REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON COSTS

Case no: HC-MD-CIV-MOT-GEN-2018/00025

In the matter between:

NELSON NDELIMONO NAPEJE AKWENYE	**FIRST APPLICANT**
FERUSA CAPITAL CC	**SECOND APPLICANT**

and

ILKE HENRIETTE AKWENYE	**FIRST RESPONDENT**
SQUIRREL INVESTMENT TWENTY FOUR	**SECOND RESPONDENT**
NAMAGRI PROPERTIES	**THIRD RESPONDENT**
AUCOR NAMIBIA (PTY) LTD	**FOURTH RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA LTD	**FIFTH RESPONDENT**
STANDARD BANK NAMIBIA LIMITED	**SIXTH RESPONDENT**

Neutral citation: *Akwenye v Akwenye* (HC-MD-CIV-MOT-GEN-2018/00025) [2018] NAHCMD 347 (31 October 2018)

Coram: ANGULA DJP

Heard: **14 February 2018, 13 March 2018, 28 March 2018 and 15 August 2018**

Delivered: **31 October 2018**

Flynote: Civil Practice – Costs – Abandonment of proceedings – Rule 97 – The rule provides that where a party in whose favour a judgement or order has been

made abandons part of the order without consent to pay the costs, the other party may apply to court for an order for costs – The intervening parties are entitled to wasted costs following his abandonment of part of the order made in the applicant's favour.

Summary: Civil Practice – The intervening respondent applied for leave to intervene in the proceedings related to the properties in which they had direct and substantial interest – The applicant did not oppose the respective applications – Thereafter the applicant abandoned part of the order relating to the intervening respondents' properties – In an application for an order by the intervening respondents directing the applicant to pay their wasted costs.

Court held – Where an application or action is withdrawn, an intervening party should demonstrate that he would have been entitled to intervene and in doing so, had incurred costs which became wasted by virtue of the applicant's decision to withdraw the application.

Held further – Where a litigant withdraws an action or an application, there should exist very sound reasons why a respondent should not be entitled to his or her costs. An applicant who withdraws or abandons his or her application is in the same position as an unsuccessful litigant. This is, because his or her application is futile and the respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings.

Court held – In casu there were no exceptional grounds or facts justifying the court to depart from the normal rule to order the applicant to compensate the intervening respondents in respect of their wasted costs. Accordingly, the applicant was ordered to pay the intervening respondents' wasted costs.

ORDER

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1. The applicant is ordered to pay the first and second intervening respondents' costs occasioned by their application to intervene in the main application, and

where applicable, such costs are to include the costs of one instructing and one instructed counsel.

2. The matter is removed from the roll and is considered finalised.

RULING

ANGULA DJP:

Introduction

[1] The issue for determination in this matter is whether the applicant should be ordered to pay the costs of the intervening parties. The applicant disputes that he is liable to pay the intervening parties' costs. In order to appreciate the dispute, it is necessary to briefly set out the background.

Background

[2] On 1 February 2018, the applicant approached this court on an urgent basis, seeking certain relief. Upon hearing the application the court issued a rule nisi 'calling upon the respondents and all interested parties to show cause on 14 February 2018 at 09h00 why the first and second respondents should not be interdicted from selling and/or alienating and/or disposing of and/or transferring to any third party, pending the finalization of the main action to be launched – the following properties, shareholdings and vehicles, currently in the first respondent's possession: Erf 431, Auasblick, the shareholding in Squirrel Twenty Four (Pty) Ltd which in turn is the owner of Erf 296, Auasblick, Erf 288, Evelyn Street, Goreangab, Windhoek; the Mercedes Benz G Wagon, the Range Rover Sport, the Range Rover Vogue, the Isuzu pick-up, and Erf 857, Kleine Kuppe (Extension No. 1) Gariseb Street, Windhoek. It is common cause that the Mercedes Benz and the Isuzu pick-up had been financed by First National Bank (FNB) (the first intervening respondent). Furthermore, the immovable property being Erf No. 431, Auasblick has two mortgage bonds registered in favour of FNB.

[3] It is further common cause that the Range Rover Vogue vehicle had been financed by Standard Bank and that ownership thereof vested in it (the second intervening party). Furthermore Erf 288, Goreagab and Erf 296 Auasblick had a mortgaged bond registered in favour of Standard Bank.

[4] The applicant and the first respondent were at the time of the commencement of the proceedings married to each other out of community of property. From the papers filed by the parties, it appeared that there was a marital dispute between the applicant and the first respondent. As a matter of fact divorce proceedings were in progress. According to the first respondent, the applicant was squandering the matrimonial properties. In order to save the situation, she proceeded to surrender to the intervening respondents *inter alia* the luxury vehicles which had been bought by the applicant through the banks. After the vehicles were surrendered to the intervening respondents, they were in turn handed over to an auctioneer, the fourth respondent, to sell the vehicles in order to recoup the intervening respondents' loans. It was that sale the applicant sought to stop and interdict. When the application was called on 14 February 2018, at around 9 o'clock in the morning, the court was informed that the auction was scheduled to take place at 10h00 that morning: thus urgency attended upon the matter.

