

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTIVE 61

Case Title: Ohorongo Cement (Pty) Ltd v Quintus Erasmus	Case No: HC-MD-CIV-MOT-GEN-2021/00257
	Division of Court: High Court (Main Division)
Heard before: Honourable Lady Justice Schimming-Chase	Date of hearing: 22 March 2022
	Judgment delivered on: 29 April 2022
Neutral citation: <i>Ohorongo Cement (Pty) Ltd v Erasmus</i> (HC-MD-CIV-MOT-GEN 2021/00257) [2022] NAHCMD 222 (29 April 2022)	
Results on the merits: Merits considered for purposes of costs order sought.	
The order: Having heard Mr A Van Vuuren , on behalf of the applicant, and Ms Garbers-Kirsten , on behalf of the respondent and having read the papers filed of record for HC-MD-CIV-MOT-GEN-2021/00257: IT IS HEREBY ORDERED THAT: 1. The respondent is ordered to pay the costs of the applicant on an attorney and client scale, from the applicant's receipt and consideration of the respondent's answering affidavit up to and including the delivery of the applicant's replying affidavit, such costs to include the costs of one instructing and one instructed counsel.	

2. The balance of the costs related to this application are awarded against the respondent on a party and party scale as tendered, such costs to include the costs of one instructing and one instructed counsel.

3. The matter is removed from the roll and considered finalised.

Reasons for the order:

Schimming-Chase J:

[1] On 22 March 2022¹ the court made the following order:

‘1. The provisional order of sequestration granted on 20 August 2021 is hereby confirmed. The estate of the respondent is placed under a final order of sequestration and the assets are placed in the hands of the Master.

2. The matter is postponed to 29 April 2022 at 10:00 for delivery of a ruling on the applicant’s application for costs on an attorney client scale and the referral of the respondent to the Office of the Prosecutor General.’

Ruling in regard to paragraph 2 of the order

[2] At the hearing of the application on 22 March 2022, and after the matter was stood down to 14h15 on request of the respondent for purposes of engaging with the applicant in settlement negotiations, Ms Garbers-Kirsten who appeared for the respondent, formally withdrew the respondent’s opposition to the making of a final sequestration order in this matter, and tendered the wasted costs of the application on a party and party scale.

[3] The notice of withdrawal was delivered on 23 March 2022. Although the notice does not embody the tender of wasted costs made at the hearing of this matter, the court accepts the tender of costs as made at the hearing.

[4] Dissatisfied with the respondent’s tender, the applicant sought to reopen the proceedings as it were, as it sought costs on an attorney client scale, as well as a referral of the respondent to the Prosecutor General.

¹ The order was varied mero motu on 11 April 2022 in terms of rule 103 to correct certain errors.

[5] The basis for the applicant's stance is essentially that the respondent was manifestly dishonest with the court in his opposing papers wherein he sought to prove that the final order of sequestration should not be made. In this regard, the respondent denied that he committed an act of insolvency. The question for the determination of costs is based, according to Mr A van Vuuren appearing for the applicant, solely on the basis of the conduct of the respondent in the litigation, with specific reference to the respondent's averments contained in his answering affidavit.

[6] In *Germishuys v Douglas Besproeiingsraad*² the following was stated:

'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 application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings. . . .'

[7] In *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)*³ the court said:

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

[8] As was stated by Damaseb JP in *Erf Sixty-Six Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others*⁴ where it was held that the court retains a discretion as to the award of costs, even where an action or application has been withdrawn. It is ultimately a question of fairness as between the parties. The court may therefore in the exercise of its discretion in appropriate circumstances take into account that the party that has withdrawn the litigation was justified in bringing the litigation. Thus, even in cases where litigation has been withdrawn, the general rule is of application, namely that a successful litigant is entitled to his costs unless the court is persuaded, in the exercise of its judicial discretion upon consideration of all facts, that it would be unfair to mulct the unsuccessful party in costs.

² *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300E.

³ *Reuben 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.

