

IN THE HIGH COURT OF NAMIBIA

Case Title: Northern Regional Electricity Distributors (Pty) Ltd and Namibia Development Corporation	Case No: HC-MD-CIV-ACT-CON-2019/00129
	Division of Court: MAIN DIVISION
Heard before Honourable Lady Justice Tommasi J	Date of hearing: 7 October 2019
	Delivered on: 14 February 2020
Neutral citation: <i>Northern Regional Electricity Distributors (Pty) Ltd v Namibia Development Corporation (HC-MD-CIV-ACT-CON-2019/00129)</i> [2020] NAHCMD 54 (14 February 2020)	
Results on merits:	
The order: Having heard MR MULUTI on behalf of the Applicant, and MR KAURIVI on behalf of the Respondent, and having read the documents filed of record: IT IS ORDERED THAT: 1. The Respondent/Plaintiff is to pay the costs of the Applicant/Defendant on the following tariffs: From Date of Summons to 3 May 2019 – cost on a party and party scale From 3 May 2019 to date hereof – Cost on an attorney and client scale	
Reasons for orders:	
<p>[1] The Plaintiff/Respondent withdrew its action against the Defendant and did not tender costs. The Defendant/Applicant applied to this court for a cost order against the Plaintiff on an attorney and client scale. The application is opposed. In order to determine the issue of costs the court must have regard to the conduct of the parties. What follows is a brief summary of the conduct of the case from the inception.</p>	

[2] The plaintiff instituted action against the defendant for payment in the sum of N\$3 763 984.76 for the supply of electricity on 17 January 2020 in terms of a partly written and partly oral contract.

[3] The defendant entered an appearance and the matter was referred to me for case management. On 18 April 2019 the Defendant raised two special pleas namely that the defendant ceased to exist before the summons was issued and prescription. The defendant's plea on the merits is that the defendant is not the owner nor has it been a tenant of the property cited, it never entered into any contract with the plaintiff and the person who acted on behalf of the defendant when the contract was entered into was never in the employ of the Defendant.

[4] The plaintiff's legal practitioner, Mr Kaurivi, in his opposing affidavit, stated that he wrote to the plaintiff on 24 April 2019 highlighting the special plea. He further stated that he advised plaintiff that it might have to withdraw the matter and institute action against the newly created entity, Namibia Industrial Development Agency. According to the legal practitioner, plaintiff did not respond to this letter.

[5] On 5 May 2019 defendant's legal practitioner, Mr Muluti, filed a one sided case management report and appeared at the case management hearing on 08 May 2020. Plaintiff's legal practitioner Mr Kaurivi failed to be in attendance at this hearing. The court consequently adopted the one sided report of the defendant and ordered the parties to file witness statements and discovery affidavits. Defendant complied with the court order and filed a discovery affidavit on 16 May and a witness statement on 7 June 2019.

[6] Plaintiff failed to comply with this order but instead filed a status report on 21 June 2019 indicating that: the plaintiff received payment in full on 3 May 2019 from the Defendant; the matter was settled and it may be deemed finalised; and that each party must pay its own costs.

[7] The defendant refused to accept this proposal and in its status report informed the court that the defendant did not make any payment and that the payment was made by the Government of the Republic of Namibia represented by the Ministry of

Industrialization, Trade and SME Development who in fact owed plaintiff the money. This became a bone of contention between the parties. The defendant was not prepared to accept a proposal that each party bears its own cost and the court ordered the parties to file a pre-trial report since there was no withdrawal of the action and the matter remained unresolved. On 04 September 2019 plaintiff filed a notice of withdrawal of action without tendering costs. Defendant thereafter brought this application.

[8] Mr Muluti, submitted that plaintiff was aware as of 03 May 2019 that the matter will no longer proceed but allowed the defendant to file discovery affidavits, and to prepare a draft pre-trial report. He argues that the legal practitioner's conduct was untoward or reckless. He further submitted that plaintiff had a duty to inform the defendant that the amount had been paid by the actual party to the contract but instead he failed to do so. He submitted that Mr Kaurivi failed appear in court on 08 May 2019 and to apprise the court and the defendant of the payment which was received. He submitted that the legal practitioner knew at that stage that the payment was done. He pointed out that to date, Mr Kaurivi did not explain his non-appearance and failure to file the documents as ordered by the court.

[9] The long and short of Mr Kaurivi's argument is that the court, when determining whether a party has been successful must not only consider the form of the judgment but its substance. In this case, he submitted that the court must have regard to the full facts of the case which is that the action prompted Defendant's line Ministry to pay the plaintiffs claim amount in full, on behalf of the Defendant. He argued that, the action instituted against defendant achieved its desired target i.e. to obtain the claim amount.

[10] Rule 97 (1) provides that a party who withdraw the proceedings instituted and may include a consent to pay costs in the notice of withdrawal. It is thus not compulsory to do so. Rule 97 (3) however affords the other party the opportunity to approach the court for a cost order.

[11] In *GR v ER 2019 (1) NR 46 (HC)* at page 47 - 48, para 3, Prinsloo J sets out the general position as follow:

'The general rule, in relation to cost orders where a litigant withdraws his or her action is that the withdrawing party is liable to pay the costs of the proceedings. There must be sound reasons

why the other party should not be entitled to his or her costs. This is because the withdrawing party is in the same position as an unsuccessful litigant. This rule is not absolute as each case must be considered against its own facts.'

[12] In casu, this matter was not settled. The defendant did not pay the plaintiff but a third party paid the debt. Mr Kaurivi at first informed this court that defendant paid the full debt and during these proceedings argued that payment was done on behalf of the defendant. These submissions were in fact not correct. He attached to his affidavit confirmation from the Ministry of Industrialisation, Trade and SME Development on 15 July 2019 indicating that it is the legal owner of the property and that the defendant managed the Tannery on behalf of the Ministry. This is a clear admission that it was liable to pay the debt.

[13] The plaintiff was furnished with the issues raised in defendant's plea during April 2019 and received the payment on 03 May 2019 from a third party. The plaintiff ought to have known, in light of the plea on the merits and the payment made by the owner of the property that it had instituted proceedings against a party who was not a party to the agreement. The plaintiff having cited the wrong party could not under these circumstances claim that it successfully litigated against the defendant. The defendant ought to have instructed its legal practitioner to withdraw the matter and to tender the wasted costs at this junction.

[14] The matter however was allowed to proceed thus forcing the defendant to comply with various court orders and to unnecessarily escalate the legal cost of the defendant. Such apathy in the conduct of litigation which the plaintiff instituted caused substantial prejudice to the defendant who is in the first place erroneously cited as the debtor. It justifies a punitive cost order from the date of payment as it was at this point that the Plaintiff could have stopped the proceedings.

[15] I am not persuaded that Mr Kaurivi was aware of the true state of affairs. He had to seek an explanation from the third party, and not his client, as to the basis upon which payment was made. In this case the plaintiff must be held accountable for the costs and given their reckless approach to litigation, will be visited with a punitive cost order to pay the cost on an attorney and client scale from the date it received payment from the true

debtor.

[11] In the result the following order is made:

1. The Respondent/Plaintiff is to pay the costs of the Applicant/Defendant on the following tariffs:

From Date of Summons to 3 May 2019 – cost on a party and party scale

From 3 May 2019 to date hereof – Cost on an attorney and client scale

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
Mr Muluti of Muluti & Partners	Mr Kaurivi of Kangueehi Kavendjii Inc