REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WONDHOEK

RULING ON COSTS

Case No: HC-MD-CIV-ACT-CON-2021/00278

In the matter between:

DORNFONTEIN SAFARIS (PTY) LTD **APPLICANT**

and

ELLIS & PARTNERS LEGAL PRACTITIONERS **RESPONDENT**

Neutral Citation: *Dornfontein Safaris (Pty) Ltd v Ellis & Partners Legal Practitioners* (HC-MD-CIV-ACT-CON-2021/00278) [2021] NAHCMD 358 (05 August 2021).

CORAM: MASUKU J
Heard: **11 June 2021**
Delivered: **05 August 2021**

Flynote: Costs – discretion of the court to award costs – costs follow the successful party – imposing a cost order on a party who withdraws defence or opposition

Summary: The applicant (the defendant in the main action) launched an application for a rescission of a default judgement. The respondent, having been the applicants' legal practitioner withdrew its opposition when it was required by a court order to file its

heads of arguments. The applicant now wishes to be awarded costs *de bonis propriis* and on a punitive scale as a result of the withdrawal of the opposition.

Held: that the basic rule is that the awarding of costs lies within the court's discretion. At the same time, the general rule is that costs follow the event, that is the successful party is awarded his or her costs.

Held that: there is no reason why the court should not impose a costs order on a party that merely withdraws an opposition or a defence.

Held further that: when a party seeks a punitive costs order, it should prove that the other party has acted in a dishonourable, vexatious, vindictive or other improper manner, unless such behaviour can be deduced from the reading of the papers.

Held that: When considering the propriety of granting a punitive costs order in this case, the allegations of impropriety could not be settled on the papers and required oral evidence which would be provided by the trial of the action between the parties.

In the result the court found that the respondent has in any event been successful in its opposition to the granting the costs at this stage and awarded the costs in favour of the respondent subject to the provisions of rule 32(11).

ORDER

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1. The question of costs for the withdrawal of the opposition to the rescission application stands over for determination by the trial court, together with the merits of the action.
2. The Applicant is ordered to pay the costs of this application subject to the provisions of rule 32(11).
3. The matter is removed from the roll and is regarded as finalised.

RUILING

MASUKU, J

Introduction

[1] The main question for determination in this ruling is the propriety of granting an order for costs against the respondent, *de bonis propriis* and on the punitive scale, in the light of its concession to the granting of an application for rescission that it had previously opposed.

[2] The respondent contends that it would be fair, proper and just for the determination of the costs of the application for rescission to be reserved for determination by the trial court. The remit of this court is to decide which of the protagonists is on the correct side of the law.

Background

[3] It appears common cause that the applicant and the respondent were enjoying a relationship of legal practitioner and client. The relationship appears to have gone south, culminating in the respondent issuing a summons against the applicant claiming payment for legal services it had rendered.

[4] It would appear that the summons never came to the applicant's attention for the reason that it was served on the applicant's auditors. Default judgment was, in the premises entered against the applicant by this court. Once aware of the said judgment, the applicant filed an application for rescission of the default judgment, which was opposed by the respondent. In this regard, papers were exchanged and the applicant filed its heads of argument, namely on 28 May 2021.

[5] On 4 June 2021, the respondent indicated by letter that it consented to the granting of the rescission to enable the matter to proceed to case planning and

subsequent judicial case management steps. The reason for the respondent to take that step was explained as follows in the said letter: 'To limit costs and expedite the matter, we agree that the default judgment be rescinded and that the matter proceed to case planning; with costs to be in the cause, alternatively, stand over.'

[6] Plainly, the applicant did not accept the proposal regarding the issue of costs standing over. It wanted its pond of flesh instantly and not to stand over for delivery at some future and yet indeterminate date. It is this question that occupies the court. Should costs be ordered now and if so, on what scale, or should the matter stand over to be dealt with together with the merits.

[7] I must mention at the outset, that it appears to me that there is a lot of bad blood between the parties and the acrimony is plain from reading the papers filed, including the heads of argument. This should not, however, debar the court from dealing with the matter purely in terms of the law, the emotions and palpable acrimony assigned to a locker so as not to influence the court in its determination of the applicable principles.

The law

[8] In his work entitled, Law of Costs, [1]the learned author Cilliers states at 2.01 that, 'The basic rule is undoubtedly the one that an award of costs is in the discretion of the court. At the same time, however, the general rule of our law is that costs follow the event, that is the successful party is awarded his costs.' These principles also hold true in this jurisdiction.

[9] In *Standard Bank Namibia Limited v Bergh*[2] the court expressed itself as follows:

'It has been held that where a litigant withdraws an action or application (or opposition or defence) there should exist very sound reasons why the defendant or respondent should not be entitled to his costs: that this is because an applicant or plaintiff who withdraws or

[1] A C Cilliers, Law of Costs, Lexis Nexis Butterworths, Durban, Service Issue 14, 2006.
[2] *Standard Bank Namibia Limited v Bergh* HC-MD-CIV-MOT-GEN-2019/00065 [2019] NAHCMD 102 (8 April 2019).

abandoned his or her action or application is in a position of an unsuccessful litigant and under those circumstances, the opposing party is entitled to all the costs associated with the withdrawn application or action proceedings. . .'

