REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON COSTS

Case no: HC-MD-CIV-MOT-GEN-2019/00065

In the matter between:

STANDARD BANK NAMIBIA LIMITED	**APPLICANT**

and

STEPHANUS BERGH N.O	**FIRST RESPONDENT**
RUDOLF WOLDERMAR WINCKLER N.O	**SECOND RESPONDENT**
PIETER JACOBUS KRUGEL	**THIRD RESPONDENT**
RENATHE BERGH	**FOURTH RESPONDENT**
SCHALK WILLEM BEZUIDENHOUT	**FIFTH RESPONDENT**
SERVE INVESTMENTS FIFTY (PTY) LTD	**SIXTH RESPONDENT**
PAPALLONA INVESTMENTS (PTY) LTD	**SEVENTH RESPONDENT**
MERENSKY INVESTMENTS (PTY) LTD	**EIGHTH RESPONDENT**
FAANBERGH WINCKLER PROJECTS (PTY) LTD	**NINTH RESPONDENT**
FAAN BERGH HOLDINGS (PTY) LTD	**TENTH RESPONDENT**

Neutral citation: *Standard Bank Namibia Limited v Bergh* (HC-MD-CIV-MOT-GEN-2019/00065) [2019] NAHCMD 102 (8 April 2019)

Coram: ANGULA DJP

Heard: **15 March 2019**

Delivered: **8 April 2019**

Flynote: Civil Practice – Applications and Motions – Urgent Application – Withdrawal of proceedings; application withdrawn against respondents with inadequate tender of costs and costs not tendered – Respondents applied for an order of costs in terms of rule 97(3) of the High Court Rules – Where a litigant withdraws an action or application (or opposition or defence) there should exist very sound reasons why the defendant or respondent should not be entitled to his costs – Applicant failed to give good reasons as to why the respondents should not be granted costs.

Summary: Civil Practice – Applications and Motions – Urgent Application – Withdrawal of proceedings – Applicant brought an urgent application against the respondents seeking an order to have two Trusts sequestrated and an order to wind-up six companies of the same group of companies – The application was opposed and opposing papers were filed – After receiving some of the respondents' answering papers, the applicant withdrew the application tendered costs up to a stage of the proceedings and at a rate which was not acceptable to the respondents. The respondents filed applications in terms of rule 97(3) for an order for applicant to pay their costs, some of the respondents sought orders on an adverse scale due to the applicant's reprehensive behaviour.

Court held: Where a litigant withdraws an action or application (or opposition of defence) there should exist very sound reasons why the defendant or respondent should not be entitled to his costs; that this is because a party who withdraws or abandons his or her action or application is in a position of an unsuccessful litigant and under those circumstances, the opposing party is entitled to all the costs associated with the withdrawn application or action proceedings.

Held further: In order for a court to make an adverse order of costs, it must be in possession of all the facts necessary to make such an order. In the present matter, with regard to a prayer of an adverse costs order in respect of the main application, the court held that it was not in position of the facts upon which it could make an order that the applicant had been vexatious or frivolous.

Held further: The behaviour of the legal practitioners for the applicant was reprehensible in so far as they refused to tender the respondents' costs when the application was withdrawn; that the applicant's legal practitioners displayed little or no regard for their opponents' rights. The conduct of applicant and its legal practitioners was 'objectionable, unreasonable, unjustifiable and oppressive' in the circumstance of the case and called for severe sanction as a demonstration of the Court's disapproval of the applicant and its legal practitioners' conduct, the court imposed an adverse cost order against the applicant on an attorney and client scale.

ORDER

1. The applicant is ordered to pay those respondents' who opposed the application, their costs in respect of the main application on party and party scale, such costs to include the costs of one instructed and one instructing counsel up to the delivery of this ruling.

2. The applicant is ordered to pay the costs of first, fourth, fifth, sixth, seventh, eighth, ninth, and tenth respondents, as well as the second respondent's costs occasioned by their applications made in terms of rule 97(3) on a scale as between attorney and client, such costs to include the costs of one instructed and one instructing counsel up to the delivery of this ruling. The costs shall not be subject to the limit imposed by rule 32(11).

