.

⁴ LAWSA Vol 3 par 833.

[19] Legal practitioners as officers of this court, hardly need reminding that their dealings with court must be with utmost *uberrima fides* – that is utmost good faith, as the absence thereof diminishes the court's esteem in counsels' ethical behaviour.

[20] I found counsel's response rather unhelpful, and devoid of *bona fide*. In my view the response was not credible. My view was based on the following facts: The preservation of property order lapsed on 4 August 2017. This was approximately 8 court days before counsel was due to appear before Court on 14 August 2017. During that is period counsel did not, inexcusably obtain instructions with respect to issue of costs, despite the fact that by agreement between the parties, the issue of costs had stood over for determination at a later stage. Counsel knew or ought reasonably to have known that issue of wasted costs would be the only remaining issue before court in view of the fact the preservation order had lapsed. Counsel did not explain to the court why instructions regarding the payment wasted costs had not been obtained prior to her appearance in court on 14 August 2017.

[21] In any event, in my view, Ms Boonzaier did not need instructions from the PG regarding the issue of payment of wasted costs. As the PG's legal practitioner, Ms Boonzaier had a duty to advise the PG that in terms of the law and the rules of this court, that the PG was, in the circumstances of this matter, obliged to pay the costs occasioned by the indulgence granted to the PG when a postponement was sought and granted on 21 July 2017. The court would have otherwise have been satisfied that Ms Boonzaier had discharged her duty to her client and to the court, had her response been to the effect that: I advised the PG that she would have to tender or pay the wasted costs occasioned by the postponement but the PG declined to heed my advice.

[22] In this matter, there were no reasons and neither were any advanced to the court, why the PG should not have been ordered to pay the respondent's wasted costs occasioned by the postponement on 21 July 2017. The wasted costs of the postponement were included in the overall order of costs made by the court on 14 August 2017. The court did not consider it necessary in its formulation of the court order, to delineate or differentiate the wasted costs occasioned by the postponement and the overall costs of the application.

Overall costs of the application

[23] The thrust of Ms Boonzaier's argument as to why the PG should not have been ordered to pay the applicant's costs, was that the respondent was not a 'successful party' in the proceedings. I should immediately point the court's reason for awarding the costs order in favour of the respondent was not based upon a consideration of the respondent being 'a successful party' in these proceedings. In retrospect, however, and with the benefit of hindsight, a careful consideration of what transpired in these proceedings, it could be said that the respondent had been 'substantial successful' if regard is had to the favourable terms of the agreement reached between the parties after the respondent had launched the application to anticipate and to rescind the preservation order, which terms were made an order of court on 17 July 2017 set out above.

[24] As it would become apparent immediately, the degree of success is not the only basis upon which a party may be granted costs. The question whether the PG is liable to pay the respondent's costs, must be considered against the back ground of the provisions of sub-rules 97(3) and (4) of rule 97 of the rule of this court, dealing with withdrawal of the proceedings by a party who initiated such proceedings and the abandonment of proceedings by the party who initiated such proceedings.

[25] Rule 97(1) provides that:

'A person instituting proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she must deliver a notice of withdrawal and may include in that notice a consent to pay costs and the taxing officer must tax such costs on request of the other party.'

Rule 97(3) provides that:

'If no consent to pay costs is included in the notice of withdrawal the other party may apply to court on notice for an order for costs.'

Rule 97(4) provides that:

'A party in whose favour a decision or judgment has been given may abandon the decision or judgment either in whole or on part by delivering notice to that effect and that judgment or decision abandoned in part is considered as abandoned and sub rules (1), (2) and (3) relating to costs applies with the necessary modifications required by the context to a notice delivered in terms of this subrule.'

[26] It has been held that when and where a litigant withdraws an action or an application, very sound reasons must exist why a defendant or respondent should not be entitled to his or her costs. The plaintiff or applicant who withdraws his or her action or application is in the same position as an unsuccessful litigant. This is, because his or her 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.⁵ In such a case it is not necessary to go into the merits of the matter.

[27] Ms Boonzaier was at pains to stress that the preservation of property order had lapsed and therefore, that there was no application for the rescission of the preservation order to be adjudicated upon. Furthermore that the court could not assume that the PG's decision not to proceed to apply for a forfeiture order was due to the respondent's application for the rescission of the preservation of property order and therefore the respondent was a successful party. On the other hand, Mr. Heathcote pointed out that the respondent could not persist with the application for the rescission, but the fact of the matter was that the application was still on the roll and the issue of costs had stood over for determination.