[10] I wholeheartedly agree with the above statement of the law. It appears to me to be consistent with the provisions of rule 97, especially subrule (3) of this court's rules. The only difference is that the rule appears to only address the situation where proceedings are withdrawn but not where opposition of a defence is withdrawn. There is, in my view, no reason in law or principle why the position that costs should be paid by the withdrawing party should not apply in the event an opposition of defence is withdrawn. They are two sides of the same coin.

[11] In this case, it is clear that the respondent withdrew its opposition at the stage where it had to file its heads and when all the papers were already in. There is no reason why the respondent should, all things being equal, should not pay the costs of the applicant and this would be my *prima facie* view. This is, however, not the end of the matter.

[12] The applicant prays for the costs to be levied on the punitive scale. The reasons for this are stated, including that the respondent did not proffer sound advice. I am of the considered view that in the instant case, the scale of costs prayed for by the applicant, being on the punitive scale, is, from what is before me, informed by considerations which cannot be decided in this forum. It would appear that oral evidence may be necessary for the purpose.

[13] The principles on the instances where the court may, in its discretion order punitive costs are trite. As to whether a party has been able to meet the test for the granting costs on the punitive scale, has to be considered by reference to the evidence before court, which suggests that the said party has acted in a dishonourable, vexatious, vindictive or other improper manner. There are those cases where the evidence of that unacceptable behaviour may be gleaned on the papers.

[14] There are, however, other cases where there are allegations of conduct *ex facie curiae,* so to speak, to which the court cannot be privy on the papers. Allegations of

improper conduct in a relationship between attorney and client, as alleged, did not take place in open court. From the allegations made, it appears to have taken place in chambers and away from public glare.

[15] In such a case, where accusations are made against the legal practitioner, and which it appears he contests, this does not provide a proper forum for the determination of who is correct or wrong on the probabilities. That being the case, I am of the considered view that this is a matter that should stand over for determination together with the main issues at the trial. The propriety of issuing of the costs *de bonis propriis* appears to me to be a further matter that cannot be resolved in this forum as it appears to be intertwined with the conduct of the legal practitioner involved.

[16] Once the issues are ventilated in a trial, it may well be that the *prima facie* view I expressed in paragraph 11 may turn on its head as there are some explanations that the respondents make. These are issues that may affect the question of costs and it would, in the circumstances, be the most feasible way to deal with the issue of costs in this matter. This is so, in particular, considering the overriding objects of judicial case management. Both parties will be before the trial judge and will be able to fully ventilate their respective positions and be cross-examined thereon, if necessary.

[17] The respondent referred the court to *United Africa Group (Pty) Ltd v Uramin Inc and Others*[3] where the Supreme Court, in dealing with an issue of costs occasioned by a postponement, found it fitting to refer that matter to the trial court as it would have all the evidence before it, which has a bearing on the postponement. '. . . it is clear to me that the trial court will be in a far better position to properly assess the liability for the wasted costs occasioned by the postponement once it has all the evidence before it.'

[18] It would appear to me that the approach of the Supreme Court, albeit in a different context, is appropriate to follow in the instant case. As mentioned, it is the scale of the costs, in particular, and that the costs are sought *de bonis propriis* in particular, that would dictate that the costs of the rescission should be allowed to stand over for determination by the trial court.

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[3] *United Africa Group (Pty) Ltd v Uramin Inc and Others* 2019 (1) NR 276 (SC) para 61 – 64.

Conclusion

[19] In the premises, I am of the considered view that this is not a matter that can be settled in the present setting for the reasons advanced above. In view of the nature of the issues that arise from the issue of costs, as canvassed above, it is appropriate that the question of costs be referred to the trail court, to untie the Gordian Knot regarding the question of costs, as it were.

Costs

[20] I am of the considered view that from the analysis and conclusion above, it is fair to say that the respondent has been successful in that its opposition to the granting of costs at this stage, has carried the day. In the light of that fact, the costs of this interlocutory application are awarded to the respondent, subject to the provisions of rule 32(11).

Order

[21] In view of the conclusion reached above, the following order commends itself as the appropriate one to issue in the circumstances:

1. The question of costs for the withdrawal of the opposition to the rescission application stands over for determination by the trial court, together with the merits of the action.
2. The Applicant is ordered to pay the costs of this application subject to the provisions of rule 32(11).
3. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES

FOR THE APPLICANTS	Z. Duvenhage Of Fisher, Quarmby & Pfeifer
FOR THE RESPONDENT	J. Visser Of Koep & Partners