

IN THE HIGH COURT OF NAMIBIA

Case Title: ISSASKAR KAUNE V NDJOURA HOPHNY TJOZONGORO	Case No: HC-MD-CIV-ACT-CON-2018/01674
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 26 JULY 2019
	Date of order: 26 JULY 2019
	Reasons delivered on: 26 JULY 2019
Neutral citation: <i>Kaune v Tjozongoro</i> (HC-MD-CIV-ACT-CON-2018/01674) [2019] NAHCMD 257 (26 July 2019)	
Results on merits: Application for costs in terms of Rule 97 (3). Merits not considered.	
The order: Having heard KATUNA KAMUHANGA , for the Plaintiff and JAPIE JACOBS , for the Defendant and having read the documentation filed of record: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none"> 1. The defendant is entitled to the costs occasioned in the proceedings withdrawn against him by the plaintiff on a party and party scale. 2. The applicant is ordered to pay the defendant'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. 	
Reasons for orders:	
<u>Background</u> [1] The plaintiff issued summons on 27 April 2018 instituting the proceedings under which this application is emanating from. The defendant defended the matter on 4 June 2018. The parties were issued with a case planning conference order on 7 June 2018. In the joint case plan filed on 25 June 2016 the plaintiff indicated	

that he wishes to apply for summary judgment against the defendant. In terms of the case plan order the parties were directed to file the application for summary judgment and the answering affidavit opposing the application and return to court on 23 August 2018 for a status hearing during which the court would then direct the parties to file their heads of arguments and also set a date for hearing of the summary judgment application.

[2] Subsequent to the plaintiff filing its application for summary judgment and founding affidavit on 13 July 2018 the defendant proceeded to file his answering affidavit resisting summary judgment 13 August 2018.

[3] On 21 August 2018 the parties filed a joint status report indicating that they are looking into a possible settlement and requested the court to postpone the matter until 6 September 2018 for a further status hearing. In line with the joint request of the parties the court postponed the matter to 6 September 2018, however on 4 September 2018 the plaintiff withdrew the action against the defendant in terms of rule 97(1) of the Rules of Court but did not tender costs in the notice of withdrawal. The plaintiff did not disclose the reasons for the withdrawal of the action neither did the plaintiff disclose the reasons why he did not tender costs.

[4] Pursuant to the withdrawal of action by the plaintiff the defendants filed a notice in terms of rule 97(3) and in the following terms:

'KINDLY TAKE NOTE, with reference to Plaintiff's Notice of Withdrawal of its Action dated 4 September 2018, that the Defendant will apply for an order for costs as envisage in Rule 97(3) of the Rules of the High Court at a hearing, as directed by the Honnnorable (sic) Managing Judge, on the following basis:

The Plaintiff filed its Notice of Withdrawal of Action on 4 September 2018. In terms of Rule 97(1) the Plaintiff can only withdraw the action with the Defendant's consent or the leave of the Court. The Defendant did not and does not consent to the withdrawal without a tender of its wasted costs.

The Defendant will therefor apply to court for an order on the date as directed.'

[5] This application was opposed by the plaintiff.

The arguments advanced by the parties

On behalf of the defendant

[6] It was submitted on behalf of the defendant that as the plaintiff filed a notice to oppose without setting out the reasons for the opposition, the defendant is limited in their argument and defendant's counsel proceeded to set out the applicable legal principles relating to costs.

[7] In this regard the court was referred to *The Prosecutor General v Africa Autonet CC t/a Pacific Motors*¹ wherein Angula DJP stated as follows:

[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.² In such a case it is not necessary to go into the merits of the matter.'

[8] The defendant submitted that the plaintiff is unable to show 'very solid reasons' why he should not be ordered to pay the defendant's wasted costs.

On behalf of the plaintiff

[9] The plaintiff raised a point *in limine* wherein he takes issue with the application of the defendant with specific reference to the wording of rule 97(3) read with rule 1 and rule 65(1) of the Rules of Court. The plaintiff submitted that one has to have regard to the definition of the word 'application' in terms of the definition provisions set out in rule 1 where application is defined as follows:

“application” means an application on notice of motion as contemplated in Part 8'

[10] The plaintiff also referred to the wording of rule 65 (1) which provides as follows:

'Requirements in respect of an application

65. (1) Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp

¹ (POCA 5/2017) [2017] NAHCMD 265 (13 September 2017).

² *Germishuys v Douglas Besproeingsraad* 1973 (3) SA 299 (headnote).

and uniquely numbered for identification purposes.'

[11] The plaintiff submitted that the party wishing to invoke the provisions of rule 97(3) should make out a case on application, ie on a notice of motion setting out the relief claimed which is accompanied by an affidavit on which the bases for the invocation of the rule is clearly spelt out. It was further submitted that the defendant only filed a 'Notice in terms of Rule 97(3)' but that the defendant misinterpreted the rule and as a result the defendant filed an application that is irregular, which should not be regarded as an application. The plaintiff conceded that no sound reasons were advanced for not tendering costs but further submitted that had the defendant filed a proper application the plaintiff would have set out his reasons in his opposing affidavit.

