

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 166/2016

In the matter between:

ZEST INVESTMENTS SEVENTY-THREE CC

PLAINTIFF

And

**MUNICIPAL COUNCIL OF THE
MUNICIPALITY OF WINDHOEK**

FIRST DEFENDANT

**THE MINISTER OF URBAN AND RURAL
DEVELOPMENT**

SECOND DEFENDANT

QUIVER TREE INVESTMENTS

TWO SIX CC

THIRD DEFENDANT

Neutral citation: *Zest Investments Seventy-Three CC v Municipal Council of Windhoek*
(I 166/2016) [2019] NAHCMD 87 (04 April 2019)

Coram: USIKU, J

Heard on: 04 April 2019

Delivered: 04 April 2019

Released: 09 April 2019

Flynote: Costs – Court called upon to adjudicate only on costs – Court taking into consideration the parties' pre-litigation and during litigation conduct – Court awarding costs in favour of the unsuccessful litigant.

Summary: The plaintiff initiated action seeking relief, among other things, for costs including costs of one instructing and one instructed legal practitioner – The first defendant withdrew its defence after pre-trial stage and tendered costs on party and party basis – The plaintiff insisted on costs including costs of one instructing and one instructed legal practitioner – Trial proceeded as between plaintiff and third defendant – The court dismissed plaintiff's claim and ordered plaintiff to pay third defendant's costs – The plaintiff withdrew its tender of costs on basis that the plaintiff was the unsuccessful party in the matter – The plaintiff launched application for costs against the first defendant – The court granted costs in favour of the plaintiff against the first defendant – Court taking into consideration the pre-litigation and during litigation conduct of the parties.

ORDER

1. The first defendant is ordered to pay the plaintiff's costs in the action incurred up to the 22 March 2017, and such costs are to include costs occasioned by the employment of one instructing and one instructed counsel.
 2. The first defendant is ordered to pay the plaintiff costs in respect of this application.
 3. The matter is removed from the roll and regarded finalised.
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RULING

Usiku, J:

Introduction

[1] This is an application by the plaintiff against the first defendant for costs in terms of rule 97 of the Rules of the High Court, following the withdrawal of the defence by the first defendant to the plaintiff's action and the tender by the first defendant to pay taxed costs.

[2] I will refer to the parties as cited in the main action.

[3] On the 29 January 2016, the plaintiff instituted action against the first defendant, claiming transfer of certain immovable property into the name of the plaintiff against payment of the purchase price; costs of suit, including costs of one instructing and one instructed counsel and further and/or alternative relief. The plaintiff also cited the second defendant and the third defendant, however, no relief was sought against them as they were cited due to the interest they may have in the matter. The second defendant did not defend the action. The third defendant defended the action.

[4] The nature of the interest that the third defendant had in the action was that: the first defendant had cancelled a sale of agreement in terms whereof the aforesaid immovable property was sold to the plaintiff, and the first defendant had subsequently resolved to offer the same property to the third defendant for sale.

[5] The matter was docket allocated to a managing judge and passed through the prescribed judicial case management procedures and processes relating to the case. A pre-trial order was issued on the 24 January 2017.

[6] On the 22 March 2017, the first defendant delivered a notice of “withdrawal of defence”, in which it withdrew its defence to the plaintiff’s action and in that notice the first defendant also tendered costs on a party and party scale.

[7] On the 14th to 18 August 2017, the matter proceeded to trial, as between the plaintiff and the third defendant. The closing arguments were concluded on 25 October 2017 and the matter was postponed to 25 April 2018, and later postponed to 22 June 2018 for judgment.

[8] The plaintiff prepared a bill of costs and a notice of taxation of costs which were served on the first defendant’s legal practitioners on 24 April 2018. The taxation was set down for 9th May 2018, however, the process could not be finalised due to objections made by the first defendant to numerous items of the bill of costs.

[9] On the 22 June 2018 the court delivered its judgment in the action. In this judgment, the court dismissed the plaintiff’s claim and ordered the plaintiff to pay the costs of the third defendant. The court also made some adverse criticism about the conduct of the first defendant which contributed substantially, in the court’s view, to the undue initiation of the action.

[10] On the 16 August 2018, the first defendant delivered a notice of withdrawal of its tender of costs, on the basis that the plaintiff was ordered in the action to pay the costs of the third defendant.

[11] On the 28th November 2018, the plaintiff launched the present application, praying for an order in the following terms:

1. That the First Defendant be and is hereby ordered to pay the Plaintiff's costs in this action incurred as at 22 March 2017 and as tendered in the notice of withdrawal of defence by the first defendant, such costs to include the costs of one instructing and one instructed counsel.
2. That in the event of this application being opposed the first defendant be ordered to pay the costs of this application.
- 3.. Further and/or alternative relief'

[12] The first defendant opposes the application.

