REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON COSTS

HC-MD-CIV-ACT-CON-2021/00094

In the matter between:

TULELA PROCESSING SOLUTIONS (PTY) LTD	**PLAINTIFF**
And	
WEATHERLY MINING NAMIBIA LIMITED	**1st DEFENDANT**
ONGOPOLO MINING LIMITED	**2nd DEFENDANT**

Neutral citation: *Tulela Processing Solutions (Pty) Ltd v Weatherly Mining Namibia Ltd* (HC-MD-CIV-ACT-CON-2021/00094) [2022] NAHCMD 211 (22 April 2022)

Coram: Ndauendapo, J
Heard: **15 March 2022**
Delivered: **22 April 2022**

Flynote: Rules of Court – Rule 97 (3) – Withdrawal of proceedings without tendering costs and consequences thereof – The plaintiff failed to give good reasons as to why the defendants should not be granted costs.

Summary: The plaintiff and the defendants entered into a sale of shares agreement. Before signing the agreement, representative for the plaintiff assured the representative of the defendants that plaintiff had sufficient funds at its disposal to pay the deposit and the purchase price of the shares of US$ 15 million. In terms of clause 10.1 of the agreement, the plaintiff warranted it had the necessary and sufficient funds in its possession at the date of the signing the agreement to satisfy the full consideration asked by the defendants. It later transpired that the plaintiff did not have enough funds to pay the deposit and the purchase price yet it signed the agreement. Clearly, there was a material misrepresentation by the plaintiff entitling the defendants to cancel the agreement. On 18 January 2021 the plaintiff then issued out summons for an order *inter alia* to rectify the agreement and compel the defendants to comply with the rectified agreement.

The sales agreement was subject to the fulfillment of a suspensive condition that the transaction be unconditionally approved by the Namibia Competition Commission, and which was approved on 4 March 2021. Aggrieved by the approval, the defendants on 6 April 2021 brought a review application before the Minister of Industrialization and Trade to set aside the approval on the basis that the plaintiff misrepresented its ability to pay the deposit and purchase price at the time of concluding the agreement while that was not the case. The Minister set aside the approval of the transaction on 3 September 2021. The plaintiff did not take the decision of the Minister to set aside the approval on review instead, the plaintiff withdrew the action and did not tender costs on the basis that defendants were *mala fide* when they took the decision to have the approval of the transaction by the Competition Commission on review to the Minister and that they breached the cooperation clause of the agreement. Furthermore, the decision to set aside the approval of the transaction by the Minister resulted in the impossibility of the fulfilment of the agreement and consequently the relief sought by the plaintiff in the action became superfluous.

Held: The defendants' decision to take the Competition Commission on review for approving the transaction was within their rights. In addition to that, there is nothing in the cooperation clause that prevented the defendants from exercising their rights.

Held that: The plaintiff's action against the defendants was weak, had it been strong the plaintiff could have taken the Minister's decision on review but it didn't, the failure to do so clearly shows that it had a weak case against the defendants.

Further held that: there was nothing to rectify in the agreement. The purchase consideration was clear and how there could have been any misunderstanding on such an essential aspect of a sale's agreement, is difficult to fathom.

Further held: That when the plaintiff withdrew the action, there were no sound reasons not to tender the costs of the defendants.

ORDER

1. The application succeeds with costs and such costs not to be capped as per rule 32(11).
2. The matter is removed from the roll and regarded finalised.

RULING

Ndauendapo, J:

Introduction

[1] The defendants (applicants) seek an order in terms of rule 97(3) directing the plaintiff to pay their costs incurred in defending the main action instituted by the plaintiff against them, but later withdrawn, without tendering the costs. They also seek that such costs be paid on the punitive scale and not to be capped in terms of rule 32(11).

The parties

[2] For the sake of convenience, I shall refer to the parties as in the action proceedings. The plaintiff is Tulela Process Solutions (Pty) Ltd ("Tulela"), a company duly incorporated according to the company laws of the Republic of Namibia, having its principal place of business at No.501 Unit2, Ndilimani Cultural Troupe Street, Tsumeb, Republic of Namibia.

[3] The First defendant is Weatherly Mining Namibia Limited ("WMN"), a company duly incorporated according to the laws of the Republic of Namibia, having its principal place of business situated at 2nd floor, Unit3, Ausspann Plaza, Dr. Augustinho Neto, Ausspannplatz, Windhoek, Republic of Namibia.

