

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 2099/2015

In the matter between:

**KAUNA NDILULA**

**PLAINTIFF/RESPONDENT**

and

**MARIETHE BEUTHIN**

**DEFENDANT/APPLICANT**

**Neutral citation:** *Ndilula v Beuthin* (I 2099/2015) [2018] NAHCMD 73 (28 March 2018)

**Coram:** PARKER AJ

**Heard:** 20 March 2018

**Delivered:** 28 March 2018

**Flynote:** Costs – General principle that costs follow the event and that the rule may be departed from where exceptional circumstances exist applied – Court held that where plaintiff has dragged defendant to the High Court in a matter where the

Magistrates' court also has jurisdiction and defendant succeeds in her defence court should award to defendant costs applicable to the High Court – Court held further that where plaintiff succeeds in a matter in the High Court in which the Magistrates' court also has jurisdiction it will be unjust and inequitable for court to award to plaintiff costs applicable to the High Court.

**Summary:** Costs – General principle that costs follow the event and that the rule may be departed from where exceptional circumstances exist applied – Court held that where plaintiff has dragged defendant to the High Court in a matter where the Magistrates' court also has jurisdiction and defendant succeeds in her defence court should award to defendant costs applicable to the High Court – Court held further that where plaintiff succeeds in a matter in the High Court in which the Magistrates' court also has jurisdiction it will be unjust and inequitable for court to award to plaintiff costs applicable to the High Court – In instant case court found that plaintiff has not shown exceptional circumstances to persuade the court to depart from the general principle – As respects to Claim 2 court found that the Magistrates' court also clearly has jurisdiction and plaintiff should be awarded costs applicable to the Magistrates' court – As respect Claim 1 court found that since defendant was dragged to the High Court and defendant has been successful in her defence, defendant should be awarded costs applicable to the High Court.

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### ORDER

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- (a) Claim 1 is dismissed.
- (b) Claim 2 is granted.
- (c) With regard to Claim 1, plaintiff must pay defendant's costs that are applicable to High Court proceedings.
- (d) With regard to Claim 2, defendant must pay plaintiff's costs that are applicable to proceedings in the Magistrates' court.

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## JUDGMENT

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PARKER, AJ

[1] In this matter, wherein summons was issued on June 2015, plaintiff makes two claims, namely, Claim 1 and Claim 2. Claim one concerns allegations of non-payment of rent by defendant in respect of the months of October (N\$18 000) and November (N\$18 000) 2012, making a total of N\$36 000, plus interest thereon. Claim 2 is in respect of allegations of defendant failing to pay Municipal bills for water and electricity in the amount of N\$7 800, 69, plus interest thereon. Plaintiff claims also costs of suit.

[2] In the course of events, the parties agreed as follows: namely, that –

- (a) Claim 1 be dismissed;
- (b) Claim 2 be granted;
- (c) Court to award costs as to the court seems “just and equitable”.

The upshot is that plaintiff is successful in respect of claim 2; and defendant is successful in respect of claim 1.

[3] The burden of the Court is, therefore, to determine the matter of costs. Ms Angula, counsel for the plaintiff, and Mr Philander, counsel for the defendant, made able written and oral submissions.

### The Law

[4] In *Channel Life Namibia Limited v Finance in Education (Pty) Ltd* 2004 NR 125, the court held that where a court is called upon to adjudicate only upon the question of costs, there should not be a hard-and-fast rule whether it would be necessary for the

court to consider the merits of the case: each case must be treated on its own facts. In some cases, it would be necessary to consider the merits; in some cases it would not be necessary to do so. On the facts and in the circumstances of the present proceeding, particularly the fact that each party has been successful in one of the claims, as set out previously, by agreement between the parties, it is absolutely unnecessary to consider the merits.

[5] It is trite law that costs follow the result unless exceptional circumstances exist for the court to depart from this general principle. Relevant to this general principle should be that if plaintiff X drags defendant Y to the High Court not the Magistrates' court where the latter court also has jurisdiction in the matter and defendant Y is successful, it will be unjust and inequitable to grant defendant Y Magistrates' court costs instead of High Court costs. The other side of the coin should also apply, that is, if plaintiff A drags defendant B to the High Court instead of the Magistrates' court in a matter where the latter court also has jurisdiction, and plaintiff A is successful, it will be unjust and inequitable for the court to grant plaintiff A costs applicable to the High Court.

[6] With these principles and approaches in my view, I proceed to consider costs in respect of Claim 1 and Claim 2.

#### Claim 1

[7] Defendant has been successful; and so costs should follow the event. Ms Angula submitted that if defendant had not waited until after some two years to inform plaintiff that he had made payments in respect of the claimed rentals, plaintiff would not have instituted proceedings to claim same. That cannot, with respect assist the plaintiff. As Mr Philander submitted, at least as at April 2017 plaintiff was aware that payments had been made – it is of no moment whether they were made to plaintiff's agent. It cannot be disputed that defendant had made certain previous payments to plaintiff through that agent; and plaintiff never complained. Despite such knowledge, plaintiff persisted in pursuing Claim 1. With respect, there is therefore nothing in Ms Angula's

submission that can constitute exceptional circumstances capable of persuading the court to depart from the general principle, and since plaintiff dragged the defendant to the High Court, defendant should have her costs, and costs that apply to the High Court.

### Claim 2

[8] The plaintiff has been successful; and so, plaintiff should have her costs. Mr Philander agrees, but counsel argued that the costs should be costs applicable to the Magistrates' court because the Magistrates' court has jurisdiction as far as Claim 2 is concerned. I agree. Having found that the two claims are severable and having taken into account what I have said in paragraph 5 above, it will be unjust and unfair and the court will be setting a very dangerous precedent, if plaintiff were awarded costs applicable to the High Court for a matter in which clearly the Magistrates' court has jurisdiction.

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

- (a) Claim 1 is dismissed.
- (b) Claim 2 is granted.
- (c) With regard to Claim 1, plaintiff must pay defendant's costs that are applicable to High Court proceedings.
- (d) With regard to Claim 2, defendant must pay plaintiff's costs that are applicable to proceedings in the Magistrates' court.

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C PARKER  
ACTING JUDGE

## APPEARANCES

For Plaintiff:

N Angula

of Dr Weber, Kauta &amp; Hoveka Inc., Windhoek

For Defendant:

R Philander

of ENSAfrica | Namibia (incorporated as Lorentz Angula  
Inc.), Windhoek