3. The applicant is ordered to pay the third respondent's costs occasioned by the application made in terms of rule 97(3) on a party and party scale, such costs to include the costs of one instructed and one instructing counsel up to the delivery of this ruling.

4. The matter is removed from the roll and is considered finalized.

JUDGMENT

ANGULA DJP:

Introduction:

[1] The crisp issue for determination in this matter is at what scale the applicant be ordered to pay the respondents' costs following the applicant's withdrawal of the application against the respondents. In other words should it be on a normal party and party scale or should it be on a punitive scale of an attorney and client's scale.

Factual background:

[2] The applicant launched this application on an urgent basis seeking an order to have the Faanbergh Winckler Development Trust and the Bergh Trust sequestrated on the basis that they are insolvent. The applicant further sought an order to wind-up the sixth to the tenth respondents for the reasons that they are unable to pay their debts and that it is just and equitable that they be wound up.

[3] Following the service of the application on the respondents, the second respondent opposed the application and filed an opposing affidavit. Shortly thereafter, the applicant withdrew its application against the second respondent by filing a formal notice of withdrawal without tendering costs. When the matter was called, Mr Kauta, who appeared for the applicant, assisted by Ms Kuzeeko, confirmed that no costs would be offered to the second respondent and that the second respondent's remedy with regards to its wasted costs was provided by rule 97(3) of the Rules of this Court. In other words the second respondent should make a formal application asking for the applicant to pay his wasted costs.

[4] Mr Muhongo who appeared for the second respondent informed the court that the second respondent would indeed file an application in terms of rule 97(3) in due course and further gave notice that an adverse order of costs would be sought against the applicant given the applicant's stance.

[5] The first, fourth, fifth, seventh, eighth, ninth and tenth respondent also opposed the application. Mrs Garbers-Kirsten appeared on their behalf. The answering affidavit filed on their behalf, appeared on the e-justice system a few minutes before the matter was called. It would appear that a hard copy of the affidavit had been made available to the applicant's counsel shortly before the matter was called.

[6] A notice to oppose had also been filed on behalf of the third respondent but no answering affidavit had been filed. Mr Strydom who appeared on behalf of the third respondent, indicated to the Court that he needed time to consult and to thereafter file his client's answering affidavit.

[7] When Mr Kauta raised to address the Court, he informed the Court that upon perusal of the answering affidavit filed on behalf of the respondents represented by Mrs Garbers-Kirsten, it made a 'factual allegation' that the sale of the units developed by the respondents' Group of companies with the money lend to them by the applicant was indeed on-going and that latest sale was concluded on 7 March 2019 – a day the application was launched. Counsel further informed the Court that should the allegation be proved to be correct, he would advise the applicant to withdraw the application.

[8] The Court took the view that the applicant should have verified such an important fact before launching the application. Furthermore, the Court was not prepared to deal with the matter in a piecemeal approach. Accordingly the Court directed that the matter would be postponed to the following day at 9 o'clock; that Mr Muhongo for the second respondent would be excused from attending further proceedings as his client's only issue was costs which had not been tendered. The Court therefore directed that the second respondent should, in the meantime, file its application in terms of rule 97(3) to be set down for hearing after the main application had been heard. The Court further directed that the third respondent, who was the only one who had not filed his answering affidavit, should file his affidavit.

[9] When the matter was called the following day at 9 o'clock, Mr Kauta was not present. Ms Kuzeeko, who appeared with Mr Kauta the previous day, appeared on behalf of the applicant. The appearance on behalf of the respondents were as the previous day including Mr Muhongo, for the second respondent whom I had excused from further appearance. Counsel informed the court that there had been developments overnight, which necessitated his appearance.

[10] When Ms Kuzeeko, for the applicant raised, she informed the court that there had been developments, since the adjournment the previous day, in that the applicant has withdrawn its entire application against the respondents and tendered costs up to the previous day at 10 o'clock when the matter was adjourned. A notice of withdrawal of the application against respondents first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth in terms of rule 97 and the third respondent had been filed on the e-justice system tendering to pay the respondents' wasted costs 'only up to the appearance in Court on 14 March 2019 at 10h00. Ms Kuzeeko then suggested to the Court that any remaining issue of costs should be postponed so as to allow the applicant to put facts before court to explain its tender and why it was not prepared to tender to the second respondent's wasted costs.

