

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: A 180/2016

In the matter between:

THEOPHILUS MOFUKA

APPLICANT

and

**BANK WINDHOEK LIMITED
DEPUTY SHERIFF OF THE HIGH COURT
FOR THE DISTRICT OF WINDHOEK**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Mofuka v Bank Windhoek Limited* (A 180/2016) [2018] NAHCMD 308
(24 September 2018)

Coram: USIKU, J

Heard on: 24 September 2018

Delivered: 24 September 2018

ORDER

1. The application for condonation by the 1st Respondent for failure to file the application for costs by the 16 August 2018, is hereby condoned.
2. The application for condonation by the Applicant for failure to file his answering affidavit by the 20th August 2018, is hereby condoned.
3. The Applicant in the withdrawn main matter under Case Number A180/2016 is hereby ordered to pay the 1st Respondent's costs in the withdrawn matter and such costs include costs of one instructing and one instructed counsel.
4. The Applicant in the withdrawn main matter under Case Number A180/2016 is hereby ordered to pay the costs of this application for costs, such costs to include costs occasioned by the appointment of one instructing and one instructed counsel.
5. The matter is removed from the roll and regarded finalized.

REASONS IN TERMS OF PRACTICE DIRECTIONS 61 (9)

USIKU J:

Condonation

[1] The condonation application by the 1st Respondent and the condonation application by the Applicant are granted.

Points in *limine*

[2] I am not persuaded that the citation of the parties in this matter creates confusion in the circumstances. The parties and the court, are not in doubt as to who the parties are to the present proceedings. This point is therefore rejected.

[3] I am further not convinced that the relief that the 1st Respondent seeks in the present application is ambiguous. I see no other possible meaning that can be ascribed to the relief sought as appears from the Notice of Motion. Clearly the word “by” in para. 1 of the relief prayed for, is a typographical error and should read “pay”. The *point in limine* based on ambiguity is therefore rejected.

Application for costs

[4] I have taken into account the history of this matter, I have read the papers and heard oral arguments in this matter. I support the principles set out in the authorities cited by Counsel for the 1st Respondent to the effect that a party who withdraws his litigation is in the same position as an unsuccessful party, and the opposing party is entitled to the costs caused by the institution of the proceedings by the withdrawing party. Where a party withdraws an action, sound reasons must exist why the opposing

party should not be granted costs. There are no sound reasons for denying the 1st Respondent its costs in the present matter, and the 1st Respondent stands to succeed in its application for costs in this matter. I am further satisfied that 1st Respondent was justified in the employment of an instructed counsel in the circumstances.

Conclusions

[5] In the premises I make the following order:

- a) The application for condonation by the 1st Respondent for failure to file the application for costs by the 16 August 2018, is hereby condoned.
 - b) The application for condonation by the Applicant for failure to file his answering affidavit by the 20th August 2018, is hereby condoned.
 - c) The Applicant in the withdrawn main matter under Case Number A180/2016 is hereby ordered to pay the 1st Respondent's costs in the withdrawn matter and such costs include costs of one instructing and one instructed counsel.
 - d) The Applicant in the withdrawn main matter under Case Number A180/2016 is hereby ordered to pay the costs of this application for costs, such costs to include costs occasioned by the appointment of one instructing and one instructed counsel.
 - e) The matter is removed from the roll and regarded finalized.
-

B Usiku
Judge

APPEARANCES:

APPLICANT :

EMN Angula

Of AngulaCo. Inc, Windhoek

1st RESPONDENT:

CE Van Der Westhuizen

Instructed by Dr Weder, Kauta & Hoveka Inc,
Windhoek