[4] The second defendant is Ongopolo Mining limited ("OML"), a company duly incorporated according to the laws of the republic of Namibia, having its principal place of business situated at 2nd Floor, Unit 3 Ausspann Plaza, Dr. Augustinho Neto, Ausspannplatz, Windhoek, Republic of Namibia.

Background facts

[5] During June 2020 Ongopolo, a subsidiary of a company called, Weatherly, a company owning various mining interests in Namibia, decided to sell its shares. Mr. Tjiroze was assigned to find a buyer. Tulela expressed interest in purchasing the shares of Ongopolo held by Weatherly. A sale of shares agreement was concluded between Tulela and Weatherly. The purchase price of the shares was US$15 million.

[6] Prior to signing the sale agreement, Mr Tjiroze sought and received an assurance from Mr Engelbrecht that Tulela had sufficient funds at its disposal to pay the purchase price of US$ 15 million.

[7] In the sale agreement, Tulela warranted that it had "*the necessary and sufficient funds in its possession at the date of signing this agreement to satisfy the full consideration asked by the seller*".[1]

[8] It later transpired that Tulela had insufficient funds to pay the purchase price and, moreover, did not pay the agreed deposit on the date stipulated in the sale agreement. Weatherly cancelled the agreement.

[9] Tulela subsequently invoked an arbitration clause in the sale agreement and referred a dispute concerning inter alia rectification of the agreement to arbitration. Tulela averred that the agreement did not reflect the common intention of the parties. Weatherly opposed the relief sought but before the arbitrators were able to arbitrate the dispute, a dispute arose concerning the jurisdiction of the arbitrators. Tulela then unilaterally terminated the arbitration.

[10] On 18 January 2021 Tulela instituted action against the defendants for an order for rectification of the sale agreement; delivery of certain annexures; and compelling the Defendants to comply with the agreement as rectified. On 22 January the defendants filed their notices to oppose the plaintiff's action.

[11] The sale agreement was subject to the fulfilment of a suspensive condition, namely that the transaction be unconditionally approved by the Namibia Competition Commission. On 4 March 2021 the Namibian Competition Commission ("NACC") approved the transaction unconditionally.

[12] On 6 April 2021 the Defendants launched a review application, to review the NACC's decision in terms of Section 49 of the Competition Act to the Minister of Industrialization and Trade ("the Minister"). The grounds of review were, inter alia, that the sale agreement was fatally tainted by Tulela's misrepresentation of its financial

[1] Sale Agreement – clause 10.1- Page 161.

ability to pay the purchase price from funds it allegedly possessed at the time of concluding the sale agreement.

[13] In the meantime, and in terms of the order of this Court, the Defendants filed their pleadings including a special plea of *Lis Pendens*. In their plea the defendants raised the following defenses: that the written agreement as it stands reflects the common intention of the parties and ought not to be rectified; that the first defendant validly cancelled the agreement on the grounds, first, a false misrepresentation by plaintiff relating to it being in possession of sufficient funds at the time of signature of the agreement to pay the purchase price and second, the plaintiff's breach by failing to pay the deposit on the terms and date stipulated in the agreement.

[14] On 22 April 2021 Tulela served and filed a replication and plea to the counterclaim.

[15] On 30 July 2021 the Minister published a notice in the Government Gazette inviting interested parties to make submissions regarding the review application.

[16] At about the same time, the Court directed that Weatherly's special plea addressed separately and prior to other issues in terms of a special case under Rule 63, and that the parties file a consolidated statement of facts by 17 September 2021.

[17] Upon receipt of the Court's directive on 10 August 2021, the Defendants and their legal practitioners proceeded to draft a statement of agreed facts and prepare for the special plea hearing.

[18] On 30 August 2021 the parties exchanged drafts of the joint statement. On 1 September 2021, Tulela requested and was provided certain annexures it desired.

[19] On 9 September 2021, the Plaintiff reverted to the Defendants in respect of the amended stated case and on 21 September 2021 the parties agreed to hold a joint

meeting via Zoom on 23 September 2021 for purposes of producing the consolidated special case.

[20] On 3 September 2021, the Minister issued the determination setting aside the decision of the NACC to approve the transaction.