[28] In my view the lapsing of the preservation of property order did not have the effect of terminating the proceedings before court. Furthermore the court would not assume that the PG's decision not to proceed with the application for a forfeiture order was caused by the force of the rescission application. In my view the situation is similar to a party who decided not to call his or her witness who is willing and available to testify on a crucial issue in dispute. In such an event the court simply draws an adverse inference against a party who decided not to call his or her witness. Similarly in the situation where the PG has decided not to proceed with an application for a forfeiture order, in deciding the issue of costs, in my considered

⁵ *Germishuys v Douglas Besproeingsraad* 1973 (3) SA 299 (headnote).

view, the court would be perfectly entitled to draw an adverse inference against the PG's decision not to proceed with an application for a forfeiture order.

[29] In my judgment, the proceedings before court could be terminated either by an application to court by the PG to discharge the preservation order or in terms of rule 97 of this court, with costs implications. The stage at which the decision by the PG is made not to proceed with a forfeiture of property order application would dictate which sub-rule of rule 97 of court would apply. Should the PG, for instance decide not to apply for a forfeiture of property order while the preservation of property order is still valid and in force, the PG would have two options, either to:

- (a) abandon the preservation of property order in terms of sub-rule 97(4) or;
- (b) withdraw the entire proceedings in terms of sub-rule 97(3).

[30] In either event, the PG would be bound to tender to pay the affected person's costs incurred through the futile application instituted by the PG.

[31] In the event that the preservation of property order lapses, the PG would have to withdraw the proceedings and tender costs. This is so because there would not be an order to abandon. Logic dictates that invariably, the decision not to apply for a forfeiture of property order would be made while the preservation order is still valid. It follows therefore in my view, that in the majority of cases, the PG would be obliged to abandon a preservation of property order and tender costs. Should she not tender costs she would have to justify why she should not be ordered to pay the affected person's costs. The option to withdraw would occur in rare and isolated cases because such option would only be available after the preservation of property order had lapsed. Appropriateness and decency dictate that a court order should either be formally abandoned or be discharged at the request of the party who applied for it. Allowing a court order to lapse has costs implication for the pending proceedings and might have serious consequences for the future conduct of the matter say in the event the PG might wish to apply for a second preservation of property order⁶. It is therefore a decision which should not be lightly made.

⁶ See: *Atlantic Ocean Management Group (Pty) Ltd and Another v The Prosecutor-General* NAHCMD 255 (6 September 2017)

[32] Applying the above principles to the facts of this matter, I was of the considered view that the PG ought to have filed a notice of withdrawal of the proceedings and tendered to pay the respondent's costs. This is because the preservation of property order had lapsed and there was no order to abandon. The PG did not formally withdraw proceedings and did not tender to pay the respondent's costs. It was thus left to the Court to make that determination regarding the payment of the respondent's costs. In the court's view, there were no sound reasons why the respondent should not be awarded its costs. Accordingly the court made the order in favour of the respondent and removed the matter from the roll as a finalised matter.

[33] It bears mentioning that since the introduction of the new rules of this court, it is no longer possible for a litigant who initiated legal proceedings to escape paying costs by, as the saying went; 'letting sleeping dogs lie', in the hope that the proceedings would die a natural death and the opposite party would not set the matter down for the determination of costs. In terms of rule 132 of this Court, a matter which is inactive for six months is allocated to a managing judge who in turn summons the parties to indicate whether they still wish to proceed with the matter or whether the matter should be struck off the roll, in which event it will be considered as having lapsed. It is at that stage that a party who initiated the proceedings would so to speak, be caught out, and called upon to pay the costs on the inactive proceedings which she or he had initiated.

[34] It was on the basis of the above legal principles, the provision of the rules of this court and for those reasons, that the court exercised its discretion in granting the costs order in favour of the respondent on 14 August 2017.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT: M BOONZAIER (with her T NANHAPO)
Of Government Attorney, Windhoek

RESPONDENTS: R HEATHCOTE SC (with him Y CAMPBELL)
Instructed by Koep & Partners, Windhoek