

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING

Case Title: NEDBANK NAMIBIA LIMITED v AVZ BUILDING CONTRACTORS CC ADRIAAN VAN ZYL HERMANUS GIDEON VAN ZYL BARBARA IMGARD VAN ZYL	Case No.: HC-MD-CIV-ACT-CON-2020/02602
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE RAKOW	Date of hearing: 13 April 2021
	Delivered on: 30 April 2021
Neutral citation: <i>Nedbank Namibia Limited v AVZ Building Contractors</i> (HC-MD-CIV-ACT-CON-2020/02602) [2021] NAHCMD 198 (30 April 2021)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. Costs of the Summary Judgement application to be costs in the cause.2. Each party is to pay its own costs for the current application before court.3. The matter is postponed for a case management conference on 18 May 2021 at 15h30.	
Following below are the reasons for the above order:	
RAKOW, J	

Introduction

[1] The plaintiff obtained default judgment against the first defendant for payment in the amount of N\$1 824 418.84 and compound interest calculated daily and capitalized monthly on the amount of N\$1 824 418.84, at the rate of 16.80 per cent per year from 16 August 2019 to date of final payment and against the second defendant payment in the amount of N\$1 600 000 and compound interest calculated daily and capitalized monthly on the amount of N\$1 600 000, at the rate of 16.80 per cent per year from 16 August 2019 to date of final payment. The claim was for monies advanced to the first defendant's current cheque account.

[2] The third claim was instituted against the third and fourth defendants in terms of a suretyship agreement which they signed in favour of the plaintiff wherein they bound themselves as sureties and co-principal debtors *in solidum* with the first defendant for due payment by the first defendant of monies which may from time to time become owing to the plaintiff, as well as for the due and punctual performance and discharge by the first defendant of any contract or agreement entered into by the first defendant with the plaintiff, plus such further sums for interest on that amount, charges and costs, including interest, discount, commission, stamps and all legal costs on a scale as between a legal practitioner and his own client. The total amount recoverable from third and fourth defendants/respondents is limited to N\$1 600 000. The third and fourth defendants defended the matter upon which the plaintiff filed an application for summary judgment.

[3] For security for due and punctual fulfillment of their obligations to the plaintiff, the third and fourth defendants passed a Mortgage Bond in favour of the plaintiff for a property situated at Erf 192, Henties Bay. The plaintiff further alleged that they are entitled to have the bonded property declared executable and to recover its costs of suit on an attorney and client scale as per the agreement.

[4] The court heard a summary judgement application and on 2 February 2021 made the following order:

‘The defendants/respondents had to make out a *bona fide* defence against the application brought by the plaintiff/applicant. This includes making a full disclosure of the defence, which they did, as well as showing that the defence is good in law. In this instance, the court finds that the defences disclosed have the potential to be good in law and give the defendants/respondents leave to defend the matter.’

[5] This order however does not make any mention of costs and as prompted the legal practitioner of the third and fourth defendants, who are the applicants in the current application, to bring an application in terms of rule 103 of the High Court rules to vary the current order to allow for a cost order to be made granting the third and fourth defendants a cost order in their favour as they were successful in opposing the summary judgement application.

[6] When hearing the arguments, the court pointed out to the legal practitioner for the applicants that the normal position in summary judgement applications is that costs are either order to be costs in the cause or cost to be determined by the trial judge unless there is a good case made out not to make such an order. Unlike other costs orders, in summary judgement application proceedings costs do not follow the event when the event is the granting of leave to defend the matter. (See *Summary Judgement – a Practical Guide by Van Niekerk, Geyer and Mundell*)¹ He was then invited to provide the court with grounds to make a special court order, but failed to do so. The court declined to vary the court order of 2 February 2021 to award costs to the successful parties who were granted leave to defend the matter in this instance.

Where does it leave the issue of costs?

[7] The court order of 2 February 2021 is silent about the issue of costs and the position is therefore that no cost order was made. In the general application a judgement or ruling with the words – no order as to costs – would mean that every party is to carry his or her own costs.² However a court can amend its own cost order. In *Thompson v South African Broadcasting Corporation*³ Harms JA said the following:

¹ LexisNexis Butterworths Service issue April 2014 at 12-3.

² *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA).

'A Court was entitled to correct an 'error in its judgment or order so as to give effect to its true intention' but not to alter 'its intended sense or substance'. Thus it could 'supplement (its) pronounced judgment, provided that the sense or substance of (its) judgment (was) not affected thereby'

[8] It was clearly the intention for the court to have the general rule apply, that costs of the summary judgement application should be costs in the cause and for that reason the court will vary its order of 2 February 2021 in terms of rule 103 as to include the following:

'4.Costs of the Summary Judgement application to be costs in the cause.'

[9] In terms of the current application before court, the court finds that the applicants were not successful in their application to have a cost order made in their favour but the court did in fact alter its previous cost order and for that reason the court order that each party is to pay its own costs for the current application before court.

Judge's signature	Note to the parties:
	Not applicable
Counsel:	
Ms R Kandjella of AngulaCo Inc. On behalf of the Plaintiff	Mr F Pretorius of Francois Erasmus and partners On behalf of 3 rd and 4 th Defendants

³ Supra.