

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: Roads Authority v Chico/Octagon Joint Venture	Case No: HC-MD-CIV-ACT-DEL-2018/03647
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 08 February 2021
	Date of order: 11 February 2021
Neutral citation: <i>Roads Authority vs Chico/Octagon Joint Venture</i> (HC-MD-CIV-ACT-DEL-2018/03647 [2021] NAHCMD 35 (11 February 2021))	
Results on merits: Merits not considered.	
The order: Having heard Mr Nangolo for the plaintiff/respondent and Ms Du Plooy for the first defendant/applicant, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: 1. The court order dated 23 May 2019 is varied in terms of rule 103(1)(b) of the Rules of Court as	

follows:

- ‘(b) The second to eighth exceptions are upheld. Cost to stand over for argument.’
2. The parties are granted leave to argue the issue of cost in respect of the court orders dated 23rd May 2019; 4 November 2019 and 11 February 2021.
 3. The case is postponed to **17 February 2021** at **08h30** for Status hearing (Reason: Allocation of hearing date).

Reasons for orders:

[1] This is a matter that has been disposed of in November 2019 when the respondent withdrew the action against the applicant. The respondent instituted an action alleging constitutional damages (Article 25 of the Constitution) due to infringement of its Article 16 right of the Constitution or delictual damages of almost N\$ 100 million. The applicant raised a number of exceptions to the respondent's particulars of claim. After having heard the exceptions the court made the following order:

- (a) The first exception is dismissed;
- (b) The second to eighth exceptions are upheld with costs and the plaintiff is granted leave to file its amended particulars of claim, should it be so advised, within 21 days from date of release of reasons;
- (c) The matter is postponed to 27 June 2019 at 15:00 for a status hearing.’

[2] In the ruling dated 23rd May 2019 this court ruled as follows on the issue of costs:

‘The only remaining issue to consider is the issue of costs. The general rule is that costs of suit shall be allowed to the prevailing party as a matter of course. In the present matter, there are no good reasons why the costs should not follow the result. It will accordingly be so ordered.’

[3] The respondent subsequently withdrew the action against the applicant tendering the taxed costs of the applicant.

[4] An issue arose between the parties as the order does not reflect whether the limit imposed by rule 32(11) was in fact relaxed as requested by the applicant.

[5] Pursuant to the court orders dated 23 May 2019 and 4 November 2019 the applicant drafted its bill

of cost on the scale of attorney own client for all costs occasioned by the plaintiff's/respondent's action. The respondent took issue with the bill drafted and was of the opinion that the bill should be capped in terms of rule 32(11). The applicant contended that the costs are governed by rule 97(1) as the matter was withdrawn.

[6] The parties could not reach an amicable resolution to the disagreement regarding the issue of the order as to costs resulting in the current application.

[7] The applicant filed an application seeking variations of the court orders dated 23 May 2019 and 4 November 2019, in terms of rule 103, as follows:

'1. The court order dated 23rd May 2019 is varied to read as follows: "the second to eighth exceptions are upheld with costs, such costs to include cost of one instructing and two instructed counsel and which costs are not limited in terms of Rule 32(11).

2. The court order dated 4 November 2016 is varied to read as follows: "the matter is removed from the roll; case withdrawn with taxed costs, such costs to include cost of one instructing and two instructed counsels and to include costs occasioned by the interlocutory application and the main action".

3. Cost of suit only in the event that this application is opposed.

4. Further and/or alternative relief.'

Arguments on behalf of the applicant

[8] Ms Kuzeeko submitted that there are two orders forming the basis of the application before court. The less contentious order is the one dealing with the final withdrawal of the action and the respondent's obligation as to costs and submitted that this must be regulated by rule 97 and same should include the cost from the initiation of the action to the date of withdrawal thereof.