[21] On 23 September 2021 the video conference took place where the parties agreed on the content of the special case and to file it with a status report by 30 September 2021.

[22] On 27 September 2021, Tulela's representatives delivered a letter to the Defendants advising that Tulela would be withdrawing the action. Tulela alleged that the defendants were culpable by approaching the Minister to review and overturn the NACC's determination and so Tulela would not tender any costs, and invited the Defendants to bring a Rule 97 (3) application.[2]

[23] On 29 September 2021, Tulela filed a formal notice of withdrawal of the action in this Court, without tendering costs. Tulela submitted that they withdrew the action on very sound reasons and therefore not tendering costs.

[24] Tulela's reason as to why the defendants should be deprived of their costs was because the defendants had taken the NACC's determination on review "*which resulted in the impossibility of the fulfilment of clause 9.1.1 of the agreement*" and therefore "*the terms of the agreement cannot become operative".* As a result, "*The relief sought by* [Tulela] *has become superfluous"*.

Issues

[25] The issue for determination is whether the plaintiff, having withdrawn the action against the defendants, without tendering costs, should be ordered to pay the wasted

[2] Founding Affidavit para 33 Page 9; and HT12 Page.

costs of the defendants for opposing the action. The corollary issue thereto, is whether such costs should be on a punitive scale.

The applicable legal principles

[26] Rule 97(1) to (3) provides that –

'97. (1) A person instituting proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she must deliver a notice of withdrawal and may include in that notice a consent to pay costs and the taxing officer must tax such costs on the request of the other party.

(2) A consent to pay costs referred to in subrule (1) has the effect of an order of court for such costs.

(3) If no consent to pay costs is included in the notice of withdrawal the other party may apply to court on notice for an order for costs.'

[27] In *Erf Sixty-Six Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others* (260 of 2007) [2012] NAHC 62 (13 March 2012) the court held that:

'[10] The first issue I must determine is whether, in adjudicating the opposed Rule 42(1)(c) application, I must do so by considering the merits of the matter as a whole based on the papers as they stood after the first respondent answered; or whether I should determine the costs liability solely on the basis of the conduct of the parties in the litigation. The Court has a discretion in the matter. As this Court said in Channel Life Namibia Ltd v Finance in Education (Pty) Ltd 2004 NR 125 at 126F-G:

> *"There may very well be cases where the Court will have no other choice but to consider the merits of a matter in order to make an appropriate costs allocation, while there will, doubtless, be others where the Court may make an appropriate costs allocation based on the 'material' at its disposal, without regard to the merits of the case. Each case will be treated on its own facts."*

[11] I am guided by the quoted dicta in the following cases: In *Germishuys v Douglas Besproeiingsraad*[3] the court said:

> *"Where a litigant withdraws an action or in effect withdraws it, very sound reasons… must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because after all, his claim or applications futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings."*

[28] In *Rosenblum Family Investments (Pty) Ltd and another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening*[4]*,* the court said:

'Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him.'

The defendants' case

[29] Counsel argued that Tulela initially put up only one reason for refusing to pay the defendants costs, namely that by approaching the Minister to review and set aside the NACC's decision, the suspensive condition could no longer be fulfilled and therefore no purpose would be served by attempting to either rectify or enforce the sale agreement.[5]

[30] Later, in its answering affidavit, Tulela provides a contrary reason, namely that the Defendants were supposedly in breach of a cooperation clause in the sale agreement; therefore Tulela cannot rely on the Defendants to cooperate in implementing the sale agreement; consequently Tulela cancelled the sale agreement, and for these reasons withdrew the action.[6]

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[3] In *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300E.
[4] *Rosenblum Family Investments (Pty) Ltd and another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening* 2003(3) SA 547 (C) at 550C-D
[5] HT 16 Page 106; AA para 17 Page 125
[6] AA para 14.4 to 14. 18 Page 121 to 123

[31] Counsel argued that Tulela was constrained to resort to the second "reason" in response to the unanswerable assertion that the first reason was unsustainable. Had the Minister made her decision without giving Tulela sufficient notice to make submissions and raise objections, her decision would have been set aside in a Court for failing to recognise the *audi alterem partem* principle. Yet, by Tulela's own admission, it elected not to challenge the Minister's decision and must take responsibility for not doing so. Put differently, had Tulela had exercised its rights to challenge the Minister's decision, it would not have had to withdraw the action as the status quo – i.e., the NACC's decision would have stood and thus the suspensive condition would have been fulfilled.