⁴ *Erf Sixty-Six Vogelstrand (Pty) Ltd v Council of the Municipality of Swakopmund and Others* 2012 (1) NR 393 (HC) para 12 and the authority cited at fn 9.

[9] The same principles apply mutatis mutandis to the withdrawal of a defence or action or opposition, the latter being the case in this matter.

[10] For purpose of considering whether to grant costs on an attorney and client scale, the court must be satisfied that the conduct of the respondent justifies such an order, and that a party and party costs order will not be sufficient to meet the expenses incurred by the innocent party.⁵ In other words, costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.

[11] Courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fide (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.⁶

[12] From a consideration of the respondent's answering papers it is apparent that the respondent made a desperate and considerably ill-conceived attempt to convey that he was indeed solvent. He attacked the acting deputy sheriff's nulla bona return, and denied that the writ of execution was served on him in the manner required by the Rules. This turned out to be untrue, given the affidavit of the acting deputy sheriff which formed part of the applicant's replying papers. The statement of his assets and liabilities was provided in a document that was not properly identified, or even confirmed by an auditor or accountant, or by the respondent himself. It was simply a 'statement of assets and liabilities' with nothing more.

[13] The respondent further sought to rely on monies that he was to receive from a sale of shares agreement, but it was apparent ex facie the papers that, there were material discrepancies in his averments on this issue. In fact, the agreements the respondent referred to were terminated before the answering affidavit was even filed.

[14] Several judgments were also granted against the respondent in this court to the tune of N\$35,985,667 in terms whereof several immovable properties were declared executable, and these judgments were similarly granted before the answering affidavit

⁵ *Erf Sixty-Six Vogelstrand* (supra) para 22; *Hailulu v Anti-Corruption Commission* 2011 (1) NR 363 at 277H.

⁶ *Indigo Sky Gems (Pty) Ltd v Johnston* 1998 NR 152 (HC) at 53H; *Public Prosecutor v South African Reserve Bank* 2019 (6) SA 253 (CC) para 18; *Minister of Police v Sheriff, Mthatha and Another* 2022 (1) SA 229 (ECM) para 50 and the authorities cited at fn 35.

was deposed to. This the respondent did not disclose, resulting in the applicant having to spend considerably more time sourcing the information relating to the judgments and the so-called sale of shares agreement for purposes of the replying affidavit. In fact, and to make matters worse, it is apparent from one of the court orders that the respondent's legal representative was present in court when judgment was granted against the respondent. The respondent also failed to disclose that writs of execution had been issued against him before he deposed to the answering papers in this matter.

[15] I am inclined, in light of the foregoing to agree with Mr Van Vuuren's contention that the respondent was not truthful under oath and not bona fide in his opposition to the application. In effect it cannot be ignored that the respondent sought to mislead the court, and such conduct would in the circumstances warrant censure by the court, even in these sequestration proceedings. In the result, attorney and client costs (for what it is worth in the circumstances) should be granted against the respondent, from receipt and consideration of the respondent's answering affidavit up to the preparation for and the delivery of the applicant's replying affidavit.

[16] As regards the question of the referral of the respondent to the Prosecutor General, the court is not inclined – despite the dishonest conduct of the respondent – to refer the matter to the Prosecutor General. Nothing prevents the applicant from pursuing its referral by laying a criminal charge against the respondent.

[17] In light of the foregoing, the following order is made:

1. The respondent is ordered to pay the costs of the applicant on an attorney and client scale, from the applicant's receipt and consideration of the respondent's answering affidavit up to and including the delivery of the applicant's replying affidavit, such costs to include the costs of one instructing and one instructed counsel.
2. The balance of the costs related to this application are awarded against the respondent on a party and party scale as tendered, such costs to include the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and considered finalised.

Judge's signature	Note to the parties:
Schimming-Chase Judge	Not applicable.
Counsel:	
Applicant	First and second respondents
Adv A van Vuuren on instructions of ENS Africa incorporated as LorentzAngula	Adv H Garbers-Kirsten on instructions of Kruger Van Vuuren & Co