[5] Having heard counsel for the applicant, I issued a rule *nisi*, with a return date being 14 February 2018 with the terms as narrated in paragraph 2 above, calling upon *inter alia* the respondents and all interested parties to come and show cause on the return date why the order should not be made final.

[6] The facts which gave rise to the relief sought are no longer relevant, because after the interim order was granted, the merits were not persisted with by the parties before this court.

[7] On the return date, 14 February 2018, the first intervening respondent, had by then filed an application to intervene in the proceedings. As indicated earlier, its interest was limited to one immovable property over which it has registered a mortgage bond as security for the loan advanced to the first respondent and to the two motor vehicles, namely the Mercedes Benz and the Isuzu pick-up, it has financed. The application for intervention was not opposed by the applicant. The

court was satisfied that it had direct a substantial interest in the subject-matter of the dispute and accordingly granted leave to FNB to intervene in the proceedings.

[8] A day before the return date, Standard Bank Namibia through what was described as a 'status report' sought directions from court to intervene in the proceedings. Mr Kauta, who appeared for Standard Bank, informed the court that he experienced problems when he attempted to access the e-justice system to file his client's application for leave to intervene.

[9] During the proceedings, Mr Mhata for the applicant indicated that he would file an application for leave to join Standard Bank as a party to the proceedings. Therefore it would no longer be necessary for Standard Bank to apply for leave to intervene in the proceedings.

[10] On the understanding that the application to join Standard Bank would be made and granted, the court made an order setting out the timeline for filing papers in the main application, including the filing of heads of arguments. The court *inter alia* ordered Standard Bank to file its answering affidavit on or before 20 February 2018. The rule was extended and matter postponed to 13 March 2018 for hearing of the application.

[11] On 13 March 2018, when the matter was called, Mr Mhata for the applicant sought a postponement because he could not secure the services of an instructed counsel.

[12] Mr Mhata further informed the court that contrary to his earlier undertaking that he would file and serve an application to join Standard Bank to the proceedings and despite having filed and served the application to join Standard Bank, he would not be moving his application to join Standard Bank as a party to the proceedings. The reasons for not moving the application, according to Mr Mhata, were that, after the first respondent had filed her answering affidavit, the applicant realised that the first respondent had surrendered to the banks the properties which were financed by the banks. Mr Mhata further informed the court, that the applicant had in the meantime, abandoned part of the rule *nisi* relating to the properties financed by the banks and that a formal notice of abandonment it terms of rule 97(4) had been filed.

In the light of this development, the only issue which remained for determination by the court was the issue of wasted costs. The court granted the application for postponement, and postponed the matter to 23 April 2018. The issue of wasted costs of that day was ordered to stand over for argument.

[13] It turned out later that the date to which the matter had been postponed, did not suit the instructed counsel of the applicant. A new suitable date, being 28 March 2018, was agreed upon between the parties and on that date, the matter was again postponed to 15 August 2018 for argument. The parties on the said date appeared and argued the issue of costs. The matter was postponed to 3 October 2018 for the ruling.

[14] Despite the fact that an answering affidavit was filed and submissions were made on behalf of Standard Bank, it was still not a party to the proceedings. It has been held that a court has an inherent or common law power to order the joinder of a party to proceedings which have already begun; and that the reasons for such power is to enable the court to ensure that persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment or order of the court are before court[1]. Notwithstanding such power, the court took the view that given the fact that Standard Bank had at all material times demonstrated its desire to intervene in the proceedings, but due to its inability to access the e-justice system and in addition the fact that it expected to be joined to the proceedings by the applicant and indeed an application to that effect had been filed, the court decided not to exercise its inherent power to join Standard Bank but to rather afford it an opportunity to apply for leave to intervene, if so advised. It was further apparent to the Court from the facts before court if Standard Bank had a direct and substantial interest in the subject matter of the litigation before court.

[15] Accordingly when the matter was called on 3 October 2018, I made an order giving Standard Bank an opportunity to file an application for leave to intervene in the proceedings, if so advised. The matter was postponed to 17 October for a status hearing.

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[1] *SA Steel Equipment Co (Pty) Ltd v Luvelli (Pty) Ltd* 1951 (4) SA 167 at p 172-173.

[16] As was to be expected, Standard Bank in the meantime filed an application for leave to formally intervene in the proceedings. None of the parties to the proceedings opposed the application. The application was thus granted and Standard Bank became the second intervening party to the proceedings. So much for the back ground. I now proceed to consider the opposing parties' respective contentions.

[17] The applicant argued that the fact that it abandoned the portion of the order which affected the intervening respondents' properties and the fact that he sought no order against them, they were not entitled to any order of costs against him. Furthermore, it was argued the fact that intervening parties might have incurred costs in the preparation of their affidavits is of no moment since, they did so at their own election. In effect, the applicant denied that the intervening respondents have a direct and substantial interest in the subject matter of the application. In developing this argument, Mr Mhata submitted during the hearing that the applicant did not seek any relief against the intervening respondents and therefore the applicant was not liable to pay the costs occasioned by their intervention and that in any event, the part of the order which related to their properties had been abandoned. I should mention that the applicant did not even offer to pay the wasted costs occasioned on the day when the matter had to be postponed because Mr Mhata could not secure the service an instructed counsel.