[32] Counsel contended that as to why Tulela did not challenge the Minister's decision – the real answer lies in Tulela's response to the Defendants' allegations that Weatherly had been unlawfully induced into concluding the sale agreement by the false representations made by Mr. Engelbrecht that Tulela had the ability and possessed sufficient funds to pay for the Ongopolo shares.

[33] Counsel submitted that in the founding affidavit, the Defendants made detailed reference to Tulela's misrepresentation, and the subsequent warranty that Tulela was in possession of sufficient funds to pay the purchase price.[7] In its answering affidavit, Tulela did not refute these allegations. Instead, Tulela seeks to avoid answering the allegations by averring, falsely, that Mr. Tjiroze acted as its agent at the time that the sale agreement was concluded.[8]

[34] Counsel argued that Tulela has therefore not taken the Court into its confidence and the Defendants' averments stand unchallengeable and irrefutable that Tulela is guilty of a deliberate misrepresentation which induced Weatherly into concluding the sale agreement. For this reason, Tulela cannot and still does not deny the factual basis of the Minister's decision to set aside the NACC's decision to approve the transaction.

[7] Founding Affidavit para 58 to 63 Page 19 to 22.
[8] Answering Affidavit para 13 Page 119.

[35] Counsel submitted that it is because Tulela was aware that it cannot deny the Defendants' assertion that Weatherly was unlawfully induced to conclude that sale agreement, that Tulela knew it could not challenge the Minister's decision on the merits in an application to set aside the Minister's decision, nor could it successfully challenge the Defendants' defence, namely that the sale agreement was null and void due to Tulela's misrepresentation, and breach of the warranty, in the action.

[36] Counsel argued that Tulela therefore introduced an alternative explanation for withdrawing the action by relying upon the cooperation clause. However, its reliance is baseless as the cooperation clause could never have been intended to mean that a party to the agreement who discovers that the NACC's approval was based upon a false representation by the counterparty should be stripped of its right to approach the Minister, a right afforded all parties to the transaction in terms of Section 49 of the Competition Act.

[37] Consequently, the Defendants submit that the alternative explanation or justification for withdrawing the action, based on an alleged breach of the cooperation clause, should be rejected as an afterthought lacking any merit.

[38] Counsel argued that the Court would be entitled to consider the merits of the action to the extent that they have been traversed in the affidavits filed in the current application. Following Channel and Sixty-Six supra, the Court is entitled to examine the merits in order to determine whether the Plaintiff would have been successful in the litigation.

[39] Counsel submitted that Tulela would have been unsuccessful in the action because:

First, the sale agreement (which Tulela wanted to rectify) was null and void as a result of Tulela misrepresenting its ability to pay the purchase price given its assertion, which proved to be false, that it was in possession of sufficient funds to

pay the purchase price. Consequently, a Court would not move to order rectification of an agreement which was null and void.

Second, by not challenging the Minister's decision to set aside the NACC's decision to approve the transaction, Tulela has conceded that her decision must stand and enjoy the full force of the law, and therefore the agreement is becoming unconditional. Consequently, a Court would not move to order rectification and enforcement of an agreement which had lapsed by virtue of non-fulfilment of a suspensive condition;

Third, the prayer for rectification had no merit given the undisputed facts on the papers.

Tulela has not produced any tangible evidence to support its contention that the contents of the sale agreement do not accord with the common intention of the parties.

[40] Counsel submitted that on the contrary, the Court can infer from the facts that Tulela was not in a position to comply with the terms of the agreement which it had concluded because it, from the very start, did not have the funds to pay the purchase price. Accordingly, Tulela was obliged to take steps to escape the terms of the sale agreement and to squeeze the Defendants into accepting a re-negotiated agreement, alternatively, attempt to have the agreement rectified to reflect the terms which its funders and investors demanded.

[41] Counsel argued that the Defendants have explained fully how it came about that the misrepresentation was conceded by Mr. Engelbrecht namely when the NACC requested information and documentation regarding the funders and investors whom Tulela had approached. It was in that context that Mr. Engelbrecht admitted that the funding would come from the latter and that Tulela did not have sufficient funds available as per the misrepresentation and/or warranty in the sale agreement.