Arguments on behalf of the plaintiff

[13] The plaintiff contends that the fact that the plaintiff was not successful in the action is irrelevant, insofar as the first defendant's liability to pay the plaintiff's costs is concerned. The conduct of the parties illustrated that the parties reached an agreement in respect of the liability to pay plaintiff's costs. The first defendant caused significant amount of costs to be incurred by the plaintiff before it withdrew its defence. The plaintiff further contends that the first defendant had entered appearance to defend the action without believing that it had a valid defence.

[14] The plaintiff further argues that, should the court find that there was no agreement between the parties based on the tender of costs and the acceptance of such tender, the court should exercise its discretion and award costs in favour of the plaintiff.

Arguments on behalf of the first defendant

[15] The first defendant raised a "*point in limine*" to the effect that the deponent to the plaintiff's founding affidavit is the plaintiff's legal practitioner of record. The practice of legal practitioners deposing to affidavits in support of their clients' claims has been criticised in recent judgments that it should be discouraged and be desisted from. The first defendant further argues that the deponent to the plaintiff's founding affidavit has not furnished reasons why the plaintiff could not depose to the affidavit. As the

plaintiff's legal practitioner is not a party to the proceedings, the first defendant argues, he cannot depose to the plaintiff's affidavit without reasonable explanation. The point in limine was not pursued by the first defendant during oral argument.

[16] In regard to the merits, first defendant argues that the plaintiff is the unsuccessful party in the action and costs should follow the event. The first defendant further contends that the court held in the action that the first defendant was entitled to cancel the sale agreement as the plaintiff had failed to furnish the first defendant the required guarantee. The court had dismissed the plaintiff's action with costs. The tender of cost by the first defendant, the defendant argues, became extinguished when the court dismissed the plaintiff's claim on that basis.

[17] The first defendant contends further that there was no agreement between the parties to pay costs as there was no acceptance by the plaintiff of the offer made by the first defendant to pay costs and the parties did not agree on the nature of the costs to be paid. The first defendant argues that, since the plaintiff's claim for costs is based on the tender for costs by the first defendant and the alleged subsequent acceptance of such tender by the plaintiff, it follows that if plaintiff's argument based on the alleged agreement fails, then the whole of the plaintiff's application must also fail.

[18] The first defendant also submits that rule 97 is applicable only to plaintiffs and applicants and does not find application in the present matter.

Applicable legal principles

[19] The general rule is that a party who is successful in the proceedings should be awarded costs. In determining who the successful party is, the court will endeavor to ascertain which of the parties has been substantially successful.¹

¹ Prosecutor-General v Africa Autonet cc t/a Pacific Motors 2017 (4) NR 969 at p.972 D.

[20] The purpose of an order of costs in favour of a successful litigant is to indemnify him or her for the expenses to which he or she has been put through having been unjustly compelled to initiate or defend litigation.²

[21] The issue of costs is in the discretion of the court. This discretion must, however, be exercised judicially. The discretion must be exercised in accordance with reason and justice and not capriciously. The court may in appropriate cases depart from the general rule, where the court is persuaded upon consideration of all the facts, that it would be unfair to mulct the unsuccessful party in costs.³

Application of the principles to the facts

[22] The court is now called upon to determine the issue of costs as between the plaintiff and the first defendant.

[23] As regards the *point in limine* raised by the first defendant, it is correct that in recent judgments, this court has cautioned against the practice by some legal practitioners, of deposing to affidavits, on factual matters.⁴ The caution made in such judgments is correct and should be heeded by all parties concerned. However, I am not convinced that the *point in limine* relating to the aforesaid caution has impact on the present application. The present application focuses on whether or not costs of suit should be paid by the first defendant to the plaintiff. The first defendant has not indicated how the *point in limine* raised could dispose of the plaintiff's application, and I cannot see how the same could be destructive of the plaintiff's application. The point in limine is therefore dismissed.

² Ibid at page 972 C.

³ Erf Sixty-Six Vogelstand Pty Ltd v The Councils of the Municipality of Swakopmund and others Case No. A 260/2007 delivered on 13 March 2012 para 12.

⁴ See IA Bell Equipment Co. Namibia (Pty) Ltd v ES Smith Concrete Industries (CC I 1860/2014) [2015] NAHCMD 68 (23 March 2015) and The Prosecutor-General v Paulo (POCA 13/2015) [2017] NAHCMD 43 (17 February 2017).

