

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON COSTS

CASE NO. A 353/2015

In the matter between:

PATRICIA SKYER

APPLICANT

and

ALFRED SCHULTZ

1ST RESPONDENT

THE PALMHOF BODY CORPORATE

2ND RESPONDENT

THE REGISTRAR OF DEEDS

3RD RESPONDENT

Neutral citation: *Skyer v Schultz* (A 353/2015) [2017] NAHCMD 95 (15 March 2017)

Coram: ANGULA, DJP

Heard: 27 February 2017

Delivered: 15 March 2017

ORDER

1. The order made by this court on 11 April 2016 is hereby reaffirmed without variation.
2. In respect of the costs incurred by the parties in these proceedings since the order of 11 April 2016 was issued, to date, it is ordered that each party shall bear her or their own costs.
3. The matter is considered finalised and is accordingly removed from the roll.

RULING

ANGULA, DJP:

Introduction

[1] This ruling concerns the reconsideration of the question of costs afresh following the court having confirmed the rule nisi on 11 April 2016 and ordered that the respondents pay the applicant's costs. At the time the order was made, the court was not aware or made aware of an unconditional offer of settlement made by the respondents to the applicant. Rule 64 (12) provides that if the court had made an order of costs out of ignorance of the offer of settlement and such offer is thereafter brought to

the attention of the court, the court must reconsider the question of costs afresh, subject to the court's discretion.

Background

[2] On 11 December 2015 the applicant launched an urgent spoliation application against the respondents set down for hearing on 14 December 2016.

[3] When the matter was called on 14 December 2015 no notice of opposition had been filed on behalf of the respondents. Mr Theron however appeared on behalf of the respondents and informed the court that the respondents would reserve their rights.

[4] At the hearing of the matter on 14 December 2015 the court issued a rule *nisi* with a return date being 22 January 2016.

[5] On 20 January 2016 the Respondents filed their notice to oppose.

[6] On 25 January 2016 the first respondent filed his answering affidavit.

[7] On the date of the return date of the rule nisi that is 22 January 2016, the managing judge was not available whereupon Mister Justice Ueitele extended the rule to 12 February 2016.

[8] On 12 February 2016 the court ordered that the applicant file her replying affidavit on 15 February 2016; that the parties file their heads of argument on or before 12 February 2016. The rule was again extended to 18 February 2016.

[9] On 18 February 2016 the parties presented their arguments where after the rule was again extended to 11 April 2016 for the ruling.

[10] On 11 April 2016 the court confirmed the rule *nisi* and ordered the respondents to pay the applicant's costs on a normal scale of party and party up and until 14 December 2015. Shortly after the rule was confirmed, Mr Jacob for the respondents, attempted to hand up to court a letter in which he said the respondents had allegedly made an unconditional offer of settlement in terms of Rule 64(12) to the applicant. The court declined to accept the letter and suggested that the respondents follow the procedure prescribed by Rule 64.

[11] Subsequent thereto a meeting was convened by the managing judge in chambers, attended by the legal representative for the parties and held on 9 June 2016 to try to find a solution to the issue of costs in order to limit escalating of costs. At the end of the meeting the managing judge informed the parties that should an agreement not be reached by the parties with regard to the issue of costs and the respondents still wished to place the letter with an unconditional offer before court they would have to bring an application for leave to place such letter before the managing judge

First respondent's application for condonation for failure to bring the letter containing the unconditional offer to the notice of the Registrar with the time period prescribed by Rule 64.

[12] Rule 64(12) provides that the unconditional offer must be brought to the notice of the registrar in writing within five days after the date of the judgement or order. The registrar would then place the letter before the judge. It was common cause that the respondent was way out of the time of the period of five days prescribed by the rule. It was therefore necessary for the respondents to bring an application for condonation and for leave to place the letter before the judge.

[13] On 22 July 2016 the first respondent brought an application for condonation for failure to lodge the letter which contains the offer of settlement with the Registrar as prescribed by Rule 64 (12) and further, for leave to lodge the said letter with the

Registrar and for the latter to place such letter before the managing judge so that the issue of costs can be considered afresh.

[14] The application was opposed by the applicant in the main application.