[42] Counsel argued that the facts presented to the above demonstrate conclusively that Tulela had no prospects of success in the action and that the application for rectification would not have succeeded.

[43] Counsel submitted that Tulela's argument that there was a "*very sound reason*" not to award costs to the Defendants because the Defendants had the temerity to challenge a determination made by the NACC has no merit whatsoever. First, the proposition that a party with rights under the Competition Act should not exercise those rights but rather abide by a decision tainted by the wrongdoing of its counterparty, has no basis in law, logic or reason. The effect of Tulela's approach is that parties to an agreement should not raise wrongdoing by one of those parties before a regulatory body and should rather act against the public interest by preserving the rights of a party who may be guilty of misconduct in its business dealings.

[44] Counsel argued that Tulela's complaint that it was not given sufficient opportunity to oppose the review application is exaggerated. Firstly, Tulela was aware of the review application at the time that the Mandamus was served on it. The review application was in fact an annexure to that application and, if Mr. Engelbrecht and his advisors, Cronje & Co., had read the application, they would have understood the difference between a mandamus and a review application. This appears to be another example of Mr. Engelbrecht and his advisors seemingly failing to pay sufficient attention to documentation placed before them.

<u>The plaintiff's case</u>

[45] Counsel argued that the case for plaintiff is that although it withdrew the action it instituted there are sound reasons why the defendant should not be awarded costs. Firstly, the plaintiff was fully justified in instituting action and secondly, the action becoming futile was caused by the defendants.

[46] Counsel argued that the defendants seek an order for costs which is in the nature of final relief. The Plascon-Evans rule finds application. The application is to be decided on the facts alleged by the plaintiff as respondent and the facts stated by the defendants which are not disputed by the plaintiff, unless the allegations on behalf of the plaintiff can be rejected outright as they do not raise a real dispute of fact or are so farfetched or clearly untenable that it may be rejected on the papers.

[47] Counsel argued that the defendants brought a substantial application, the founding affidavit and replying affidavit together amounting to 71 pages, excluding the annexures. The affidavits are replete with unnecessary statements and annexures, argument and opinion. All this in an interlocutory application.[9]

[48] Counsel argued that prior to action being instituted the plaintiff attempted to follow the alternative dispute resolution course provided for in the agreement by giving notice of arbitration. In the plea filed by the defendants they confirm this by pleading that the arbitrators had been appointed and allege that the arbitration proceedings are pending.[10] In the replication to the plea the material facts not disclosed by the defendants are pleaded. The defendants refused to participate in arbitration alleging that as a result of the delay in proceedings the plaintiff "… unilaterally waived or lost its right to invoke the arbitration agreement in its entirety and has thereby waived its right in respect of all matters that can be properly brought before the court …". [11]

[49] Counsel submitted that the plaintiff had also made a most reasonable offer to the defendants to resolve the issues between the parties. This was rejected out of hand.[12] Counsel argued that a dispute arose as to the interpretation of the agreement and whether the agreement should be rectified. Without rectification the agreement is

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[9] *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ).

[10] Plea paras. 5 to 9.

[11] Replication par. 2.1.1, para 5 letter Bravo Compliance dated 16 November 2020 annexure "POC5" to particulars of claim. This is not denied in the plea by the defendants.

[12] Answering Affidavit par.18.3 and annexure "ANSWER10".

patently defective. Counsel argued that the defendants repudiated the agreement by means of their attempted cancellation.[13]

[50] Counsel submitted that after the action had been instituted the suspensive condition, approval by the Competition Commission, was fulfilled.[14] Counsel argued that the relief sought by the plaintiff in the particulars of claim was thus in respect of a fully valid and effective agreement.

[51] Counsel submitted that unbeknown to the plaintiff the defendants launched a review application to the Minister requesting that the Competition Commission approval be set aside.[15] The plaintiff was not informed of this review application at the time, and it was not served upon the plaintiff.[16]

[52] Counsel argued that the review application was a deliberate step by the defendants to frustrate the agreement between the parties. This amounts to repudiation and is furthermore a breach of the provisions of clause 20 providing for cooperation between the parties:

> 'The parties shall at all relevant and material times cooperate in matters of mutual concern to give full effect to all the terms of the agreement herein, and shall act in good faith in the course of such mutual cooperation in respect of the Transaction.'[17]

Counsel argued that the review application was filed by the defendants on 6 April 2021. Thereafter, on 8 April 2021, the defendants filed a counterclaim based upon alleged breach of contract whilst they knew that the review was pending. In this counterclaim and the plea to the claim the review application is not disclosed.