[12] On behalf of the plaintiff it was therefore submitted that the defendant's purported application should be dismissed with costs.

[13] On the merits of the matter the plaintiff, leading up to the withdrawal of the action submitted that the action *in casu* had its origin to some extent in an old case dating back to 2012 wherein the plaintiff instituted action against the estate of his late father claiming inheritance by virtue of customary law however the plaintiff was the unsuccessful party in that case. As the plaintiff was evicted from the farm and had difficulty in gathering and moving his cattle on time an agreement was reached between the plaintiff and the defendant regarding the sale of the livestock. The defendant allegedly breached the agreement which led to the institution of the current matter.

[14] According to the plaintiff during July 2019 (I am assuming it should be 2018) after a rule 32 meeting between counsel in the matter *in casu* the legal representative of the defendant issued a writ of execution in respect of the old case, to which the defendant was not a party. As a result the Deputy-Sheriff of Gobabis attached all the cattle in dispute, which extinguished the claim of the plaintiff, which resulted in the plaintiff withdrawing the current action.

[15] On behalf of the plaintiff it is submitted that at all material times the plaintiff had a valid claim against the defendant and the withdrawal of the action was not as a result of the counterclaim or the defence raised in his opposing papers. It is submitted that the claim against the defendant was only extinguished by the evasive tactics of the defendant's legal practitioner.

[16] In conclusion it is submitted that upon consideration of the relevant facts of the matter the court should not mulct the plaintiff with costs for exercising his constitutional rights and that each party should instead pay

his own costs.

The point in limine

[17] The plaintiff referred the court to the definition of application as per rule 1 of the Rules of Court which in turn also refers to Part 8 of the rules and with that in mind the plaintiff submitted that the application of the defendant should strictly comply with rule 65 (1).

[18] It would appear that the plaintiff places so much emphasis on the words 'supported by affidavit' that he loses sight of the rest of the wording of the rule which refers to 'every application initiating new proceedings, not forming part of an existing cause or matter, . . .'

[19] In *Rashed v Inspector-General of the Namibian Police And Others*³ the court was faced with an application for intervention in terms of rule 41 and the procedure stipulated in the rules of court for applications for intervention and the question of whether it is a new proceeding which requires compliance with rule 65. Although the court considered the effect of an application to intervene I am of the opinion that the case finds application to the facts before me.

[20] Masuku J, in the said case, the following:

[37] Applications are governed by the provisions of rule 65, which stripped to the bare bones require that an application must be moved on a notice of motion, duly supported by an affidavit which should state the facts upon which the relief sought is predicated. In this regard, the said rule 65(1) peremptorily stipulates that "every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification purposes"

[38] The question to be determined is whether the Minister's application can be described as a new proceeding and one not forming part of an existing cause or matter. If it is, then one may argue that it need not have followed the requirements stated above.

[39]

[40] [I]n the context of an application then, such a party would have to apply to the managing judge, to intervene as an applicant or a respondent in the proceedings, on notice to all the other parties.

[41] In my considered view, it is a sensible approach to refer the application for intervention to the managing judge. I say so for the reason that the managing judge would ordinarily be *au fait* with the matter pending before the court and would, for that reason, be best placed, to consider the application for intervention with relative ease as he or she would be steeped in the pleadings and the issues that arise in the main matter, thus placing him or

³ 2018 (3) NR 619 (HC).

her to make an informed decision regarding the application for intervention. Another judge, other than the managing judge would have to acquaint him or herself with the entire matter together with the application for intervention, thus unnecessarily duplicating the work between two judges, an unwise decision when regard is had to the very scarce judicial resources presently at the disposal of the court.

[42] It would appear to me that when proper regard is had to the application for intervention, which was on notice to all the other parties, the Minister did file an application on notice to all the other parties, seeking that he be allowed to intervene in the proceedings. My reading of the provisions does not seem to require that the application should necessarily be one that follows the mandatory provisions of rule 65, where an application to intervene as a party to proceedings already underway, is sought to be launched.

[43] I say so for the reason that it would appear from a reading of the provisions of rule 65, read together with the provisions of rule 41, an intervention is in a matter that is already in progress, thus obviating the need to follow the provisions where the application is new in the strict sense of the words. For the avoidance of doubt, I am of the considered opinion that an application to intervene is not one in terms of rule 65, as it does not initiate new proceedings. It is clearly interlocutory in nature and effect.'

