

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON COSTS

Case No: HC-MD-ACT-MAT-2016/03929

In the matter between:

G R

DEFENDANT/APPLICANT

and

E R

PLAINTIFF/RESPONDENT

Neutral Citation: *G R v E R* (HC-MD-ACT-MAT-2016/03929) [2018] NAHCMD 336 (19 October 2018)

CORAM: PRINSLOO J

Heard: 24 September 2018

Delivered: 19 October 2018

Reasons: 22 October 2018

Flynote: Costs – Principle to awarding of costs where the party initiating proceedings withdraws its claim – Court to determine whether the general rule that costs should follow the result should apply in matrimonial proceedings where parties settle – No order as to costs should be made in such instances.

ORDER

1. No order as to cost.
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RULING IN TERMS OF PRACTICE DIRECTION 61

PRINSLOO J:

Introduction

[1] The application before me is in terms of Rule 97(3) of the Rules of Court for an order directing the plaintiff¹ to pay the defendant's cost in respect of an action instituted by the plaintiff against the defendant and which the plaintiff subsequently withdrew. On 10 September 2018 the plaintiff filed a notice of withdrawal of the action but no cost was tendered.

[2] Rule 97 provides:

'97. (1) 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 the request of the other party.

¹ I will refer to the parties as they are in the main action.

(2) A consent to pay costs referred to in subrule (1) has the effect of an order of court for such costs.

(3) 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.’

[3] The general rule, in relation to cost orders where a litigant withdraws his or her action is that the withdrawing party is liable to pay the costs of the proceedings. There must be sound reasons why the other party should not be entitled to his or her costs. This is because the withdrawing party is in the same position as an unsuccessful litigant.² This rule is not absolute as each case must be considered against its own facts. In order to determine if the general rule is applicable, I will briefly consider the background of the matter *in casu*.

Background

[4] The parties were married on 09 April 2008 in Harare, Zimbabwe, out of community of property. The parties relocated to Namibia and were residing in Okahandja. Both parties are in the medical profession, as a general practitioner and an oncology nurse respectively. Due to the subsequent breakdown of the marital relationship of the parties, the plaintiff instituted an action for divorce on 28 November 2016 based on malicious, alternatively, constructive desertion. The defendant then defended the action.

[5] The parties exchanged their pleadings in terms of a case plan as set by this court on 14 March 2017. There were attempts by the parties to settle this matter but the relationship between the parties became progressively acrimonious, which led to an urgent application by the defendant for custody and control of the minor children, which was heard on 14 December 2017. During these proceedings, interim custody respect of the minor children was awarded to the plaintiff. A further interlocutory application

² *Germishuys v Douglas Bespoeiingsraad* 1973(3) SA 299(NC) at 300 D-E.

followed on 13 April 2018³ in an attempt by the defendant to rescind this court's order dated 14 December 2017.

[6] The matter progressed steadily through the judicial case management process to the point where a trial date was allocated to this matter which was due to be heard 24 to 29 September 2018.

[7] The matter was scheduled for a pre-trial status hearing on 16 August 2018 which was preceded by a request by Ms. Gebhardt, the legal practitioner acting on behalf of the defendant, for an earlier status hearing.

[8] During the pre-trial status hearing it became apparent that some of the initial issues between the parties have fallen away because of a change in the circumstance of the parties.

[9] The plaintiff relocated to Windhoek in 2017 to be closer to her employment and she brought the three minor children with her, whereas the defendant continued with his medical practice in Okahandja. The court was informed that plaintiff returned to Zimbabwe as her work permit was not renewed. The plaintiff took the minor children with her and thereby effectively removed the children from the jurisdiction of this court. The issue of the custody and control of the minor children therefor fell away.

[10] A further issue in respect of the jointly owned immovable property situated in Okahandja also fell away as the bank foreclosed on the property. This then only left the issue of the property situated in Harare, Zimbabwe.

[11] As the divorce was not opposed and the ancillary issues to some extent resolved itself the parties requested the opportunity to return to the negotiation table during which negotiations the parties reached common ground.