[53] Counsel argued that the defendants, fully knowing that the review application had been lodged, continued to participate in the process of litigation without raising the

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[13] Answering Affidavit par. 14.6, Particulars of Claim annexures "3", "4" and "5".
[14] Founding Affidavit par. 14.
[15] Founding Affidavit par. 15.
[16] Answering Affidavit par. 9.2.
[17] Clause 20.1 of agreement annexure "ANSWER9" to the answering affidavit.

pending review application.[18] Two weeks after becoming aware of the outcome of the review application, after taking legal advice on the effect thereof, the plaintiff withdrew the action.[19]

[54] Counsel argued that it is submitted that in September 2021 the plaintiff was faced with a choice. It had to decide between continuing with legal action to enforce the agreement or to accept that the defendants would never cooperate and accept the repudiation by the defendants. The conduct of the defendants made it eminently reasonable for the plaintiff to decide not to continue with the attempts to enforce the agreement and to withdraw the litigation. There is the saying "you can bring a horse to water, but you cannot force it to drink."

[55] Counsel submitted that the defendants had frustrated the arbitration process and then, when action was instituted again relied on the arbitration process as a special plea, simply to delay the litigation process. It repudiated the arbitration agreement and yet attempts to have it enforced in the special plea. The special plea was a delaying tactic only.

[56] The defendants had made it clear that they would not proceed with the transaction and sought a "legal" way to do so. The review application to the Minister resulted from this decision. It amounted to a breach of contract and was not "lawful". This conduct made it clear to the plaintiff that the defendants would not cooperate.

[57] Counsel argued that the review application by the defendants amounts to a deliberate and wrongful step to frustrate the agreement. It was reasonable for the plaintiff to conclude that there is no future in enforcing an agreement against a party that will go to such lengths to frustrate the agreement. The question is, why did the defendants not pursue the litigation with alacrity to final conclusion? Why the delay tactics and the further repudiation?

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[18] Answering Affidavit par. 16.4 (the first par. 16.4).

[19] Answering Affidavit par. 12.2, Answering Affidavit par. 16.2.

[58] Counsel contended that the withdrawal by the Minister of the consent by the Competition Commission through the review made enforcement of the agreement by means of litigation futile. A suspensive condition was not fulfilled, and the agreement could not be enforced. The conduct of the defendants in causing this frustration was *mala fide.* It is the *mala fide* conduct of the defendants which necessitated the withdrawal of the action.

[59] Counsel argued that the defendants contend that the plaintiff vacillates about its reason for withdrawing of the action. This contention is not based upon the facts. The argument is that plaintiff had an initial reason and thereafter a second reason, to suit the circumstances, for the withdrawal. This is not correct. As stated in annexure "HT16" paragraphs 4 and 5 it is the conduct of the defendants that is the cause. This is confirmed in paragraph 17.3 of the answering affidavit. In paragraph 14 of the answering affidavit, this reason is elaborated upon. In paragraphs 14.11 to 14.18 of the answering affidavit it is again the conduct of the defendants that is complained of. The defendants want to avoid the true issue, their repeated repudiation of the agreement.

[60] Counsel submitted that it is not the objective fact that the Minister withdrew the approval by the NACC, it is the conduct of the defendants in engineering this reversal that is the problem. It is the defendants alone who are to blame for this situation. The defendants argue that it would be reasonable to expect of the plaintiff to institute legal action against the Minister to have this reversal set aside. In the meantime, this transaction and the litigation in respect thereof must remain in limbo. Both parties must remain willing and able to comply with the agreement. This is most unreasonable.

[61] Counsel argued that the defendants wish to shift the blame. However, the failure of this contract is due to the conduct of the defendants. In fact, the defendants forced the Minister to take action through a mandamus.[20] It is submitted that it would be unfair and improper for the defendants to benefit from their unlawful conduct.

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[20] Answering Affidavit para. 10.1.

[62] Counsel argued that it would be eminently fair under the circumstances that the court makes no order to costs and that each party pays its own costs.

Discussions

[63] The issue for adjudication is whether the court should order the plaintiff to pay the costs of the defendants in circumstances where the plaintiff withdrew the action it instituted against the defendants and refused to tender the costs.