[18] In its application to intervene, Standard Bank argued that it was entitled to be compensated for the costs it had incurred. It pointed out further that it was ordered by the court on 14 February 2018 to file its answering affidavit and thereafter to file heads of argument. Furthermore, that it demanded that the applicant should provide security for costs. Standard Bank further pointed out that thereafter the applicant filed a notice in terms of rule 97(4) by which it abandoned part of the court order which related to its properties without tendering wasted costs.

[19] I do not agree with the applicant's argument for the following reasons: The applicant did not dispute that the intervening parties had interest in the properties which were the subject matter of the urgent interdictory order. The applicant caused the application papers to be served on the intervening parties. In my view, such service was an acknowledgment by the applicant that the intervening respondents

had a direct and substantial interest in the subject matter of the application. In respect of FNB, when the application for leave to intervene was served and filed and ultimately moved, the applicant did not oppose the application. This conduct, again in my view, served as yet a further acknowledgment that FNB was a necessary party to the proceedings and had interest in the subject matter of the dispute. Furthermore, once the applicant had realised that the intervening parties have interest in the properties, he abandoned part of the rule *nisi* which had a bearing on the properties which were financed by the intervening parties. In my view, it matters not whether the applicant abandoned part of the order relating to the properties in which the intervening parties had interest because of the content of the affidavit filed on behalf of FNB or because of the affidavit filed by the first respondent where she stated that she had surrendered the properties to the intervening parties.

[20] It is submitted on behalf of both intervening parties that, the applicant is liable to pay their costs occasioned in the proceedings on account of the applicant's abandonment of the proceedings. I agree with the submission for the reason that rule 97(4) provides that a party in whose favour a judgement or order has been made abandons part of the order without a consent to pay the costs, the other party may apply to court for an order for costs. This is exactly what transpired in the present matter. The intervening parties are entitled to demand that the applicant pays their wasted costs following his abandonment of part of the order made in his favour which related to the properties in which the intervening parties have an interest.

[21] The legal position is that where an application or action is withdrawn, an intervening party should demonstrate that he would have been entitled to intervene and in doing so, had incurred costs which became wasted by virtue of the applicant's decision to withdraw the application. Furthermore where an application or action is withdrawn, an intervening party should demonstrate that he or she was entitled to intervene and in doing so have incurred costs which became wasted by virtue of the applicants decision to withdraw the application[2].

[2] *Coetzee v National Commissioner of Police* [2010]; 2011 (20 SA 227 (GNP); See also the discussion by AC Cilliers on Law of Cost, par 11-20.

[22] This court, in *The Prosecutor General v Africa Autonet CC t/a Pacific Motors*[3] (POCA 5/2017) [2017] NAHCMD 265 (13 September 2017) at para 26, said the following with regard to the consequence of a party abandoning an order:

'[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. In such a case it is not necessary to go into the merits of the matter.'

[23] In the present matter, having regard to the legal principles outlined above and applying same to the facts in the present matter, I find that there are no exceptional circumstances or that good grounds or facts exist to justify the intervening respondents not being awarded their wasted costs occasioned by the abandonment of proceedings. As it clearly appears from the notice of motion, the applicant had called upon 'any party' which has an interest in the properties to come and show cause why the respondents should not be interdicted from selling the properties. In response to the applicant's call, the intervening respondents, intervened and showed cause why the interim order should not be made final. Following the intervention by the intervening respondents the applicant did not proceed with the application.

[24] It is only in exceptional circumstance where a party that has been put to expense of opposing the withdrawn proceedings, will not be entitled to all the costs caused by such withdrawn proceedings[4]. No exceptional circumstance exists in the present matter, justifying this court to depart from the normal rule ordering the applicant to compensate the intervening respondents in respect of their wasted costs. I am satisfied that the intervening parties have demonstrated that they were entitled to intervene and in doing so have incurred costs which became wasted following the applicant's decision to abandon part of the order which related to the properties in which the intervening respondents had an interest.

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[3] POCA 5/2017 [2017] NAHCMD 265 (13 September 2017) at para 26.

[4] *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd* 2003 (3) SA 547.

[25] Taking the foregoing considerations into account and in the exercise of my discretion, I have arrived at the conclusion that the intervening respondents are entitled to costs they have been put to in intervening in these proceedings.

[26] As a result, I make the following order:

1. The applicant is ordered to pay the first and second intervening respondents' costs occasioned by their application to intervene in the main application, and where applicable, such costs are to include the costs of one instructing and one instructed counsel.

2. The matter is removed from the roll and is considered finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	J P Ravenscroft-Jones (with him N MHATA) Instructed by Sisa Namandje & Co. Inc., Windhoek
FIRST RESPONDENT:	In person
FOURTH AND FIFTH RESPONDENTS: (1st intervening respondent)	Y Campbell Instructed by Fisher, Quarmby & Pfeifer, Windhoek
SIXTH RESPONDENT (2nd intervening respondent):	P Kauta of Dr Weder, Kauta & Hoveka Inc., Windhoek