[9] In respect of the cost order relating to the exception Ms Kuzeeko argued that the applicant in its heads of argument in respect of the exception prayed for an order 'that the plaintiff is directed to pay the costs of the defendant's exception, on a scale of two instructed and one instructing counsel and that the costs shall not be subject to the limit imposed by rule 32(11)'. Ms Kuzeeko contended that the costs ordered by court was the cost the applicant prayed for. Ms Kuzeeko argued that the omission of the order that the cost shall not be subject to the limitation by rule 32(11) creates an ambiguity.

[10] With reference to rule 103(1) of the Rules of Court Ms Kuzeeko argued that the clear reading of the rule allows the applicant to approach the court to vary the court order to remove any ambiguity or permit deliberation of a proper award of costs.

[11] Ms Kuzeeko contended that the respondent's argument that the issue of cost was never argued is incorrect as the applicant prayed for an order of cost not limited to rule 32(11) in its heads of argument and although this issue was not pertinently argued during the oral arguments by the respective counsel it does not detract from the fact that the heads of argument forms part of the litigant's argument and the issue of cost should be regarded as argued. Ms Kuzeeko however submitted that in the event that the court finds that the issue of costs was not argued that the applicant be allowed to argue the issue of costs in this regard.

[12] Ms Kuzeeko argued that the respondent's defence proffered in respect of the application, i.e. that this court is *functus officio* is misconceived as rule 103 allows a court to vary any of its orders *mero motu* or on application. Counsel argued that this is a permissive rule vesting the court with judicial discretion and where a court renders judgment, especially relating to costs, it is not appealable or reviewable, without leave, therefore such an order can be varied and requests the court to grant the application accordingly.

[13] Ms Kuzeeko referred the court to *South African Poultry Association and Others v Ministry of Trade and Industry and Others*¹ as authority for the proposition that the court retains a discretion to grant costs on a higher scale.

Argument on behalf of the respondent

[14] Ms Simson contended that the applicant did not make it clear in terms of which sub-rule of rule 103 the applicant is launching the application as the deponent to the founding affidavit stated that the court in granting the judgment in favour of the applicant omitted to indicate that the costs are not subject to the capping in terms of rule 32(11) or indicate the contrary². Ms Simson submitted however that the question before court is whether or not the issue of costs was argued at the exception hearing and whether or not the court acceded to the parties' respective prayers for costs.

¹ *South African Poultry Association and Others v Ministry of Trade and Industry and Others* (A 94/2014) [2014] NAHCMD 331 (07 November 2014) at para 67.

² Para 9 of the Founding Affidavit.

[15] Ms Simson argued that the applicant failed to bring its intended relief within the ambit of rule 103(1) (c) as the court order cannot be varied to the extent prayed for in the applicant's notice of motion.

[16] Ms Simson strongly argued that if the matter is argued in terms of rule 103(1) (c) the court order cannot be varied as the court is *functus officio*. In support of this argument Ms Simson referred the court to the matter of *Karlsruh Number One Farming Closes Corporation v De Wet Esterhuizen*³, wherein this court found that once a court pronounces itself in a judgment it is *functus officio* and the court may not ordinarily vary or rescind its own judgment.

[17] The court was also referred to *Ngede v Davey's Micro Construction CC*⁴ wherein the court discussed the exceptions to the general rule that a court may not vary its own judgments or orders if the said variation would alter the sense and substance of the judgment or order. Ms Simson submitted that should the court vary the court order it would indeed alter the sense and substance of the judgment or order.

[18] Ms Simson maintained that the applicant, though relying on rule 103(1) (c), does not set out in its papers the extent of the ambiguity, patent error or omission in the judgment but on the contrary it appears that the applicant misunderstood the order to mean that no limitations shall apply in terms of rule 32(11) and that no ambiguity was contained in the order and therefore the said sub-rule does not find application.

Applicable legal principles and discussion

[19] The general principle which is well established in our law is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it and the reason is that the court become *functus officio* but there are a few exceptions to this rule. One of these exceptions to the rule is where accessory or consequential matters like costs or interest were overlooked or omitted to grant⁵.