[64] From the authorities cited above, it is clear that the court has a discretion to grant or refuse the relief sought and that such discretion must be exercised judiciously and must be informed by the overriding objectives of judicial case management as set out in rule 1 (3) of the rules of court.

[65] Rule 1 (3) provides:

'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable. . .'

[66] The bone of contention between the parties relates to the compliance with the sale of shares agreement entered into between the parties. Prior to signing the sale agreement, Mr. Tjiroze avers that he sought and received an assurance from Mr. Engelbrecht, representing Tulela, that Tulela had sufficient funds at its disposal to pay the deposit and the purchase price of US$ 15 million.

[67] In terms of clause 10.1 of the sale agreement, Tulela warranted that it had "*the necessary and sufficient funds in its possession at the date of signing this agreement to satisfy the full consideration asked by the seller*".[21]

[21] Sale Agreement – clause 10.1- Page 161.

[68] Mr. Engelbrecht in his answering affidavit avers that he signed the agreement without obtaining legal advice, which according to him 'was a huge mistake'. Mr Tjiroze in his replying affidavit avers that Mr. Engelbrecht was throughout the protracted negotiations represented by Messrs Christiaan Cronje and Henrich Jansen Van Rensburg from the law firm Cronje & Co. In my respectful view, the version of Mr Engelbrecht (who was the managing director of Tulela) that he signed the agreement without obtaining legal advice is not plausible. This was clearly a complex and protracted transaction involving sale of shares worth millions of US$ dollars and to suggest that he signed the agreement without legal advice is simply beyond belief.

[69] In terms of clause 10.1 of the sale agreement, Tulela warranted that it had sufficient funds to pay the agreed deposit on the date stipulated in the sale agreement and the purchase price, but it turned out that, that was not the case. In the answering affidavit Mr. Engelbrecht avers that the amount of US$ 15 million is "astronomical", yet he signed the sale of shares agreement. As things turned out, Tulela could not come up with the "astronomical" amount of US$ 15 million. The fact that Tulela did not have sufficient funds to pay the deposit and the purchase price came to light, according to counsel for the defendants, when the NACC requested information and documentation regarding the funders and investors whom Tulela had approached. It was in that context that Mr. Engelbrecht admitted that the funding would come from the latter and that Tulela did not have sufficient funds available as per the misrepresentation and/or warranty in the sale agreement.

[70] The warranty by Tulela that it had sufficient funds to pay the deposit and the purchase price (which was not the case), was clearly a material misrepresentation, entitling the defendants to cancel the agreement. Mr. Engelbrecht in his answering affidavit avers that the institution of the action was necessitated by the insistence of the defendants that payment of the astronomical purchase price be made in terms of the wrongly worded unrectified agreement.

[71] The sale agreement was subject to the fulfilment of a suspensive condition, namely that the transaction be unconditionally approved by the NACC in terms of section 44(1) of the Competition Commission Act 2 of 2003 (the Act).

[72] On 4 March 2021 the Namibian Competition Commission ("NACC") approved the transaction unconditionally.

[73] On 6 April 2021 the Defendants launched a review application to the Minister of Industrialization and Trade ("the Minister"), to review and set aside the decision of the NACC's to approve the transaction in terms of section 49 of the competition Act. The grounds of review, were inter alia, that the sale agreement was fatally tainted by Tulela's misrepresentation of its financial ability to pay the deposit and the purchase price from funds it allegedly possessed at the time of concluding the sale agreement.

[74] Mr. Tjiroze avers in the founding affidavit that the review application was also served on the legal practitioners of the plaintiff and that the plaintiff did not oppose nor filed representations in rebuttal of the allegations made by the defendants in the review application. Mr. Engelbrecht denied vehemently that the review application was served on the plaintiff or its legal practitioners and challenged the defendants to attach proof of service. In reply, Mr. Tjiroze did not provide proof of service. If one has regard to the review application annexure ("HT5") itself, it was only addressed to the Minister care of Mr. Salom Katoole and sent by email nowhere on that application is there any indication that it was also served or emailed to the plaintiff or its legal practitioners(at least not by the 6 April 2021). Mr. Tjiroze not only does he not provide proof of service as challenged, but avers that the plaintiff was served with the mandamus application and the review application was attached to the mandamus application as annexure "T5".