[11] It transpired later that the tender did not include the cost of one instructed and one instructing counsel. The tender was not acceptable to the respondents. The respondents insisted on costs up to the day of the hearing, such costs to include costs of one instructing counsel and one instructed counsel.

[12] In the circumstance, I directed that the respondents, including the second respondent, file their applications in terms of rule 97(3) for hearing in the afternoon on the same day at 14h15.

[13] When the matter resumed in the afternoon, all the respondents had filed their applications in terms of rule 97(3) as directed. The applications were not opposed by the applicant. I will continue to refer to the parties, as cited in the main application.

The first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents application in term of rule 97(3)

[14] The above respondents' stance is that they have the right to be indemnified for their costs until the finalisation of the this matter; and that they have the right to be so indemnified of all their costs, which costs should include the costs of one instructing and one instructed counsel. These respondents further point out that when the matter was postponed the previous day, their legal team was not absolved from preparing to argue the matter the following morning. The respondents pointed out further that if they were to accept the applicant's tender they will be out of pocket in respect of the costs incurred until the finalisation of the matter.

The second respondent's application in terms of rule 97(3)

[15] The second respondent sought for an order, 'that the applicant's legal practitioners and/or the applicant, jointly and severally, the one paying the other to be absolved, pay the second respondent's costs of the main application on an adverse scale, the costs to include the costs of one instructed and one instructing counsel'. In this connection, the second respondent points out that he caused a letter to be addressed by his legal practitioner to the applicant's legal practitioner on 13 March 2019 requesting the applicant to withdraw the application against him failing which he would be obliged to file a notice of opposition and seek a punitive order of costs against the applicant and against the applicant's legal practitioner *de bonis propriis*. The second respondent also sought an order that the costs should not be limited in terms of rule 32(11) (which limit the costs of an interlocutory application) to the sum of N$20 000.

[16] According to the second respondent, no response was received from the said letter which prompted him to instruct his attorney to file the notice to oppose.

[17] I digress to observe that the second respondent's threat appeared to have evoked a wrath on the part of the applicant and its legal representative which caused them to adopt a hard stance against the second respondent not to tender to pay his wasted costs, following its withdrawal of the application against the second respondent. I hold this view for the reason that no affidavit was filed on behalf of the

applicant to explain why no tender was made to the second respondent in respect of his wasted costs yet a tender was made to other respondents.

[18] The second respondent raised multiple points *in limine* to the main application, including non-service of the application upon him; misjoinder; incompetency not to bring multiple applications against more than one respondent in an application for liquidation/sequestration of respondents is sought; and lack of urgency. I should mention that two of the points, if they were adjudicated upon, to have the potential of being fatal to the applicant's application. As mentioned earlier the applicant did not disclose the reasons for the withdrawal of its application against the second respondent neither did it disclose the reasons why no tender of costs was made as it should have been done in terms of the very well established legal principles.

The third respondent's application in terms of rule 97(3)

[19] The third respondent seeks an order that the applicant pays his legal costs in respect of the main application, to include the costs consequent upon the employment of one instructed and one instructing counsel; and that the applicant pays his costs occasioned by the costs of the application made in terms of rule 97(3) on the scale as between party and party including the costs of one instructing counsel and one instructed counsel.

[20] In motivation for the relief sought, the third respondent states that after the matter was postponed on 14 March 2019 at the request of the legal practitioner for the applicant, he caused a letter to be addressed by his lawyers to the applicant's legal practitioner, reminding him of his undertaking to inform his lawyers whether he still intended to proceed with the matter after he had verified the alleged 'factual allegations'. No response was received. The third respondent further states that after the notice of withdrawal of the application was received only tendering costs up to 10h00 on 14 March 2019, he caused a further letter to be addressed by his legal practitioner to the applicant's legal practitioner, demanding that the tender should include wasted costs of one instructed and one instructing counsel and should be until the timing of filing the notice of withdrawal. Again, no response was received

from the the applicant's lawyers and as a result, his legal team was obliged to return to court the following day to address the Court on the issue of costs. That concludes the respondents' respective cases.