[21] It is my considered view that an application in terms of rule 97(3) is also interlocutory in nature⁴ and falls very much under the same umbrellas in the *Rashed* matter. I find myself in respectful agreement with the conclusion that the court reached regarding matters which are interlocutory in nature and effect and I am satisfied that this dicta is applicable to rule 97(3) as well. In addition thereto rule 70(1) provides that 'despite rules 65 and 69, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require'. It is clear from the reading of the rules and the relevant case law that an application in terms of rule 97(3) is not an application in the true sense as envisaged by rule 65 as it deals with cost of an existing matter.

[22] There appears to be no merits in the point in limine raised on behalf of the plaintiff and the said point in limine is therefor dismissed.

The applicable legal principles in respect of costs in terms of rule 97 (3)

[23] In the instance where a litigant withdraws an action against the opposing party I am guided by the dicta in *Germishuys v Douglas Besproeiingsraad*⁵ which has been adopted in this jurisdiction⁶. In the aforementioned matter the court said:

⁴ *Bertolini v Ehlers and Another* (HC-MD-CIV-ACT-DEL-2016/03201) [2017] NAHCMD 284 (06 October 2017) para 1.

⁵ 1973 (3) SA 299 (NC) at 300E.

⁶ *Erf Sixty-Six, 66 Vogelstrand (Pty) Ltd v The Council of the Municipality of Swakopmund* (A 260-2007)[2012]NHC(12 March 2013); *Bertolini Ehlers and Another* (HC-MD-CIV-ACT-DEL-2016/03201) [2017] NAHCMD 284 (06 October 2017).

“Where a litigant withdraws an action or in effect withdraws it, very sound reasons . . . must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his 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.”

[24] In spite of this general principle the court retains its discretion as to the award of costs. In *Erf Sixty-Six, 66 Vogelstrand (Pty) Ltd v The Council of the Municipality of Swakopmund*⁷ Damaseb JP states as follows:

[12] The Court retains discretion as to the award of cost, even where an action or application has been withdrawn⁸. It is ultimately a question of fairness as between the parties. The Court may therefore in the exercise of its discretion in appropriate circumstances take into account that the party that has withdrawn the litigation was justified in bringing the litigation:

“It is clear from the above, in my view, that, even in cases where litigation has been withdrawn, the general rule is of application, namely that a successful litigant is entitled to his costs unless the Court is persuaded, in the exercise of its judicial discretion upon consideration of al facts, that it would be unfair to mulct the unsuccessful party in costs.”⁹

[25] The current matter before me did not really get out of the starting blocks. The plaintiff wants the court to venture into the merits but the merits were never argued before me. No pleadings were exchanged as the action was withdrawn after the answering affidavit of the summary judgment was filed. It should be noted that it was not just the application for summary judgment that was withdrawn, it was the action *in toto*. What however became clear to me from reading the affidavit resisting summary judgment is that the plaintiff’s case was not as immutable as he wants the court to believe.

[26] I accept that in an appropriate case the court will have regard to the merits. In *Erf Sixty-Six, 66 Vogelstrand (Pty) Ltd v The Council of the Municipality of Swakopmund* the court referred to the following cautionary dictum by Goldstone J in *Oranje Vrystaatse Vereniging vir Staatsonderstenende Skole and Another v Premier, Province of the Free State, and Others*¹⁰:

⁷ *Supra* at Footnote 4.

⁸ See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773A at 786C; *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 797H.

⁹ *Wildlife and Environmental Society of South Africa supra* at 131B-D.

¹⁰ 1998 (3) SA 692 (CC) at 696, para 5.

'The merits of their case have not been argued before or considered by this Court. And it would obviously not be in the interests of justice for argument to be heard on issues which have now become moot and are no longer of any consequence to the parties or indeed anyone else. The costs of such a proceeding would greatly exceed those which the parties have incurred pursuant to the application for leave to appeal.'

[27] In spite of the submissions in the plaintiff's heads of argument as well as arguments advanced in court I still have a hard time in understanding why the plaintiff refuses to pay the wasted cost of the matter. Am I to understand that the defendant is to be blamed for his legal practitioner issuing a writ of execution on the old matter between the plaintiff and the deceased estate of his father? Surely that cannot be. The defendant was brought to court by the plaintiff and cannot be held accountable for the process issued by his legal practitioner in a matter that is technically unrelated to the one presently before court. In this regard the court must note her displeasure with the way in which the plaintiff describes the defendant's legal practitioner's action in executing a lawful writ. It is unbecoming to describe it as 'evasive tactics' and what it may imply. If the plaintiff wishes to take issue with the conduct of the legal practitioner of the defendant, there are certain processes that he can follow to report the legal practitioner to the Namibian Law Society, should he choose to do so.

[28] From considering the papers before me and the submissions by counsel I can find no sound reason why a defendant or respondent should not be entitled to his costs.

[29] My order is therefor set out as above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
<i>Mr K Kamuhanga</i> <i>On behalf of</i> <i>AngulaCo Inc</i>	<i>Mr J Jacobs</i> <i>On instructions of</i> <i>Van der Merwe-Greef Andima Inc</i>