

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

JURGEN BRENDELL

APPLICANT

and

MAGDALENA MARYNA VAN ZYL

RESPONDENT

Neutral citation: *Brendell v Van Zyl* (HC-MD-CIV-ACT-OTH-2017/01332) [2017]
NAHCMD 285 (28 September 2017)

Coram: PRINSLOO J

Heard: 4 September 2017

Delivered: 28 September 2017

Flynote: Costs – Costs to be awarded above those provided in terms of Rule 32(11) of the High Court Rules – Party to make out clear case for seeking costs above the limits provided for in terms of court rules – Rule not absolute where successful party be awarded costs for unjust compulsion to initiate or defend litigation – Defendant initiating wrong procedure and withdrawing later on the date of hearing – Not sufficient reason however to award costs above those provided in terms of Rule 32(11).

ORDER

1. Defendant is ordered to pay the cost of the application including the cost of one instructed and one instructing council limited to rule 32(11).
2. Defendant to file plea on or before 16 October 2017.
3. Plaintiff to file replication to Defendant's plea, if any, on or before 27 October 2017.
4. The case is postponed to 09 November 2017 at 15h00 for Case Management Conference.
5. Parties must file Joint Case Management Conference report in terms of Rule 24(2).

RULING

Introduction and background:

[1] The plaintiff instituted an action against the defendant seeking *inter alia* a declaratory order that a universal partnership existed between the plaintiff and the defendant and other ancillary relief.

[2] The defendant entered an appearance to defend the action and had pursuant to such appearance to defend filed two special pleas against the plaintiff's cause of action.

[3] The defendant, without pleading over the merits raised a special plea and an alternative special plea.

[4] The matter was set down for adjudication of the special pleas raised on behalf of the defendant.

[5] At the commencement of the proceedings Mr Strydom, appearing on behalf of the defendant (applicant herein) conceded that the point taken on behalf of the plaintiff (respondent herein), that the special plea and alternative special plea was the wrong procedure to follow as it appears to be no more than disguised exceptions to the plaintiff's particulars of claim. Apart from that it was apparent in this matter that there are factual disputes that would call for evidence to be led, which should be reserved for the main action. Mr Strydom indicated that the defendant would not pursue the special plea any further and withdrew the special plea.

Argument on issue of costs:

[6] Although the parties readily agreed that the incorrect procedure was employed and that it should be withdrawn, the parties could not agree on the issue of costs. The only question to be decided by me relates to the costs of the application *in casu*.

[7] Defendant tendered costs incidental to Rule 32(11)¹ at the time of withdrawal of the special plea.

[8] This proposition is not accepted by the opposing party. Mr Corbett, appearing on behalf of the plaintiff, argued that the defendant employed the wrong procedure and must take responsibility for employing the wrong procedure. Mr Corbett took the following issues with the proposal that cost be incidental to rule 32(11).

[9] *Failure to mitigate prejudice:* Mr Corbett's complaint was that the defendant's counsel only approached plaintiff's counsel on the morning when the hearing of the arguments were due, to inform them that the defendant will not persist in proceeding with the special pleas.

¹ (11) Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners were engaged in a cause or matter, the costs that may be awarded to a successful party in an interlocutory proceeding may not exceed N\$ 20 000.

[10] Mr Corbett argued that the plaintiff was prejudiced as the defendant did nothing to mitigate the prejudice by informing opposing counsel timeously that they will withdraw the application, which would have curbed further legal costs. Arguments were due the week prior to the date of hearing and the defendant should then already have realised that the wrong procedure was employed and inform plaintiff's counsel accordingly. Failure to take pro-active steps in this regard caused the costs to escalate.

[11] *Two instructed and one instructing counsel:* In this regard Mr Corbett argued that the subject matter of the special pleas before court is not the normal run of the mill issues that were raised as there are controversy surrounding the issue of a universal partnership. The matter before court had the potential to shed light on developing the law in this regard and therefore two instructed counsel are justified for a matter of this nature.

[12] *Special plea is not an interlocutory application:* The Court was referred to the matter of *Uvanga v Steenkamp and Others*² where Masuku J ruled that a special plea is not an interlocutory and therefore rule 32(11) does not apply³. Plaintiff would thus be entitled to unrestricted costs.

General legal principle relating to costs

[13] It is trite that the party withdrawing an action or application is liable as an "unsuccessful" litigant, to pay the costs of the proceedings⁴.

[14] However, the general legal principle that costs are awarded to a successful party in order to indemnify him or her for the expenses to which he or she has been put through having been unjustly compelled either to initiate or defend litigation, is not absolute.⁵

² (I 1968/2014) [2016] NAHCMD 378 (2 December 2016)

³ Supra at paragraph 11 of the judgment.

⁴ *Germishuys v Douglas Besproeiingsraad* 1973 3 SA 299 (NC) 300.

⁵ *Wise v Shikuambi* N.O (A 293/2014) [2017] NAHCMD 148 (24 May 2017) at paragraph 28.

[15] In the South African case of *Payen Components South Africa Ltd v Bovic Gaskets CC*⁶ the Court at 417 said:

'While one of the purposes of a costs award to a successful party is "to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be" it is of equal importance that taxation 'ensures that the party who is condemned to pay the costs does not pay excessive ... costs in respect of the litigation which resulted in the order for costs.'

[16] Damaseb JP made it clear in the matter of *South African Poultry Association and Others v Ministry of Trade and Industry and Others*⁷ that a clear case need to be made out to allow a scale of cost above the upper limits of the rules and that the onus rests on the party seeking the higher scale.

[17] Costs is and remains in the discretion of the court. The plaintiff was from the onset aware that the application coming before court is bound to be abortive as it involved not only a dispute of fact but the defendant clearly employed the wrong procedure. There was thus a duty on the plaintiff to also limit the costs on his or her part as the vigilance of the respondent should match that of a responsible applicant.

[18] The poor timing of the defendant in withdrawing his special plea leaves much to be desired and as the 'unsuccessful' party must pay the wasted costs of the plaintiff herein. I am however not convinced that costs on a higher scale is appropriate in spite of the fact that the application before me is a special plea. It is clear from the pleadings that it is merely a special plea in name and not in nature.

[19] In the result, I make the following order:

1. Defendant is ordered to pay the cost of the application including the cost of one instructed and one instructing counsel limited to rule 32(11).
2. Defendant to file plea on or before 16 October 2017.

⁶ 1999 (2) SA 409 (W).

⁷ 2015 (1) NR 260 (HC) at 281.

3. Plaintiff to file replication to Defendant's plea, if any, on or before 27 October 2017.
4. The case is postponed to 09 November 2017 at 15h00 for Case Management Conference.
5. Parties must file Joint Case Management Conference report in terms of Rule 24(2).

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF: R HEATHCOTE SC (with him R MAASDORP)
Instructed by Engling Stritter & Partners, Windhoek

DEFENDANT: E SHIKONGO (with him S MILLER)
Of Shikongo Law Chambers, Windhoek