[21] I think that it is necessary to stress that despite the applicant's earlier undertaking to place facts before Court in the event of the respondents filing applications in terms of rule 97(3), when such applications were filed, the applicant did not oppose the respondents' applications neither did it provide the Court with any explanation for its stance and its reasons underlining its tender for costs made contrary to the well-established legal principles.

Applicable legal principles

[22] The applicable legal principles with regard to a party's liability who withdraws an application, action or a defence to pay costs of the other party are well-settled. I shall apply it to the facts of this matter without reviewing or referring to such legal principles in detail. Ms Garbers-Kirsten provided the court with 'Notes on Costs'. Mr Muhongo on his part provided the Court with a bundle of case-law dealing with costs. Mr Strydom on the other hand during his address referred the Court to a useful case law on point. The Court is grateful to Counsel for their assistance in this regard given the short time which was available to them to prepare papers and to conduct research.

[23] It has been held that where a litigant withdraws an action or application (or opposition of defence) there should exist very sound reasons why the defendant or respondent should not be entitled to his costs; that this is because an applicant or plaintiff who withdraws or abandoned his or her action or application is in a position of an unsuccessful litigant and under those circumstances, the opposing party is entitled to all the costs associated with the withdrawn application or action proceedings[1]. As regards the granting of attorney and client costs order, the Court will only grant such an order where special circumstances are present and in the exercise of it discretion 'for instance (where) the litigation has been pursued

[1] *Bertolini v Ehlers and Another* (HC-MD-CIV-ACT-DEL-2016/03201) [2017] NAHCMD 284 (06 October 2012); and *Akwenye v Akwenye* (HC-MD-CIV-MOT- GEN-2018/00025 [2018] NAHCMD 347 (31 October 2018).

vexatiously or frivolously or where a party has been guilty of reprehensible behaviour[2]'. I proceed to consider the respondents' parties respective stances.

Were the respondents justified in their rejection of the applicant's tender for costs?

[24] In my judgment, the respondents were perfectly justified in rejecting the applicant's tender of costs as contained in the notice of withdrawal. My conclusion in this regard is based on the following reasons: It was pointed out by counsel for the respondents that the applicant's tender did not include the payment of 'costs for one instructing and one instructed counsel'. It is common cause that, when the parties appeared before me, each party was represented by two counsel; even on the applicant's side Mr Kauta and Ms Kuzeeko appeared for the applicant and later Mr Kauta was substituted by Mr Narib. The respondents are entitled in law to be compensated for all the costs they have incurred in opposing this application. Furthermore, in my view, the applicant's tender to pay the respondents' costs up to 10 o'clock the previous day has no basis whether on facts or in law. It is disputed by the respondents that the proceedings were adjourned at 10 o'clock but that it was adjourned at 10h30. In any event, the proceedings were not terminated at 10 o'clock but were adjourned to the following morning.

[25] It later became clear, when the proceedings resumed and when Mr Narib motivated the tender for costs from the bar, that it was premised on incorrect facts or instructions to the effect that when the matter was adjourned, counsel for the respondents, were not to do anything pending Mr Kauta reverting to them. The correct position was however that, I directed Mr Strydom to do everything in the meantime to file his client's answering affidavit. His client was the only one who had not filed an answering affidavit. The matter was adjourned to proceed the following day, after all it was brought on urgent basis. Upon Mr Narib being apprised of the true position, he wisely conceded that in that event the respondents were entitled to their costs of the following day.

[26] There is a further reason why the respondents were, in my view, justified in rejecting the applicant's tender of costs up to ten o'clock the previous day. In my

[2] AC Celliers; *Law of Costs*, 3rd Edition 4-15.

view, there is substance in Mrs Garbers-Kirsten's submission, namely that, had the tender been made in the morning of the second day when the matter was called, there was good reason why it might have been accepted. Ms Kuzeeko for the applicant, however, made applicant's position clear that it was not prepared to tender the respondents' costs for that day. The applicant's stance caused the Court to order the respondents to prepare their applications in terms of rule 97(3) and adjourned the proceeding to the afternoon at 14h15.