[24] In the present matter, it is common cause that the first defendant withdrew its defence and tendered costs on a party and party basis. It is also common cause that the nature of the costs prayed for by the plaintiff in the action were costs including costs of one instructing and one instructed counsel. It is now apparent that the parties were not *ad idem* on the nature of the costs to be awarded to the plaintiff following the withdrawal of the defence by the first defendant. I say so because, after the first defendant withdrew its defence and tendered costs, the matter proceeded on the assumption (erroneous, in hindsight) that the issue as to costs between the plaintiff and first defendant was taken care of in the notice of withdrawal of defence. Since the type of costs tendered by the first defendant were not the type of costs prayed for by the plaintiff, I find that the allegation by the plaintiff that the parties had agreed on the costs, is not proved by evidence. However, that is not the end of the matter.

[25] It is likewise common knowledge that the court delivered judgment in the action in which it dismissed the plaintiff's claim and ordered the plaintiff to pay the costs of the third defendant. The court also made critical comments about the conduct of the first defendant in that judgment.

[26] Subsequent to the foregoing, the first defendant withdrew its tender for costs. In my opinion, it is of no consequence to delve into the question of whether the tender of costs that the first defendant made and purported to withdraw, is a tender of costs contemplated under rule 97(1) and (2) because the nature of the costs that the first defendant tendered were not the same as those which the plaintiff prayed for. In either case, the plaintiff is entitled, under the circumstances, to bring an application for costs in terms of rule 97(3).

[27] After the delivery of judgment in the action it became clear that the first defendant and the third defendant were the successful parties and would have been in the ordinary course of events, entitled to costs. However, such entitlement is not automatic.

[28] I am of the opinion that the conduct of the first defendant and the plaintiff prior to the initiation of the action and thereafter, is a relevant issue in the determination of the costs issue between them.

[29] In the judgment in respect of the action initiated by the plaintiff, I referred to the following conduct by the first defendant which I described as disturbing, namely that:

- (a) the first defendant, inexplicably, and deliberately permitted the plaintiff to execute the sale agreement, notwithstanding that the plaintiff did not furnish the first defendant with written proof of a loan approval from a banking institution, despite written terms that written proof of loan approval must be furnished first before the sale agreement was executed by the parties,⁵
- (b) the conscious acceptance, as good guarantee, by the first defendant of a letter of undertaking, undertaking among other things, to pay the purchase price, subject to availability of funds, and the instruction by the first defendant to its attorneys to proceed to register the transfer of the property into the name of the plaintiff, despite such letter of undertaking clearly not meeting the requirements set out in the sale agreement;⁶
- (c) the evidence furnished in court that the first defendant ordinarily and as a matter of practice, accepts and acts upon letters of undertaking or guarantees of the kind as the one furnished by the plaintiff in that matter.⁷

[30] On account of the conduct of the first defendant as outlined above, and as set out in the judgment delivered on 22 June 2018, I am of the opinion that it would be unfair to mulct the unsuccessful party in costs, as I believe that although unsuccessful, the plaintiff was justified, in the circumstances, to bring litigation against the first defendant. Against the background of the first defendant's pre-litigation conduct, the

⁵ See Zest Investment Seventy-Three CC v Municipality Council of Windhoek (I166/2016) [2018] NAHCMD 186 (22 June 2018) para. 42-43

⁶ Para 44 of the judgment.

⁷ Para 45 of the judgment.

court must also consider the fact that the first defendant had opted to enter appearance to defend, as it was entitled to, and participated in the relevant judicial case management procedures and after pre-trial stage, the first defendant decided to withdraw its defence. The question is then, who should pay costs in the circumstances as these?

[31] The circumstances of this matter dictate that the court should depart from the general rule that costs follow the event or that a successful litigant is entitled to costs, for reasons stated above. Upon consideration of all facts in this matter, and the conduct of the first defendant as alluded to above, I am persuaded to exercise my discretion in favour of the plaintiff and award the costs to the plaintiff.

[32] As regards the nature of the costs to be awarded, I am satisfied that the complexity of the matter justified employment of one instructing and one instructed counsel and I shall issue an order to that effect.

[33] In the result, the plaintiff's application stands to succeed and I make the following order:

1. The first defendant is ordered to pay the plaintiff's costs in the action incurred up to the 22 March 2017, and such costs are to include costs occasioned by the employment of one instructing and one instructed counsel.
2. The first defendant is ordered to pay the plaintiff costs in respect of this application.
3. The matter is removed from the roll and regarded finalised.

B.Usiku
Judge

APPEARENCES:

PLAINTIFF:

Mr S Vlieghe,
Instructed by Koep & Partners
Windhoek

FIRST DEFENDANT:

Ms E Angula,
Instructed by AngulaCo Inc.
Windhoek