³ *G R v E R* (HC-MD-ACT-MAT-2016/03929) [2018] NAHCMD 134 (18 May 2018).

[12] It was agreed that the plaintiff would withdraw her claim and particulars of claim and that defendant would proceed with his counterclaim. The reasoning behind this agreement was that the plaintiff would then avoid having to travel back to Namibia at great cost to proceed with her claim.

[13] The parties agreed that the custody and control of the minor children will be determined by an appropriate court in Zimbabwe and they further agreed that the property situated in Harare, Zimbabwe would be sold and the proceeds thereof will be divided equally between the parties. In order to accommodate the agreement between the parties as the ancillary relief the defendant amended his counterclaim by agreement to incorporate same.

[14] The only issue that the parties could not resolve was the issue of costs.

Argument on behalf of the defendant

[15] The defendant alleged that the plaintiff instituted divorce proceedings in Zimbabwe whilst the identical proceedings were pending in the jurisdiction of this court. On behalf of the defendant it was argued that in light of similar proceedings pending in Zimbabwe and the fact that the plaintiff relocated back to Zimbabwe without informing this court or her legal practitioner can be construed as *mala fides*. It was further argued that plaintiff instituted the current proceedings but then abandon them as she knew that she would not be returning to Namibia, in addition thereto the defendant incurred substantial costs in defending this matter.

[16] In conclusion it was argued that the defendant should be regarded as the successful party in this matter and because of the behaviour of the plaintiff the court should exercise her discretion in awarding costs in favour of the defendant on an attorney own client scale.

Argument on behalf the plaintiff

[17] On behalf of the plaintiff it was argued that there is nothing before this court to substantiate the allegation that the plaintiff instituted similar proceedings in Zimbabwe and therefore the court cannot take any cognizance of the allegations in reaching her ruling in this matter.

[18] It was further argued by Ms. Kaumbi, on behalf of the plaintiff, that if one wish to apportion blame the court should consider the many instance of delay and obstinate and obstructive behaviour can be laid at the door of the defendant. Specific reference was made to the interlocutory and further issues that arose during the litigation in this matter, which I will not discuss at this stage.

[19] In concluding Ms. Kaumbi argued that the court should decline to award costs as prayed for by the defendant and that the court should consider the position of the parties and the background circumstance of the matter and refuse to make any order as to costs.

Discussion

[20] The court made the relevant cost orders in respect of the interlocutory applications and it need not be considered for purposes of the proceedings *in casu*.

[21] 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.⁴

[22] Costs fall to be decided judicially in the exercise by the court of a broad discretion in the strict sense of the concept. The general rule that costs should follow the result does not always work satisfactorily in matrimonial proceedings. I am of the

⁴ *Wise v Shikuambi* N.O (A 293/2014) [2017] NAHCMD 148 (24 May 2017) at paragraph 28.

considered view that as settlement was reached between the parties it cannot be argued that either party is the successful party.

[23] Although earlier settlement negotiations did not bear any fruits the last round of negotiations during September 2018 brought the parties to a settlement and the divorce proceeded on an unopposed basis.

[24] Even if I considered granting the defendant costs, which I do not, I think it would also be appropriate, in what were primarily matrimonial and family law proceedings, to take into account the apparent inequality of the financial means of the parties. The defendant is a medical doctor holding his own practice, whereas the plaintiff's current position is that she is unemployed. The Plaintiff is the primary caregiver of the minor children and any cost order against the plaintiff would probably impact negatively against the material best interests of the parties minor children.

[25] In conclusion, due to the nature of the proceedings and the history of the matter I am of the view that there are no sound reasons which would entitle the defendant to the cost order sought, on a punitive scale at that. I must decline to make any order as to cost in this matter.

[26] My order is therefore as follows:

1. No order as to costs.

JS Prinsloo

Judge

APPEARANCES:

APPLICANT:

I Gebhardt
of Ileni Gebhardt & Co Inc., Windhoek

RESPONDENT:

A Hans-Kaumbi
of Ueitele & Hans Legal Practitioners Inc., Windhoek