[27] Furthermore, the proceedings were merely adjourned and not terminated or concluded. In this connection the respondents, correctly in my view, submit that they are entitled to be indemnified of all the reasonable costs incurred up to the finalisation of the matter. When the matter was adjourned to the following day, the legal teams of the respective respondents were not absolved from preparing to argue the matter the following day. In other words, they were still on brief and will be entitled to charge the respondents for being on brief. As a matter of fact, the undisputed evidence by the third respondent is that subsequent to the matter being adjourned to the following day, he had consultation with his legal team. According to the third respondent, even after the notice of withdrawal was received, he instructed his legal representative to address a letter to the applicant's legal representatives to advise that the tender was not acceptable and that the applicant should tender costs up to the time of the notice of withdrawal and that the tender should include the costs of one instructed and one instructing counsel. He states that no response was received which necessitated him to instruct his legal team to come to argue his entitlement to his costs. It is for those reasons that I hold the view that the respondents were justified in rejecting the applicant's unfair and unreasonable tender.

An improved tender of costs by the applicant

[28] When the matter was called in the afternoon, Mr Narib appeared on behalf of the applicant, instructed by Ms Kuzeeko. When he rose, he informed the court that the applicant at that juncture tendered to pay all the respondents costs up to the previous day at 10 o'clock, including the second respondent costs; that such costs would include the costs of one instructing counsel and one instructed counsel; and

that the costs were offered on a party/party scale. Furthermore, in respect of the second respondent, the applicant tendered to pay the second respondent's costs for the interlocutory application limited to N$20 000 in terms of rule 32(11).

[29] The applicant's offer was not acceptable to the respondents. Each respondent adopted different stance peculiar to its own circumstances. I will later deal with the respective respondents' stance as set out in their applications in terms of rule 97(3).

[30] Mr Narib conceded further that under the circumstances the court should grant an order of costs in favour of the respondents on a party/party scale in respect of both the main application and the respondents' applications in terms of rule 97(3). Such costs to include the costs of one instructed and one instructing counsel up to the point the offer was made in court.

[31] Mrs Garbers-Kirsten for the first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents, did not accept the offer, her clients insisted on a special order of costs on attorney and client scale in respect of both the main and interlocutory applications given the conduct of the applicant.

[32] The applicant's improved tender was partially accepted by Mr Muhongo for the second respondent in respect of the main application. With respect to the application in terms of rule 97(3) the second respondent insisted on an adverse costs order on attorney and client scale and that the costs should not be capped to the sum of N$20 000 in terms of rule 32(11).

[33] The improved tender was accepted by Mr Strydom, for the third respondent. An order to that effect will be made. I now proceed to consider whether the respondents should be granted costs other than those offered by the applicant.

Should the first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents to be awarded costs on attorney and client's scale in respect of the main application?

[34] Mrs Garbers-Kirsten argued that the applicant should be mulcted with cost on an attorney and client scale because the main application had no basis; and that 'it

was a dead horse' right from the beginning. Counsel argued further that there was an obligation on the applicant before it brought the application to verify the correctness of its basis for bringing the application namely whether sales of the units were continuing; and further whether the water and electricity accounts and levies by the municipality in respect of the units were in arrear as alleged. Counsel pointed out that, as it turned out the correct facts are that, the sales of the units are on-going and the accounts for the Municipality are not in arrears. Counsel further argued that it was bad in law for the applicant to have brought the application of various legal entities in one single application; and that such procedure is impermissible in law. Counsel further submit that the application was motivated by malice.

[35] In response to Mrs Garbers-Kirsten submission, Mr Narib for the applicant, on the other hand submitted that it was not unreasonable for the applicant to have withdrawn the application once it had verified the true facts; that there was nothing malicious about such a conduct.

[36] I pointed out to Mrs Garbers-Kirsten, during arguments, that I did not consider the merits of the main application as it was withdrawn. In other words I did not have an opportunity to consider the merits or demerits of the application, the reasonableness or otherwise of the applicant, let alone the basis to form an opinion whether there was malice on the part of the applicant in bringing the application. Furthermore, the parties have not finalised the exchange of affidavits. For instance the third respondent had not filed his answering affidavit and the applicant had not filed its replying affidavit. The issues have not been joined.