[75] Mr Engelbrecht avers that it was only during 16 June 2021 when he held a virtual meeting with Mr. Haidula from the Ministry that he became aware of the review application, but it was only on 17 August 2021 when he was provided with the link

containing the review application that he became aware of the content of review application. Mr. Engelbrecht further avers that when the content of the review application became known to him on the 18 August 2018, the plaintiff expected to be afforded 30 days to prepare its representations, but to its surprise the Minister made the determination on 3 September 2021 and by that time the plaintiff representations were not ready. The plaintiff saw no purpose of taking the decision of the Minister on review. The plaintiff further avers that after the approval of the transaction was set aside by the Minister, it would have been futile to proceed with the action and that is why it withdrew the action. The plaintiff complained that by taking the decision of the NACC to approve the transaction on review, the defendants breached the cooperation clause in the sale agreement. Clause 20 of the cooperation clause provides that:

'The parties shall at all relevant and material times cooperate in matters of mutual concern to give full effect to all the terms of the agreement herein, and shall act in good faith in the course of such mutual cooperation in respect of the Transaction.'[22]

[76] It was within the rights of the defendants to take the decision of the NACC on review. The law provides for that and there is nothing in the cooperation clause that prevented them from exercising their rights. As counsel for the defendants aptly put it: "The proposition that a party with rights under the Competition Act should not exercise those rights but rather abide by a decision tainted by the wrongdoing of its counterparty, has no basis in law, logic or reason. The effect of Tulela's approach is that parties to an agreement should not raise wrongdoing by one of those parties before a regulatory body and should rather act against the public interest by preserving the rights of a party who may be guilty of misconduct in its business dealings. "In my respectful view, the defendants' decision to launch the review application was not in breach of the cooperation clause of the sale agreement.

[77] The only issue that was procedurally not correct and contrary the cooperation clause and fairness was not to have served the review application on the plaintiff the same day that it was served on the Minister. Mr. Tjiroze in the founding affidavit avers

[22] Clause 20.1 of agreement annexure "ANSWER9" to the answering affidavit.

that the review application was served on the 6 April 2021 on the Minister and on the plaintiff. When he was challenged to provide proof of service, he could not do that. Also, the mandamus application to which the review application was attached was served in June 2021 on the plaintiff's legal practitioners.

[78] Mr. Engelbrecht avers that he became aware of the review application in June 2021, but only got it in August 2021. That is a period of two months. If Tulela was eager to make representation about the review application, why wait for two months before getting the review application? That delay in my view was unreasonable and flies in the face of Tulela's submission that it expected to be afforded 30 days to prepare its representations before the determination was made on 3 September 2021. It had time since June 2021 when it came to its attention that a review application was served on the Minister but failed to act timeously to get the application and to make representation timeously.

[79] Counsel for the plaintiff argued that the withdrawal by the Minister of the consent by the Competition Commission through the review made enforcement of the agreement by means of litigation futile. A suspensive condition was not fulfilled, and the agreement could not be enforced. The conduct of the defendants in causing this frustration was *mala fide.* It is the *mala fide* conduct of the defendants which necessitated the withdrawal of the action. I disagree with that submission. If the plaintiff had a strong case against the defendants, it could have taken the decision of the Minister on review, the failure to do that clearly shows that it had a weak case against the defendants. On the facts of this case, there was also nothing to rectify. The purchase consideration was clear and how there could have been any misunderstanding on such an essential aspect of a sale's agreement, is difficult to fathom. The only inescapable conclusion why it withdrew the action is that the plaintiff could not have overcome the insurmountable averments by the defendants that it induced the defendants to sign the agreement under material misrepresentation of its financial strength.

[80] One matter remains. Are the defendants entitled to costs on the punitive scale? The defendants have not made out a case why costs should be on the punitive scale and accordingly costs will be awarded on the ordinary scale.

[81] For all those reasons, I am satisfied that the defendants have made out a case for the relief sought.

Order

1. The application succeeds with costs and such costs not to be capped as per rule 32(11).
2. The matter is removed from the roll and regarded finalised.

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N G NDAUENDAPO

Judge

APPEARANCES

PLAINTIFF:	P C I Barnard Instructed by Cronje' Inc, Windhoek.
DEFENDANTS:	N Tjombe Of Tjombe Elago Inc, Windhoek.