[15] It turned out that the applicant was also late in filing her answering affidavit. Accordingly the applicant brought an application for condonation for the late filing of her answering affidavit.

[16] The first respondent's application and the applicant's application for condonation were both granted at the hearing of the matter on 27 February 2017. Furthermore leave was granted to the applicant to submit the letter containing the unconditional offer to the Registrar for the latter to place it before the managing judge.

[17] From the stamp of the office of the Registrar it appears that the letter was submitted to the Registrar on 3 March 2017. Shortly thereafter the Registrar placed the letter before me for reconsideration of the issue of costs afresh.

[18] The issue for consideration now before me, is whether in the light of the content of the letter the court is persuaded to vary its costs order of 11 April 2016.

[19] Initially the applicant demanded that the respondents pay the applicant's costs on attorney and client scale. In the letter of offer the respondents offered to pay the applicant's costs on a party and party scale. The court granted the applicant's costs on party-party scale payable only up to 14 December 2015 even though the order was made on 11 April 2016. The only difference between the respondents' offer and the court order is the period up to when the costs should be paid. In respect of the offer, the cut-off date was the date of the letter being 18 January 2016 whereas in respect of the court order the costs were granted up to 14 December 2015. It would therefore appear to me that the respondents' offer was more generous compared to the court order.

[20] I have considered the conducts of the parties to this matter in dealing with this application and I formed the view from the material before me that both parties have been using these proceedings to settle pre-existing scores between them. I say this because the real issue of spoliation has long been settled when the rule *nisi* was confirmed on 11 April 2016. The parties have since been litigating on the question of costs only.

[21] It is clear to me that the parties have been using these proceedings as a smoke screen to spite each other and fight an invisible war fuelled by the precast wall forming the boundary wall between their respective properties. From the papers before me it appears that the position of the boundary wall has been, so to speak, a bone of contention for a long time.

[22] It is necessary to point out to the parties in this matter that courts do not exist to settle personal scores: they exist to settle real issues in dispute affecting legal rights between litigants, efficiently and costs effectively as far as possible taking into account the amount or value of monetary claim involved.

[23] In my view the conduct of the parties in this matter bordered on abuse of court process if not being outright vexatious. I say this for the reasons that the amount of money involved compare to the amount money expended by both parties since the rule *nisi* was confirmed, in all probabilities have by now exceeded the costs the respondents have expended in order to have the letter of offer placed before court. And conversely the money expended by the applicant to prevent the letter being placed before court must by now have depleted the monetary benefit of the costs order she initially obtained from the court order in her favour. The only victim and loser in this game has been the court which has been forced in a position by the conducts of the parties to spend its judicial time unproductively and its resources not cost effectively.

[24] I am of the view that the conducts of the parties in these proceedings must be discouraged by not awarding them any order of costs as a sign of disapproval of such conducts. At the time the court made the order of costs in favour of the applicant it was done on the normal principle that the costs follow the results. In hindsight, had the court foreseen that the parties would conduct themselves in the manner they did subsequent to the costs order it would definitely not have granted the applicant an order of costs. But that, is so to speak, water under bridge.

[25] Having regard to the fore going I have not been persuaded that circumstance exist in this matter or by the contents of the letter with unconditional offer, to exercise my discretion to vary my previous order of costs.

[26] Regarding the costs incurred by the parties since my previous order and having regard to the conducts of the parties, as I have tried to demonstrate, as a sign of the court's displeasure and disapproval of their conducts, I have decided not make an order of costs in favour of any of the parties in respect of the proceedings since this court's order of 11 April 2016.

[27] In the result, I make the following orders:

1. The order made by this court on 11 April 2016 is hereby reaffirmed without variation.
2. In respect of the costs incurred by the parties in these proceedings since the order of 11 April 2016 to date, it is ordered that each party shall bear her or their own costs.
3. The matter is considered finalised and is accordingly removed from the roll.

H Angula

Deputy Judge President

APPEARANCES

APPLICANT:

Mr Bangamwabo

Instructed by Clement Daniels Attorneys

RESPONDENT:

Mr Jacobs

Instructed by PD Theron & Associates