[37] I am accordingly of the view that in order for this Court to make an adverse order as to costs, it must be in possession of all the facts necessary to make such an order. In the present matter, with regard to a prayer of an adverse costs order in respect of the main application, I am not in position of the facts upon which I can make a judgment that the applicant has been vexatious or frivolous. Mr Strydom referred the Court to the approach adopted by the Court in a similar matter of *Erf Sixty-Six Vogelstrand v Municipality of Swakopmund*[3]. In that matter the applicant did not file a replying affidavit. The court declined to consider the merits. The court held

[3] 2012 (1) NR 393.

that in order for it to grant an attorney and client costs it must be satisfied that a party and party order of costs in favour of the applicant would not be sufficient to compensate the expenses incurred by the respondent in defending the matter. The respondents represented by Mrs Garbers-Kirsten have likewise not placed evidence before this Court to satisfy the Court why a normal order of costs on a party and party scale would not be sufficient to indemnify them of their normal costs.

[38] In the light of the foregoing, I have thus arrived at the conclusion that the first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents have failed to establish a basis upon which this Court can exercise its discretion to grant them a punitive order of costs in respect of the main application. Accordingly the respondents' request in this regard is declined. I next move to consider whether the respondents should be awarded a punitive order of costs with regard to the applications in terms of rule 97(3).

Should the first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents and the second respondent (hereinafter referred to as 'the respondents') be awarded costs on attorney and client's scale in respect of the application in terms of rule 97(3)?

[39] These respondents seek an attorney and client punitive order of costs against the applicant in respect of their interlocutory applications in terms of rule 97(3), such order to include the costs of one instructed and one instructing counsel and not to be limited to the sum of N$20 000 in terms of rule 32(11). The respondents argue that the applicant's refusal to tender all their costs is unfair and unjust in the circumstances based on the facts of this matter. These respondents submit that good reasons exist in this matter for this Court to deviate from the general rule that costs be granted on a normal scale of party and party. In this regard the respondents submit that the applicant's reasons for refusing to tender their costs is frivolous and unreasonable.

[40] In this regard Mrs Garbers-Kirsten submitted that when the applicant withdrew its application against the respondents it signified an acknowledgment that the

application was futile and still-born. Therefore the applicant should have immediately tendered costs.

[41] Mr Narib, who, so to speak, became a voice of reason when he appeared on behalf of the applicant, reasonable and gracefully conceded that a tender to pay the respondents' costs should have been made when the application was withdrawn. Counsel ascribed the absence of tender to 'a misunderstanding'. He therefore pleaded that the costs be awarded in terms of rule 32(11) thus capped to N$20 000.

[42] I am of the view that the behaviour of the legal practitioners for the applicant up to the point Mr Narib appeared on the scene was repressible in so far as they refused to offer the respondents' costs when the application was withdrawn. The legal practitioners were aware of the applicable legal principles when an application or action (opposition or defence) is withdrawn. They were involved in the *Akwenye* matter (*supra*) when this Court, as presently constituted, discussed and explained applicable legal principles and in fact ordered the applicant in that case to pay their client's costs, when the applicant withdrew the matter without tendering wasted costs to their client. Based on that experience and the order made in that matter which was made in favour of their client, I would have expected them to, have learned a lesson and to behave appropriately by tendering all the respondents wasted costs. Mrs Garbers-Kirsten submitted that the applicant acted with *malice* and *mala fide*. On the facts of the matter, I must say, I am not convinced that the legal practitioner for the applicant acted with *mala fide*; the bar to satisfy an inference of *mala fide* is higher and has, in my view, not been satisfied in this matter.

[43] Mr Muhongo, on his part submitted that the applicant's refusal to tender costs and to demand that the respondents apply to be granted costs, smacks of arrogance. I agree. The applicant's legal practitioners displayed little or no regard for their opponents' rights. I found the conducts of applicant and its legal practitioners (with the exclusion of Mr Narib) nothing but 'objectionable, unreasonable, unjustifiable and oppressive' in the circumstance of the present matter and calls for severe sanction as a demonstration of this Court's disapproval of the applicant and its legal practitioners reprehensive behaviours. I explain the basis of my conclusion below.