[20] In *Firestone South Africa (Pty) Ltd v Gentiruco AG*⁶ Trollip JA stated as follows on the issue of cost

³ *Karlsruh Number One Farming Closes Corporation v De Wet Esterhuizen* (HC-MD-CIV-ACT-DEL-2016/02394) NAHCMD 225 (16 June 2020) at para 18.

⁴ *Ngede v Davey's Micro Construction CC* (SA 5/2014)[2016] NASC 4 (27 October 2016).

⁵ *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) 306 F-G.

not argued:

'(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens *since the question of costs may depend upon the ultimate decision on the merits*), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see *Estate Garlick's case, supra*, 1934 AD 499). The reason is (see pp. 503 - 5) that in such a case the Court is always regarded as having made its original order 'with the implied understanding' that it is open to the mulcted party (or perhaps any party 'aggrieved' by the order - see p. 505) to be subsequently heard on the appropriate order as to costs. But, of course, if after having heard the parties on the question of costs, either at the original hearing or at a subsequent hearing (as happened in the present case), the Court makes a final order for the costs, there can then be no such "implied understanding"; and such an order is as immutable (subject preceding exceptions) as any other final judgment or order. This exception has thus no application to the present case either.'

[21] The question that should be determined in the current matter is not whether the limitation of the rule 32(11) was argued at the hearing of the matter but whether the issue of cost was argued at all during the hearing. Having had the opportunity to consider the papers and the transcription of the proceedings, the issue of cost was never argued. What Ms Kuzeeko refers to as an argument on the issue of costs can hardly be regarded as such. It only amounts to prayer for relief sought.

[22] Ms Kuzeeko referred the court to *South African Poultry Association v The Ministry of Trade and Industry*⁷, in motivation of why the applicant would be entitled to cost at a scale not limited to rule 32(11) but one should not lose sight that the SAPA matter also made it very clear that a clear case must be made out if the court is to allow a scale of cost above the upper limits allowed by the rule and that the onus rests on the party who seeks a higher scale.⁸

[23] I am of the considered view that there was no ambiguity in this court's order. The fact that the cost order does not include the said limitation does not cause the order to be vague or ambiguous nor does it constitute an omission. The meaning of the order is not obscure or otherwise. I am of the opinion that the provisions of rule 103(1) (c) does not find application in this matter before me. I am however of the view that

⁶ Supra at 307-308 G-A. Also see the approach in *Pogrand v Yutar* 1968 (1) SA 395 (A) 397G - 398C and in *Ex parte Barclays Bank* 1936 AD 481).

⁷ *South African Poultry Association v The Ministry of Trade and Industry* (A 94/2014) [2014] NAHCMD 331 (07 November 2014), paragraph 67.

⁸ Supra at para 67.

rule 103(1) (b) would be applicable and because the issue of costs was not argued, this court would not be *functus officio*. I am of the view that this court should exercise her discretion in favour of both parties and allow them to argue the issue on costs.

[24] An application in terms of rule 103(1) (b) is expected to be made within a reasonable time⁹ and I note that a substantial period has passed from the date of the order to date of the application. However, from the e-file it is clear that the parties for the better part of 2020 attempted to resolve the issue of costs during taxation but were unable to do so and due to the restrictions caused by the COVID Pandemic it caused a further delay. I am of the view that it would be interest of justice to allow the parties to argue the issue of cost regardless the period of time that lapsed.

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

	Note to the parties:
PRINSLOO Judge	Not applicable.
Counsel:	
Applicant	Respondent
Ms. M Kuzeeko of Dr Weder, Kauta & Hoveka	Ms. K Simson of Sisa Namandje & Co Inc.

⁹ *Poggrund v Yutar* 1968 (1) SA 395 (A) 397D-E; *Estate Garlick's V Commissioner for Inland Revenue* 1934 AD at 505.