[44] As has been observed from the summary of events, when the matter was called on the first day Mr Kauta for the applicant requested for a short adjournment in order to verify an alleged 'factual allegation'. He indicated to the court that: 'If it is correct that sales were proceeding, the correct way of dealing with this application is to withdraw it, tender costs for those respondents and re-launch the application in the normal course'. The court granted him the indulgence. I say 'indulgence' because it was a crucial fact upon which his client's application was premised. It should have been verified before the application was launched. Thereafter, Mr Kauta failed to keep his undertaking by offering the respondents their full costs upon withdrawal of the application. The tender did not include the costs of one instructed counsel and one instructing counsel. Furthermore, the tender did not include the costs up to the conclusion of the matter. It was based on arbitrary time frame which had nothing to do with proceedings which were still pending before court. The cut off time period for the tender of costs, namely up to 10 o'clock the previous day, was later ascribed to as 'a misunderstanding'.

[45] As regards the failure to tender the second respondents costs when the applicant withdrew its application against the second respondent, Mr Kauta also undertook to the Court that when the second respondent would institute its application in terms rule 97(3) the applicant would show why the second respondent was not entitled to costs and that in fact the applicant would show that the second respondent was liable to pay the applicant's costs.

[46] Similarly, Ms Kuzeeko requested that the matter be postponed so as 'to allow the applicant to put facts before court as to why its tender is the way it is and why it still persists with the position that it is not going to tender wasted costs in respect of the second respondent'. After the respondents filed their respective applications, the applicant did not oppose neither did it 'put facts before court' as promised by Mr Kauta and Ms Kuzeeko respectively. As it turned out, the applicant, under the wise and reasonable guidance of Mr Narib, ended up tendering to pay the respondents' costs what should have been offered right from the time the application was withdrawn. Furthermore it was, in considered view, unreasonable and unnecessary

for the applicant to have insisted that the respondents make applications to be granted their wasted costs.

[47] Having regard to the time and resources expended in this matter since the applicant filed its notice of withdrawal and had a prompt and reasonable tender of costs been made, it is fair and reasonable to say that the legal practitioners for the applicant failed in their duty to assist the court to deal with this matter expeditiously and cost effectively. Having regard to the available public resources and further having regard to the overall objectives of the rules of this Court.

[48] I have therefore arrived at the conclusion that, as a sign of this Court's disapproval of the reprehensible behaviour of the applicant's conduct and that of its legal representative, and in the exercise of my discretion, that it is fair and reasonable that the applicant be ordered to pay the costs of first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents and the second respondents in respect of their applications in terms of rule 97(3) on an attorney and client scale without such cost being limited to the limit imposed by rule 32(11) and that such costs shall include the costs of one instructed and one instructing counsel.

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

1. The applicant is ordered to pay those respondents' who opposed the application, their costs in respect of the main application on party and party scale, such costs to include the costs of one instructed and one instructing counsel up to the delivery of this ruling.

2. The applicant is ordered to pay the costs of the first, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents, as well as the second respondent's costs occasioned by their applications made in terms of rule 97(3) on a scale as between attorney and client, such costs to include the costs of one instructed and one instructing counsel up to the delivery of this ruling. The costs shall not be subject to the limit imposed by Rule 32(11).

3. The applicant is ordered to pay the third respondent's costs occasioned by the application made in terms of rule 97(3) on a party and party scale, such costs to include the costs of one instructed and one instructing counsel up to the delivery of this ruling.

4. The matter is removed from the roll and is considered finalized.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	G NARIB Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
FIRST, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH and TENTH RESPONDENTS:	H GARBERS-KIRSTEN Instructed by Koep & Partners, Windhoek
SECOND RESPONDENT:	T MUHONGO Instructed by Daniellé Lubbe Attorneys, Windhoek
THIRD RESPONDENT:	J A N STRYDOM Instructed by De Klerk, Horn & Coetzee Inc., Windhoek